STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2010
v	No. 291617 Wayne Circuit Court
DONALD C. RICHARDSON, Defendant-Appellant.	LC No. 08-013456-FC

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 36 to 120 months in prison for each assault conviction and two years in prison for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. FACTS

This case arises out of a shooting that occurred on September 25, 2008, outside a residence on Forrer Street in Detroit. Defendant admitted at trial that he shot the victims, Brandy Abrams and Dennis Dinwiddie, but he claimed that he acted in self-defense.

On the afternoon of the incident, defendant's wife and several other people were throwing eggs and rocks at each other outside of defendant's home. Defendant's wife swore and made threats to various people at the scene, including to her neighbor, Teresa Moore. Ms. Abrams's son was involved in the disturbance and, when Ms. Abrams drove up to defendant's house, she verbally confronted defendant's wife. The women exchanged vulgar remarks and threats and Ms. Abrams eventually picked up a baseball bat. Though it appears Ms. Abrams stood on the ground while defendant and his wife stayed on their porch or inside their front door, Ms. Abrams conceded at trial that, during the confrontation, she hit defendant's porch railing and screen door with the bat.

Mr. Dinwiddie testified that he was drinking a beer at Ms. Moore's house next door and he witnessed the argument between Ms. Abrams and defendant's wife. According to Mr. Dinwiddie, he walked up to Ms. Abrams to lead her back to Ms. Moore's house so that she would not get in trouble and so that no one would get hurt. Ms. Abrams testified that Mr.

Dinwiddie tried to talk to defendant, but defendant suddenly said he was "tired of this shit," he pulled out a gun, and started shooting. Mr. Dinwiddie said the first bullet felt like a dagger in his back. In total, Ms. Abrams sustained four gunshot wounds and Mr. Dinwiddie sustained two gunshot wounds. Thereafter, defendant reloaded his revolver and waited on his porch until the police and EMS arrived.

With regard to defendant's claim of self-defense, defendant presented evidence that he has a reputation for being a law-abiding and peaceful person. He testified on his own behalf at trial and claimed that he was provoked by Ms. Abrams when she broke his glass screen door with the baseball bat and hit him in the chest with the baseball bat. Defendant testified that, after this happened, he was afraid that Ms. Abrams would seriously hurt or kill his wife or himself and that he therefore felt it necessary to shoot. Defendant also saw Mr. Dinwiddie running toward him but could not see if he was carrying anything in his hand. Defendant testified that friends or relatives of his neighbor, Ms. Moore, have acted in a threatening manner toward him in the past, but the police provided him no assistance. Accordingly, defendant asserted that he honestly and reasonably believed he and his family were in imminent danger of severe injury or death.

II. SUFFICIENCY OF THE EVIDENCE AND SELF-DEFENSE

Defendant argues that the trial court presented insufficient evidence to support his convictions and that evidence showed he shot the two victims in self-defense. This Court "review[s] de novo challenges to the sufficiency of the evidence in a criminal trial to determine whether, when viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found all of the elements of the charged crime to have been proven beyond a reasonable doubt." *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). "The elements of assault with intent to do great bodily harm less than murder are: '(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis in *Brown*); MCL 750.84.

Evidence established both elements of assault within intent to do great bodily harm. "This Court has defined the intent to do great bodily harm as 'an intent to do serious injury of an aggravated nature.'" *Brown*, 267 Mich App at 147, quoting *People v Mitchell*, 149 Mich App 36, 39, 385 NW2d 717 (1986). "An intent to harm the victim can be inferred from defendant's conduct." *Parcha*, 227 Mich App at 239. The requisite intent is established if a defendant attempts to do corporeal harm to a victim through the use of a deadly weapon. *Id*. As noted, the prosecution presented evidence that defendant shot Ms. Abrams four times and he shot Mr. Dinwiddie twice. Evidence also showed that defendant shot both of the victims at close range and he shot Mr. Dinwiddie first in the back.[1] This evidence was sufficient for a rational jury to

[1] Defendant claims that the medical records show that Mr. Dinwiddie was shot in the side, not in the back. While he points to a notation in the medical records that could suggest that a gunshot wound to Mr. Dinwiddie's posterior right flank and chest may "possibly" represent an entrance and exit wound, other parts of the medical record state that the posterior right flank wound and the chest wound were both "penetrating" wounds and, as noted, Mr. Dinwiddie testified that he

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convict defendant of assault with intent to do great bodily harm. And, though defendant argues that prosecution witnesses offered untruthful and contradictory testimony, "[t]he credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98, 101 (2009).

Defendant argues, however, that evidence showed he acted in self-defense. "[C]ommon-law self-defense excuses an otherwise unlawful act—typically the killing of another person—under circumstances in which the defendant acted out of fear of death or serious bodily harm." *People v Dupree*, 284 Mich App 89, 101; 771 NW2d 470 (2009). Indeed, pursuant to MCL 780.972:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.
>
> (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

"'Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.'" *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009), quoting *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

We hold that the prosecutor established, beyond a reasonable doubt, that when defendant shot Ms. Abrams and Mr. Dinwiddie, he did not have an honest or reasonable fear of imminent harm. Defendant argues that various witnesses threatened him at the scene, including Ms. Moore, Ms. Abrams, and Mr. Dinwiddie, and that this led to his reasonable fear of imminent harm. Specifically, he cites Ms. Moore's reference to throwing acid on his wife, Mrs. Richardson. However, Ms. Moore testified that, in response to Mrs. Richardson's attempt to throw a bucket of hot water on her, she merely said to defendant that he should restrain his wife and that it would be wrong of Ms. Moore to throw acid on Mrs. Richardson. Ms. Moore testified that she did not have any acid and was merely pointing out that such conduct would be wrong, just as Mrs. Richardson's conduct was wrong. The record does not support an inference that Ms. Moore "threatened" Mrs. Richardson or defendant. Evidence also showed that Ms. Moore was on her porch when she made the comment and that Mrs. Richardson and defendant were on their own property. Thus, Ms. Moore's comment could not lead defendant to believe that he or his wife were in imminent danger of being harmed by Ms. Moore.

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felt the bullet hit him in the back.

Defendant also asserts that Mr. Dinwiddie made threats to Mrs. Richardson and defendant. Mrs. Richardson told police that Mr. Dinwiddie tried to get inside her house and said he was going to "get" her. However, this was not corroborated by other witnesses. To the contrary, Mr. Dinwiddie, Ms. Abrams, and Ms. Moore testified that Mr. Dinwiddie was simply trying to restrain Ms. Abrams and to bring her back to Ms. Moore's property. Defendant testified that, when Mr. Dinwiddie was standing on Ms. Moore's porch, he told defendant that when the argument was over "its [sic—it's] going to be between me and him. And he said he didn't have a problem busting a woman upside the head . . . ." Again, however, Mr. Dinwiddie allegedly made this threat from Ms. Moore's house and several witnesses testified that the confrontation subsided for several minutes thereafter. It also appears undisputed that Mrs. Richardson was swearing at and threatening numerous people at the scene throughout this period of time.

Defendant concedes that defendant did not testify truthfully about Ms. Abrams hitting him with a baseball bat. No other witness so testified and no one else stated that Ms. Abrams broke defendant's glass screen door. Defendant argues that his presumably false assertion is irrelevant because the testimony of other witnesses was so contradictory. However, defendant's own argument makes the point: like the witnesses he cites, defendant also made statements that contradicted his other testimony, his wife's statements to the police, and the testimony of other witnesses; it is not for this Court to sort out which witnesses offered the more credible version of events. *Harrison*, 283 Mich App at 378.

Defendant's best evidence to support his theory of self-defense is that Ms. Abrams yelled at and threatened Mrs. Richardson while carrying a bat, and she admittedly hit defendant's porch railing and screen door with the bat. However, ample other evidence showed that Ms. Abrams never walked up onto the porch to physically confront Mrs. Richardson or defendant, defendant had pushed Mrs. Richardson inside the house when Ms. Abrams hit the porch and door (thus getting her out of the way of any potential harm), defendant had armed himself earlier in the day with three loaded guns, Mr. Dinwiddie attempted to defuse the situation by pulling Ms. Abrams away from the confrontation, the two were heading back toward Ms. Moore's house when defendant began to shoot, and the first shot coming from defendant's gun hit Mr. Dinwiddie in the back. This evidence, if believed by the jury, establishes beyond a reasonable doubt that defendant could not have had a reasonable belief that he needed to use deadly force against either Ms. Abrams or Mr. Dinwiddie to prevent imminent death or great bodily harm to himself or his family.

Defendant seems to suggest that the history of acrimony on the street and the whole atmosphere on the afternoon of the incident led him to believe that he or his family could be gravely injured or killed. By all accounts this was a volatile confrontation involving a great deal of yelling and threatening language from both sides. It also appears that defendant may well have had trouble with unruly, intoxicated neighbors but felt powerless to do anything about it. However, based on the evidence presented at trial, Ms. Abrams's conduct and that of Mr. Dinwiddie simply did not rise to a level that would excuse defendant's actions in shooting them six times with a revolver. While, arguably, defendant had no duty to *retreat* because he was on his porch at the time of the incident, absent evidence that he had an honest and reasonable belief that he had to use deadly force to prevent imminent injury or death, his conduct is not excused

under a theory of self-defense. *People v Riddle*, 467 Mich 116, 127; 649 NW2d 20 (2002). Accordingly, we affirm the jury's decision.

III. JUDICIAL CONDUCT AND JURY INSTRUCTIONS

Defendant argues that he was denied his constitutional right to due process because the trial court was biased against him. As this Court explained in *People v Odom*, 276 Mich App 407, 421-422; 740 NW2d 557 (2007):

> A determination regarding whether a party has received due process is a question of law reviewed de novo. For a due process violation to result in reversal of a criminal conviction, a defendant must prove prejudice to his or her defense.

Because defendant did not preserve his claim of bias through a timely objection before the trial court, this Court reviews this unpreserved constitutional claim under the plain error standard. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MRE 611(a) provides as follows:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Moreover, in *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), this Court explained:

> A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. [Citations omitted.]

A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Defendant contends that the trial court had a "hostile attitude" toward defense counsel during his cross-examination of Ms. Abrams. The record reflects, however, that the trial court was merely attempting to control defense counsel's improper cross-examination. Defense counsel was attempting to introduce Ms. Abrams's prior testimony when he was not actually impeaching any testimony elicited at trial. Moreover, the trial court was simply making the point that it was improper for defense counsel to make the general, inaccurate statement before the jury that Ms. Abrams's "entire testimony" differed from her prior testimony. The trial court's comments, while perhaps exhibiting some displeasure with trial counsel's conduct, fall under the category of controlling the conduct in the courtroom and the appropriate questioning of witnesses and does not constitute error. MRE 611; *Paquette*, 214 Mich App at 340.

Later in the cross-examination of Ms. Abrams, the trial court made the accurate observation that defense counsel's attempt to impeach was improper because the allegedly conflicting testimony was actually about two different times during the incident and defense counsel raised his voice to the court while denying his own, obvious error. The trial judge did not express bias against defendant personally, nor did he respond to defense counsel's conduct improperly. Simply put, there is no indication in the record of the kind of "deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible," and it well-settled that "[c]omments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *Wells*, 238 Mich App at 391.

Defendant asserts that the trial court improperly intervened on two other occasions to guide his questioning, including when defense counsel asked if Ms. Abrams had told a police officer that defendant was the only person with a weapon on the scene. Ms. Abrams acknowledged her prior statement and defense counsel countered, "You have forgotten that you had the baseball bat at that time; is that correct?" The trial court intervened and said:

> There is a difference between saying someone has something like a gun that's known to be a weapon and someone having a baseball bat. In and of itself a baseball bat is not a weapon. You should phrase the question to at least understand the two are different, Mr. Lusby.

Contrary to defendant's implication on appeal, the trial court was not telling the jury that a baseball bat can never be a weapon. Rather, the trial judge was merely clarifying that, to properly impeach a lay witness, the testimony must actually conflict. The judge was simply asking defense counsel to phrase the question in a manner so as not to wrongfully suggest that Ms. Abrams denied to the police officer that she had a bat at the scene of the shooting. Again, this was not improper. MRE 611; *Paquette*, 214 Mich App at 340.

Though defense counsel complains that the court emphasized a point that favored the prosecution during the testimony of witness Annie Norman, i.e., that Ms. Abrams was not standing on defendant's porch when she swung the bat, this was proper questioning under MRE 611 in an effort to "make the interrogation and presentation effective for the ascertainment of the truth" and no error occurred. Nothing in the record indicates that the trial court showed bias for or against one of the parties and defendant is not entitled to relief on this issue.

Under the same question presented, defendant argues that the trial court gave the jury confusing and improper instructions. Defendant's point appears to be that, in combination with the trial court's alleged hostility toward the defense, the trial court's instructional error resulted in an unfair trial. Defendant's argument is without merit.

In *Dupree*, 284 Mich App at 97, this Court opined:

> This Court reviews de novo claims of instructional error. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). Likewise, this Court reviews de novo questions of law such as the proper interpretation of criminal statutes in the context of traditional common-law principles. See *People v Tombs*, 472 Mich 446, 451-459; 697 NW2d 494 (2005).

Furthermore,

> Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). [*People v Waclawski*, 286 Mich App 634, 675; 780 NW2d 321 (2009).]

"Instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support." *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). "Even if the 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.

The trial court instructed the jury on self-defense and stated that "a person is never required to retreat if attacked in his or her own home, nor if the person reasonably believed that the attacker is about to use a deadly weapon, nor if the person is subject to a sudden fear and violent attack." Defendant does not complain that this instruction was incorrect and, indeed, counsel expressed satisfaction with the instructions after the trial court gave them. After the jury asked the scope of a person's "home" for purposes of self-defense, the trial court instructed the jury that "home" includes the curtilage, "meaning land or yard adjoining a house usually within an enclosure." The Court further explained:

> And also, as used in this section, dwelling means a structure or shelter that is used permanently or temporarily as a place of abode and including an appurtenant structure attached to that structure, meaning something that is attached to that structure or shelter also. Sometimes people may have sheds or something like that, enclosed porches, something along that line.

The trial court also reinstructed the jury on self-defense and, again, defense counsel expressed satisfaction with the court's instructions. When the jury indicated that it could not reach a verdict, the trial court re-instructed the jury on its duties as the finder of fact, the presumption of innocence, and the definition of reasonable doubt. The trial court also gave the jury the self-defense instruction again, including the word "curtilage" when referring to the lack of a duty to retreat within a person's own home. Though defense counsel asked the court to define "curtilage" again, the court declined to do so.

The trial court's decision not to re-instruct the jury on the definition of "curtilage" did not deprive defendant of a fair trial. The trial court fully, accurately, and repeatedly instructed the jury on self-defense, explicitly defining the word curtilage to the full satisfaction of defense counsel. The jury did not express confusion about the word after the trial court defined it and there is simply no reason to presume that the jury failed to understand the definition as given by the court. Jurors are presumed to follow their instructions and nothing in the record suggests that the verdict was based on a misunderstanding or failure to consider the meaning of "curtilage." See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Overall, the court "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Aldrich*, 246 Mich App at 124. Accordingly, defendant has not shown that he was denied a fair trial.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto