STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2010
v	No. 278411 Kent Circuit Court
SAMMIE RAY BAILEY, JR., Defendant-Appellant.	LC No. 06-006768-FC

Before: O'CONNELL, P.J., and BANDSTRA and GLEICHER, JJ.

PER CURIAM.

ON REMAND

In an order issued on February 2, 2010, our Supreme Court vacated the portion of this Court's prior opinion "addressing harmless error," and remanded the case to this Court "for reconsideration of its harmless error analysis for constitutional error under the holding in *Neder v United States*, 527 US 1, 15; 119 S Ct 1827; 144 L Ed 2d 35 (1999)." Having revisited our earlier harmless error analysis, we now reverse and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

Defendant Sammie Ray Bailey, Jr., and codefendant Terrill Lashon Lambeth stood trial jointly for the May 2006 shooting death of Keith Hoffman, the victim. Bailey's jury convicted him of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Lambeth's jury found him guilty of first-degree premeditated murder, MCL 750.316(1)(a), and felony-firearm. The trial court sentenced Bailey to a term of 20 to 50 years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm count. The trial court imposed on Lambeth mandatory terms of life imprisonment without parole for the first-degree murder conviction and a consecutive two-year term for the felony-firearm count.

Defendants appealed as of right in this Court, and in *People v Bailey & Lambeth*, unpublished opinion per curiam of the Court of Appeals (Docket Nos. 278411, 278519), issued December 18, 2008, this Court affirmed defendants' convictions and sentences. In our original opinion, we found that the trial court had committed several instructional errors concerning Bailey's self-defense claim, but we rejected Bailey's contention that the trial court's erroneous instructions amounted to constitutional error. *Id.*, slip op at 4-9. Bailey filed a motion for reconsideration, which this Court granted. *People v Bailey & Lambeth*, unpublished order of the

Court of Appeals, issued April 17, 2009 (Docket Nos. 278411, 278519). In the order, we vacated a previous order consolidating the two appeals and our opinion as to Bailey only. We again affirmed Bailey's convictions and sentences, but found that the self-defense instructional errors were of "constitutional dimension." *People v Bailey* (*On Reconsideration*), unpublished opinion per curiam of the Court of Appeals, issued May 21, 2009 (Docket No. 278411), slip op at 8. In analyzing the impact of the instructional errors, we applied the standard for "nonstructural, preserved constitutional error" articulated in *People v Carines*, 460 Mich 750, 765 n 11, 774; 597 NW2d 130 (1999). *Id*. We found it "clear beyond a reasonable doubt that a properly instructed jury would have rendered the same verdict." See slip op, 8-9. Pursuant to the Supreme Court's February 2010 order, we now examine whether the instructional errors qualify as harmless, consistent with the analysis in *Neder*, 527 US 1.

In *Neder*, 527 US at 4, the trial court neglected to instruct the jury concerning materiality, an element of the fraud statutes under which the defendant was charged. The United States Supreme Court explained that an instruction omitting an element of an offense "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id*. at 9 (emphasis in original). Rather, the test "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id*. at 15, quoting *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967). Because the evidence supporting materiality was "overwhelming" and the defendant never proffered any argument contesting the materiality of his statements, the Supreme Court affirmed the court of appeals determination that the error qualified as harmless. *Id*. at 16-17. The Supreme Court emphasized that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id*. at 17.

"[W]here an omitted element is supported by uncontroverted evidence," the harmless error approach set forth in *Chapman* "reaches an appropriate balance between 'society's interest in punishing the guilty (and) the method by which decisions of guilt are to be made.'" *Neder*, 527 US at 18, quoting *Connecticut v Johnson*, 460 US 73, 86; 103 S Ct 969; 74 L Ed 2d 823 (1983). But where "a thorough examination of the record" reveals that facts underlying an omitted instruction have been contested throughout the trial, *Neder* compels a different conclusion. *Id*. at 19. If a reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error," it should not deem the error harmless. *Id*. The Supreme Court offered an example of a circumstance precluding a finding of harmless error: "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding[.]" *Id*.

Throughout the instant case, Bailey and Lambeth asserted that they had killed the victim in self-defense. Lambeth testified at trial that during the summer of 2005, the victim had "hopped" into Lambeth's car, pulled a gun, and robbed Lambeth of some money, jewelry and a watch. Lambeth described that in January 2006, as he and a friend approached a local party store, the victim again pulled out a weapon and robbed them. During the second robbery, the victim stole a "cherished" ring from Lambeth. Lambeth explained that he did not report either robbery to the police because the victim had threatened his mother and brother.

Lambeth averred that the victim referred to himself as "a Kzoo Boy," and recounted that other people advised him that the victim had committed "a few shootings in the area." A different trial witness testified that the victim "used to carry a weapon everwhere (sic) he go, and he was a known drug dealer in the neighborhood." The witness recalled that she had heard the victim called "Killer-Keith" because of his "reputation." A jail inmate called as a witness for the defense admitted having bought drugs from the victim, and also referred to the victim as "Killer-Keith."

Lambeth further testified that on May 3, 2006, he went to his mother's house on Dallas Street in Grand Rapids to wash his car and change a headlight. He noticed the victim, and considered asking him "if I could possibly get my ring back." Lambeth asked Bailey to accompany him to "possibly watch my back while I go down here and ask [the victim] if I could possibly get my ring back and pay him for it, and if he could just please leave my family alone." Lambeth claimed that he needed someone to "watch his back" because the victim's "home boyz (sic)" and "friends" were "always around … in that area."

Lambeth recalled that when he and Bailey arrived at the corner, he (Lambeth) asked the victim for the ring. Lambeth maintained that the victim replied, "Fuck you, Bitch. I'll rob you right now." Lambeth testified, "Then I seen him reach for a firearm, and that's when I relinquished (sic) mine and fired out a shot, or maybe two." Lambeth recounted, "I definitely feared for my life at that point in time. It was either defend myself or get shot." Lambeth surmised that Bailey had started shooting when he saw that the victim remained standing, with a weapon, despite Lambeth's shots. Under cross-examination by Bailey's counsel, Lambeth agreed that Bailey had "absolutely, positively nothing, or no gripe, no beef, no misunderstanding, nothing, with [the victim]."

The defense theorized that someone, probably a neighborhood resident, had removed a weapon from the victim's body before the police arrived. In support of this argument, the defense pointed out that the police found a jacket worn by the victim at an unspecified distance from the body. The victim's cell phone and a package of his cigars appeared to have been deliberately "stacked up" near the body. According to the defense, this evidence indicated that someone had ample opportunity to remove the victim's weapon before the police arrived. The defense also emphasized that police never tested the victim's hands for gunshot residue. The foregoing evidence and argument, if believed by the jury, would support that Bailey shot the victim in self-defense or while defending Lambeth. The trial court's decision to instruct Bailey's jury about self-defense confirms that Bailey presented sufficient evidence to warrant his claim of justifiable homicide.

"Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Elkhoja*, 251 Mich App 417, 443; 651 NW2d 408 (2002), vac'd in part on other grounds 467 Mich 916 (2003); *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). We previously concluded that the trial court had erred by failing to properly instruct Bailey's jury that the prosecutor had the burden to prove beyond a reasonable doubt that Bailey did not act in self-defense. In a criminal case, "the law assigns solely to the jury" the task of finding the facts. *Sandstrom v Montana*, 442 US 510, 523; 99 S Ct 2450; 61 L Ed 2d 39 (1979). The Sixth Amendment right to a jury trial "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v Louisiana*, 508 US 275, 277; 113 S Ct 2078; 124 L Ed 2d 182

(1993). The right to a jury trial "is further interpreted as prohibiting judges from weighing evidence and making credibility determinations, leaving these functions for the jury." *Barker v Yukins*, 199 F3d 867, 874 (CA 6, 1999).

On the basis of Lambeth's testimony, a rational juror could have believed that the victim appeared to have reached for a weapon or fired the first shot at the outset of the May 3, 2006 encounter between him, Bailey, and Lambeth, and a reasonable juror could have concluded that Bailey fired either to protect himself or to protect Lambeth. Irrespective of any doubts that we as judges may harbor about Lambeth's veracity, the Sixth Amendment prohibits the substitution of our credibility determinations for those of a properly instructed jury. Given the defense evidence supporting a self-defense theory, we cannot conclude that the trial court's omission of a proper instruction concerning the burden of proof amounts to harmless error. By failing to instruct the jury that the prosecutor bore the burden of *disproving* self-defense beyond a reasonable doubt, the trial court significantly prejudiced Bailey's self-defense claim. A juror who believed that the victim fired the first shot or appeared to have reached for a gun may nevertheless have rejected self-defense on the basis of the mistaken belief that *Bailey* failed to prove this claim beyond a reasonable doubt. Stated differently, if the jury concluded that Lambeth was probably telling the truth about the victim's actions immediately before the shooting, it may have nevertheless convicted because of the misapprehension that *Bailey* had to prove Lambeth's truthfulness beyond a reasonable doubt. Because we simply cannot conclude beyond a reasonable doubt that the inadequate and incomplete burden of proof instruction "did not contribute to the verdict obtained," we must reverse Bailey's convictions and remand for a new trial. *Chapman*, 386 US at 24.

The trial court's second instructional error reinforces our conclusion that we must order a new trial. The trial court incorrectly instructed the jury that a person cannot claim self-defense "if what they do is confront someone, intending, by their mere presence, to provoke that person into doing something, and then take advantage of it." We previously explained as follows that Bailey did not forfeit his claim of self-defense by his "mere presence," while armed, on the street:

> No legal authority in Michigan supports that one becomes an aggressor merely by presenting oneself to the victim on a public street, even if armed. In *People v Bright*, 50 Mich App 401, 405; 213 NW2d 279 (1973), this Court held that "merely possessing a loaded weapon does not take away the claim of self-defense from an individual." In *People v Townes*, 391 Mich 578, 586-592; 218 NW2d 136 (1974), our Supreme Court rejected the notion that the defendant's trespass at a tire store and his attempted provocation of a store employee precluded him from arguing self-defense. Although the defendant shared some degree of "fault" for the encounter, he was nevertheless entitled to claim self-defense. [*Bailey (On Reconsideration)*, slip op at 6-7.]]

The trial court's misstatement that Bailey's armed presence foreclosed his right to claim self-defense relieved the prosecutor of his burden to disprove that Bailey shot the victim in self-defense. These instructional errors went to the core of Bailey's defense. Standing alone and in combination, the flawed instructions likely misled the jury into rejecting Bailey's self-defense theory, without even considering whether the prosecutor had disproved beyond a reasonable doubt Lambeth's version of the events surrounding the fatal confrontation.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher