STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2010
v	No. 291373 Huron Circuit Court
KEVIN LEE TETREAU, Defendant-Appellant.	LC No. 08-004651-FH

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of felonious assault, MCL 750.82. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to four to 15 years' imprisonment. We affirm.

I

This case arose out of an incident in the bar area of a bowling alley in Colfax Township, Michigan on the night of September 6, 2008 or early morning of September 7, 2008. At the bar, defendant engaged in a heated discussion with his cousin Richard Tetreau. During their discussion, a friend of Tetreau's, Russell Parks, approached them. Parks, who was holding a beer bottle at the time, told them to "break it up" and told defendant to leave Tetreau alone. Defendant then engaged in a verbal argument with Parks and said to him, "you don't know me" or "you don't know who I am," and "I'll fucking kill you." As he was making that statement, defendant pulled Parks toward himself with one hand, Parks' beer spilled all over, and defendant used his other hand to put a knife to Parks' neck. The knife appeared to be a pocketknife. Parks received a small scratch or cut on his neck, which produced blood. Bar security quickly approached them and escorted defendant out. At trial, a DVD of the events was played for the jury several times.

Defendant testified that he was afraid and felt threatened by Tetreau and Parks because of their aggressive manner and because Parks had a beer bottle in his hand. According to defendant, he acted in what he believed was self-defense when he held the knife to Parks' neck. Defendant admitted during cross-examination that he could have walked away at any time, although he would not have wanted to turn his back to a person holding a beer bottle. Defendant believed that Tetreau and Parks should have walked away.

II

Defendant first argues that the trial court reversibly erred by requiring him to represent himself at trial without first obtaining a valid waiver of his right to counsel. We disagree.

Defendant was first represented in circuit court by court-appointed attorney Jill Schmidt. At a hearing on December 1, 2008, Schmidt stated that defendant had asked her to withdraw. Defendant stated that he no longer wanted Schmidt to represent him because she had lied to him, he had to "twist her arm to get her to file" change of venue motions, she had only spoken to him once, she failed to take his telephone calls, and she disagreed with him. The trial court informed defendant that if he refused to cooperate with Schmidt, the court would allow her to withdraw, and that he had the right to represent himself. The court further stated, "But you don't have the right to choose the lawyer that you—that the Court appoints for you, she was appointed to represent you, you don't want her, then you have no lawyer, that's your call." Defendant indicated that he was willing to represent himself, but needed access to a law library or some other source of "controlling federal cases that have to do with self-defense." The court allowed Schmidt to withdraw and appointed her as stand-by counsel. Defendant was permitted to ask her questions and obtain legal research from her.

Notwithstanding the trial court's decision to permit defendant to represent himself, the court appointed attorney Gerald Prill to represent defendant at a December 23, 2008, hearing. The court stated that defendant "need[ed] this professional assistance" and asked that defendant cooperate and allow Prill to represent him. Defendant objected to Prill being appointed, stating that Prill was a former prosecuting attorney and, therefore, could not objectively represent him. The court stated that there was no conflict of interest and no legal or ethical prohibition against Prill representing defendant.

Approximately three weeks later, at a January 12, 2009, *Walker*[1] hearing, Prill requested to withdraw. Prill explained that in 2005, he had prosecuted defendant on a charge of "operating while intoxicated, third offense" and defendant recently filed a motion for relief of judgment pertaining to the 2005 conviction. Defendant alleged in his motion that false statements were admitted in a *Walker* hearing for that case and that Prill presented false statements or false information to the court. The trial court then interjected:

> *Trial Court*. Are you asking to withdraw as counsel?
>
> *Prill*. I would, Your Honor.
>
> *Trial Court*. And this is the second one now, Mr. Tetreau, right?
>
> *Defendant*. I know, Your Honor, but I would just as soon—I don't need another attorney, I'll represent myself.

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Trial Court. I'm going to appoint you another attorney, I'm going to appoint Mr. Woodworth to represent you.

Defendant. He's the other party in my last case with the 6.500 motion, he was my attorney back then.

Trial Court. And you're claiming that he was incompetent or that you had incompetent—

Defendant. It's ineffective assistance of counsel.

Trial Court. I guess we can't appoint you. I'm gonna appoint you a lawyer whether you like it or not. You don't have to accept it if you don't want to, I'll have stand by counsel, but I'm not going to be spending time fooling around with you, Mr. Tetreau.

Defendant. I understand.

Defendant subsequently stated that he had no problem with the court appointing attorney Elizabeth Weisenbach to represent him. The court appointed Weisenbach, and she represented defendant during the *Walker* hearing.

At a hearing on January 26, 2009, the day before trial, the court stated:

> My understanding is that the defendant has refused to cooperate with his appointed defense counsel and wants to represent himself, he has the right to do that, however I'm having counsel remain as stand-by counsel that can give him advice if he wants it during the course of the trial.
>
> But he's on his own. And you know, Mr. Tetreau, why you're making this decision, I don't know. My experience has been without question that anyone who does this is just digging themselves a hole.
>
> But if you insist on waiving your right to counsel by representing yourself, then I guess we'll let you do that. But this trial has to be something manageable, it's not going to be some kind of carnival. And we're not going to do everything you want to do, it's going to be conducted in accordance with the law.

Defendant subsequently requested access to jury instructions, specific federal case law, and a defender trial handbook. The court allowed defendant to borrow a volume of Standard Criminal Jury Instructions, stated that defendant could borrow a trial handbook if there was one available, and requested that Weisenbach provide defendant with copies of the cases he had requested. Defendant represented himself at trial the next day.

Over the course of the proceedings leading up to trial, defendant sent the trial court several letters regarding his representation. In letters dated November 7, 2008 and November 17, 2008, defendant stated that there had been a breakdown in his relationship with Schmidt, and he requested new counsel. In a December 9, 2008, letter, defendant indicated that he wished to represent himself and asked that the "privileges and rights afforded other attorneys" be afforded

to him. In a letter dated December 26, 2008, defendant stated that Prill could not represent him because of a conflict of interest and that he was asserting his "constitutional rights to represent" himself. Defendant stated that he must be afforded law library access and "any other amenities a court appointed attorney would be afforded." The record does not indicate whether defendant had any contact with the court between the *Walker* hearing when the court appointed Weisenbach and the January 26, 2009, hearing when the court stated that defendant wished to represent himself and that he would be allowed to do so. Defendant suggests in his brief on appeal and at oral argument that the prosecutor and defense counsel met with the trial court off the record and discussed defendant representing himself at that time. The court's statement at the January 26, 2009, hearing that "[m]y understanding is that the defendant has refused to cooperate with his appointed defense counsel and wants to represent himself" suggests that either defendant or defense counsel communicated in some way with the court before the hearing.

Defendant now argues that the trial court reversibly erred by requiring him to represent himself at trial and denying him his constitutional right to the assistance of counsel. See US Const, Am VI; Const 1963, art 1, § 20. We review for clear error a trial court's factual findings concerning whether a defendant has knowingly, intelligently, or voluntarily waived his or her right to counsel, review de novo the court's legal conclusions concerning whether the defendant has effected a valid waiver, and review for an abuse of discretion the court's ultimate decision whether to allow a defendant to proceed without counsel. *People v Williams*, 470 Mich 634, 640-641 and n 7; 683 NW2d 597 (2004); *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

Criminal defendants have a constitutional right to the assistance of counsel, but also have a constitutional and statutory right to represent themselves at trial. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1. Although criminal defendants may waive their right to counsel and elect to represent themselves, several requirements must be met before a defendant may do so. See *People v Russell*, 471 Mich 182, 190-191; 684 NW2d 745 (2004). In *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), our Supreme Court set forth the factors necessary to determine whether a defendant has waived the right to counsel. First, the trial court must determine that the defendant's request was unequivocal. *Id*. at 367. Second, the defendant's waiver must be knowingly, intelligently, and voluntarily made. *Id*. at 368. "To this end, the trial court should inform the defendant of potential risks." *Williams*, 470 Mich at 642. Third, the court must determine that, if the defendant represented him or herself, he or she would not disrupt, unduly inconvenience, and burden the court or the administration of court business. *Anderson*, 398 Mich at 368. The trial court must also substantially comply with the requirements of MCR 6.005(D), which states in relevant part:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first:
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Once a defendant waives his or her right to counsel, the record must at each subsequent proceeding affirmatively show that the court advised the defendant of his continuing right to counsel and that the defendant waived that right. MCR 6.005(E). A trial court's failure to comply with each of these requirements will not render an otherwise valid waiver invalid, as long as the court has substantially complied. See *Russell*, 471 Mich at 191-192.

We hold that while not handled in an ideal, textbook fashion, defendant's waiver of his right to counsel was unequivocal. Although the record does not indicate whether defendant had any contact with the trial court between the *Walker* hearing when the court appointed Weisenbach and the January 26, 2009, hearing when the court stated that defendant would represent himself, the court's statement that "[m]y understanding is that the defendant has refused to cooperate with his appointed defense counsel [Weisenbach] and wants to represent himself" indicates that either defendant or Weisenbach communicated in some way with the court before the hearing and expressed defendant's desire for self-representation. Admittedly, defendant did not expressly state such a desire at the hearing, although all of his subsequent comments at the hearing indicate that he was in favor of representing himself at trial and was preparing to do so. Moreover, defendant had expressed on multiple prior occasions an unequivocal desire to represent himself. At the December 1, 2008, hearing, defendant stated that he no longer wanted Schmidt to represent him and indicated that he was willing to represent himself, although he needed access to a law library or some other source of "controlling federal cases that have to do with self-defense." The court allowed Schmidt to withdraw and indicated that defendant would be permitted to represent himself. In a December 9, 2008, letter to the court, defendant indicated that he wished to represent himself and asked that the "privileges and rights afforded other attorneys" be afforded to him. Despite the request, at a December 23, 2008, hearing, the court appointed Prill to represent defendant. Defendant objected to Prill being appointed. In a December 26, 2008, letter to the court, defendant stated that Prill could not represent him because of a conflict of interest and that he was asserting his "constitutional rights to represent" himself. Defendant stated that he must be afforded law library access and "any other amenities a court appointed attorney would be afforded." At the January 12, 2009, *Walker* hearing, Prill requested to withdraw, and defendant informed the trial court that he did not need another attorney and would represent himself. The court stated that he would appoint an attorney whether defendant liked it or not, but that defendant did not have to accept the attorney. The court subsequently appointed Weisenbach to represent defendant. Thus, it is clear that the court erred on the side of ruling against waiver until the January 26, 2009, hearing when it permitted defendant's third appointed counsel to withdraw and allowed defendant to represent himself at trial the following day with stand-by counsel. Although it would have been preferable for the trial court to obtain an express waiver from defendant on the record at the January 26, 2009, hearing, the entirety of the record reveals that defendant unequivocally waived his right to counsel.

Further, we hold that defendant's waiver was knowingly, intelligently, and voluntarily made. Over the course of the proceedings, the trial court repeatedly indicated to defendant that it would be unwise for him to represent himself. At the December 23, 2008, hearing, when the court appointed Prill to represent defendant, the court explained its belief that defendant "need[ed] this professional assistance" and asked defendant to cooperate and allow Prill to represent him. The court reiterated at the January 26, 2009, hearing that self-representation was not advisable, that based on the court's experience, defendant was digging himself a hole by

choosing to represent himself, and that the trial would be conducted in accordance with the law, not defendant's whims. Defendant, who was in his late 40s at the time of trial, had multiple prior encounters with the criminal justice system. He revealed his familiarity with the system and the manner in which trials are conducted by requesting access to a law library, a source of "controlling federal cases that have to do with self-defense," the "privileges and rights afforded other attorneys," "any other amenities a court appointed attorney would be afforded," jury instructions, specific federal case law, and a defender trial handbook. We must conclude that defendant fully contemplated the consequences of his decision and that his waiver was sufficient in that he "kn[ew] what he [wa]s doing and his choice [wa]s made with eyes open." *Williams*, 470 Mich at 642 (quotation marks and citations omitted). Additionally, it is implicit in the trial court's statements that defendant's self-representation would not disrupt the trial proceedings. The court specifically instructed defendant that the trial had to be manageable, would not "be some kind of carnival," and would "be conducted in accordance with the law." Accordingly, we hold that the trial court substantially complied with the three requirements for valid waiver listed in *Anderson*, 398 Mich at 367-368.

The trial court also substantially complied with MCR 6.005(D). The court advised defendant of the risks involved in self-representation, albeit briefly, as described above. The court provided defendant with three appointed attorneys over the course of the proceedings and ultimately appointed stand-by counsel, who was available in an advisory capacity to defendant during trial. Although the court did not advise defendant of the charge against him or the possible sentences he faced at the January 26, 2009, hearing, the record reveals that defendant was otherwise aware of the offense he had been charged with and the minimum and maximum sentences. At his arraignment, the trial court stated the charge against defendant. Defendant, through counsel, acknowledged receipt of the felony information, which listed the charge, the maximum possible penalty for that charge, and habitual offender information. Defense counsel waived a formal reading. Later, at the January 26, 2009, hearing, the trial court requested that the prosecution serve defendant with a copy of the revised felony information. Thus, although the court did not follow the requirements of MCR 6.005(D) as closely as it could have, it substantially complied with the court rule.

Based on our review of the record, it appears that the trial court did not comply with MCR 6.005(E) by advising defendant of his continuing right to counsel on the day of the trial. But this error does not warrant reversal. A trial court's failure to comply with the requirements of MCR 6.005(E) is not subject to the same standard as that required for an initial waiver of the right to counsel. *People v Lane*, 453 Mich 132, 139; 551 NW2d 382 (1996). Instead, it is subject to the same standard as any nonconstitutional error. *Id*. at 140. Because defendant failed to preserve this issue below, he is not entitled to relief on this issue unless he can demonstrate that the trial court's error affected his substantial rights. *Id*. Defendant has not done so. He was afforded access to stand-by counsel during trial and he does not argue on appeal that he was prejudiced in any way by the court's failure to comply with MCR 6.005(E).

Review of the record as a whole reveals that the trial court substantially complied with all of the requirements necessary for a valid waiver of defendant's right to counsel. Defendant was fully aware "of the risks he faced by choosing to represent himself and he knowingly and voluntarily chose to accept them. He may not now be heard to complain about his choice." *Williams*, 470 Mich at 645.

> To permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. [*Id*. (quotation marks and citations omitted).]

While defendant did not make an express waiver of his right to counsel at the January 26, 2009, hearing, he repeatedly and unequivocally requested to represent himself over the course of the proceedings, indicated that he was fully aware of the consequences of such a decision, and appeared fully prepared to represent himself at the January 26, 2009, hearing by requesting the materials he deemed necessary to prepare for trial. Therefore, we find the Court's warning in *Williams* applicable here. The trial court committed no error in permitting defendant to represent himself at trial.

III

Defendant further argues that the trial court plainly erred in instructing the jury with CJI2d 7.15 and 7.16 (use of deadly force in self-defense and duty to retreat) and abused its discretion in refusing to instruct the jury with CJI2d 7.22 (use of non-deadly force in self-defense). We hold that although the trial court abused its discretion in failing to instruct the jury with CJI2d 7.22, defendant has not established that it is more probable than not that the error was outcome determinative. Therefore, reversal is not warranted.

Defendant first argues that the trial court plainly erred in instructing the jury with CJI2d 7.15 and 7.16. Generally, unpreserved claims of instructional error are reviewed for plain error affecting the defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). The prosecution asserts that defendant waived this issue by expressly approving the court's instructions. At trial, after defendant requested that the court give CJI2d 7.22, the court twice asked him whether he had raised all of his objections, and defendant said, "Yes." Defendant's response to the trial court did not constitute a waiver of his claim of instructional error. Defendant stated that he had no more objections. He did not affirmatively approve of the court's instructions. The failure to object qualifies as forfeiture, not waiver, of an issue. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Therefore, we will review this issue for plain error that affected defendant's substantial rights, "i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Aldrich*, 246 Mich App at 124-125. Reversal is warranted only if the error "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings." *Carines*, 460 Mich at 763 (quotation marks and citation omitted).

Defendant further argues that the trial court abused its discretion in refusing his request to instruct the jury with CJI2d 7.22. "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). An abuse of discretion occurs if a trial court's decision "results in an outcome falling outside of the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). Reversal is not warranted unless the error undermined the

reliability of the verdict. *People v Hawthorne*, 474 Mich 174, 184-185; 713 NW2d 724 (2006). Stated differently, where the issue was preserved, it must affirmatively appear more probable than not that the error was outcome determinative. *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

We review jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *Id*. "Conversely, an instruction that is without evidentiary support should not be given." *Id*. Even if jury instructions "are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Aldrich*, 246 Mich App at 124.

Defendant's theory of the case was that he acted in self-defense. The trial court instructed the jury in accordance with CJI2d 7.15 and 7.16, which cover the use of deadly force in self-defense and the duty to retreat to avoid using deadly force. Defendant asserts that the court erred in so instructing the jury; instead, the court should have instructed the jury in accordance with CJI2d 7.22, which covers the use of non-deadly force in self-defense. In denying defendant's request to instruct the jury with CJI2d 7.22, the court stated:

> [W]e're not talking of non-deadly force, we're talking of deadly force.
>
> * * *
>
> This knife is—is a dangerous weapon that we're talking about, an assault with the use of deadly force. This is not a case of fist—fist cuffs or kicking, or something of that nature, this is a knife, a deadly weapon, and that's deadly force.
>
> * * *
>
> I decline to give 7.22, I think 7.15 is the appropriate instruction.

Defendant argues that although he used a knife during the incident at issue, he did not use deadly force. He compares the facts of this case to those in *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980). In *Pace*, the defendant and the victim engaged in a verbal disagreement in the victim's home. *Id*. at 526. The victim and his wife testified that when the defendant was asked to leave the house, he reached into his pocket and pulled out a hunting knife with a broken handle or blade. *Id*. The defendant and the victim wrestled, and the defendant ultimately hit the victim in the head with a shoe. *Id*. Conversely, the defendant testified that he only threw his shoe after the victim came toward him with a baseball bat, and he only pulled out his knife after the victim's wife stabbed him with her own knife. *Id*. at 527. The defendant's wife confirmed that the victim's wife stabbed the defendant and testified that she did not see a knife in the defendant's hand until the end of the incident. *Id*. The defendant was convicted of felonious assault. *Id*. at 525. On appeal, this Court held that the trial court improperly instructed the jury on the use of deadly force in self-defense. *Id*. at 533. The Court held that "deadly force has been used where the defendant's acts are such that the natural, probable, and foreseeable consequence of said acts is death." *Id*. at 534. The Court noted that "[a]t most, the record [in *Pace*] reveals that defendant drew a knife and held it at his side. There was no testimony that he stabbed,

lunged, or swung at anybody with the blade. Merely displaying a knife implies a threat of violence, but, without more, it does not constitute deadly force." *Id*. at 533-534. This Court reversed and remanded. *Id*. at 535.

We agree with the prosecution that this case is distinguishable from *Pace*. In this case, defendant did more than display a knife at his side. Defendant first engaged in a verbal argument with Parks. Tetreau and Parks both testified that during the argument, defendant said to Parks, "I'll fucking kill you." As he was making that statement, defendant pulled Parks toward himself with one hand, Parks' beer spilled all over, and defendant used his other hand to put his pocketknife to Parks' neck. Parks held the knife against Parks' neck, giving him a scratch or cut that produced blood. Defendant did not deny cutting Parks' neck with the knife. Although defendant's actions did not result in death, and defendant claimed at trial that he did not intend to kill or seriously injure Parks, his actions were such that a reasonable jury could conclude that "the natural, probable, and foreseeable consequence of said acts is death." *Id*. at 534. A pocketknife may be used as a dangerous weapon and the throat a vulnerable area of the body. See *People v Vaines*, 310 Mich 500, 506; 17 NW2d 729 (1945) (stating that an ordinary pocketknife is not dangerous per se when carried for peaceful purposes but it may be considered a dangerous weapon under MCL 750.227 when used "as a weapon of assault or defense"); see also *People v Lynn*, 459 Mich 53, 58-59; 586 NW2d 534 (1998), quoting *People v Brown*, 406 Mich 215, 222-223; 277 NW2d 155 (1979) (stating that an instrument is a dangerous weapon under MCL 750.227 when "used, or intended for use, as a weapon for bodily assault or defense"). If defendant had applied even minimal, additional pressure to Parks' neck, or if Parks had moved even slightly into the knife as he reacted to the situation, defendant's actions could easily have resulted in Parks' death.[2]

Because the evidence in this case could support a conclusion that defendant used deadly force, the trial court properly instructed the jury in accordance with CJI2d 7.15 and 7.16. We further find, however, that a reasonable jury may also have concluded that defendant used non-deadly force. While defendant held a pocketknife, which may be used as a dangerous weapon, to Parks' neck, and held it close enough to draw blood, defendant's actions only produced a small cut or scratch on Parks. Defendant did not stab Parks or make any stabbing motions in his direction. Thus, a reasonable jury could conclude that defendant's actions were similar to the defendant's actions in *Pace*, which amounted to nothing more than a threat of violence and constituted non-deadly force. In *Pace*, 102 Mich App at 534 n 7, this Court indicated that in cases "where the evidence is conflicting on whether deadly force has been employed" the trial court may give the jury instructions on both deadly and non-deadly force, but the court "should preface [the instruction on deadly force] with a statement to the effect that 'If you find that defendant utilized deadly force, the following is the standard for assessing his self-defense claim'. Additionally, the court should also preface [the instruction on non-deadly force] with a comparable statement indicating that what follows is the standard to be applied if the jury finds defendant only used nondeadly force." Accordingly, we hold that while the trial court did not err in instructing the jury with CJI2d 7.15 and 7.16, it abused its discretion in denying defendant's

[2] The DVD video recording of the event reveals that after defendant suddenly produced the knife and raised it to Parks' neck, Parks pulled backward and away from the knife.

request to also instruct the jury with CJI2d 7.22, thereby allowing the jury to determine whether defendant used deadly or non-deadly force.

Next, we must consider whether it is more probable than not that the trial court's abuse of discretion affected the outcome of the case. See *Riddle*, 467 Mich at 124-125 (stating that preserved error only warrants reversal if it affirmatively appears more probable than not that the error was outcome determinative). The prosecution asserts that any error committed by the trial court was harmless because the instructions given included all of the elements of self-defense and the jury simply did not find defendant's self-defense claim credible. But the prosecution glosses over key distinctions between CJI2d 7.15 and 7.22. In order to have acted in lawful self-defense under CJI2d 7.15, which presumes the use of deadly force, a "defendant must have honestly and reasonably believed that [he] was in danger of being [killed or seriously injured]," and "afraid of [death or serious or serious physical injury]";[3] whereas, under CJI2d 7.22, which applies to the use of non-deadly force, a "defendant must have honestly and reasonably believed that [he] had to use force to protect [himself] from the imminent unlawful use of force by another." Thus, in this case, the jury was only instructed to consider whether defendant honestly and reasonably believed that he was in danger of being killed or seriously injured, not that force was necessary to protect himself from the imminent unlawful use of force by another. In *Pace*, 102 Mich App at 535, this Court held that the trial court did not cure the deadly-force instructions given by immediately instructing the jury on the use of non-deadly force. The Court explained that "nothing in the nondeadly force instructions dispelled the idea that a perception of death or great bodily harm was a condition precedent to claiming self-defense." *Id*.

That said, we find that in this case, there was insufficient evidence to support defendant's self-defense claim and, therefore, that the trial court's instructional error was harmless. Defendant testified that he was afraid during his argument with Parks. He testified that he felt threatened by Tetreau and Parks because of their aggressive manner and because Parks had a beer bottle in his hand, and that he acted to stop the incident from escalating. However, nothing in the record other than defendant's testimony that he was afraid and felt threatened supports a conclusion that he was in danger of "the imminent unlawful use of force by another" and was, therefore, justified in using even non-deadly force. CJI2d 7.22. Tetreau had no weapons, was not holding anything, and did not verbally threaten defendant. Parks had no weapons and, although he was holding a beer bottle, he never raised the bottle as if to use the bottle as a weapon. There was no physical contact between Parks and defendant until defendant pulled Parks toward himself and held the knife to his neck. Further, defendant admitted that any of them could have walked away at any time. Unlike *Pace*, in which a number of material facts were in dispute and the trial court's instructional error might have affected the outcome of the case, the facts in this case are for the most part undisputed. Based on the dearth of evidence

[3] CJI2d 7.16 states that if a defendant could have safely retreated but did not do so, that fact may be considered in deciding whether the defendant honestly and reasonably believed he needed to use deadly force in self-defense. Unlike CJI2d 7.15, CJI2d 7.16 does not presume the use of deadly force. It simply addresses the circumstances under which a defendant *could* lawfully use deadly force.

supporting defendant's claim that he acted in self-defense, the trial court's failure to instruct the jury with CJI2d 7.22 was harmless. Reversal is not warranted.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering