STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 3, 2010
v	No. 286985 Branch Circuit Court
ANA MARIE SANDOVAL-CERON, Defendant-Appellant.	LC No. 07-028710-FC

Before: STEPHENS, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction for voluntary manslaughter. MCL 750.321. On appeal, we must determine whether the trial court erred when it precluded defendant from calling an expert to testify about battered woman syndrome, erred when it limited defendant's ability to offer evidence concerning the decedent's aggressive character, and erred when it refused to instruct the jury on self-defense. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

Defendant's conviction stems from an altercation with Ricardo Prieto. Defendant and Prieto had had a stormy relationship. However, that stormy relationship took place in Texas two years earlier and prior to the two of them marrying other people and moving to Michigan. Although the testimony conflicted as to whether and how long Prieto had moved in with defendant prior to the night of his death—defendant denied that he stayed with her at all, but her children from a different relationship put the time at two days and two weeks respectively—there was no testimony that there were any fights during this period.

Prieto and defendant attended a wedding at the home of Jesus and Michelle Estrada on September 9, 2006. After the wedding they were drinking beer while sitting on the porch. Testimony indicated that they were both intoxicated. They began to argue and Michelle Estrada saw Prieto strike defendant with the back of his hand, causing her lip to bleed. Estrada asked her husband to intervene and he did, successfully separating the two and telling Prieto not to touch defendant.

Prieto then left the porch and stood in front of the Estradas' van. Defendant angrily pursued Prieto to the van and threw a beer bottle at him, but missed. As she tried to throw

another bottle, Jesus Estrada took it away. Defendant next picked up a ceramic pot to throw, but it became caught in her finger and she missed again. After these unsuccessful attempts to strike Prieto, defendant went into the Estradas' home and grabbed the butcher knife that was used to cut the wedding cake. According to defendant's daughter, Angelica, defendant said she "wanted to kill him because . . . she was tired of him hitting her." Angelica told her to quit, but she would not listen.

Defendant then went out on to the porch with the knife briefly before going toward Jesus and Prieto. Prieto ran from defendant while Jesus Estrada told her to stop. However, defendant refused to stop and grabbed Prieto's collar. She began swinging the knife at him with Estrada between them trying to stop her. Estrada eventually tired and defendant chased Prieto to the back of the van screaming that she was going to kill him. Defendant, who was both taller and heavier than Prieto, eventually succeeded in killing Prieto by stabbing him in the heart.

II. SELF DEFENSE

A. STANDARDS OF REVIEW

We shall first address defendant's argument that the trial court erred when it refused to instruct the jury on self-defense. Because defendant failed to object to the missing instruction at trial, we will review this claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. ANALYSIS

It is well settled that jury "instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). However, a trial court is not invariably required to give an instruction on a particular defense simply because a defendant requests it; rather, a "trial court is required to give requested instructions only if the instructions are supported by the evidence or the facts of the case." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). "A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *Crawford*, 232 Mich App at 619. "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *Ho*, 231 Mich App at 189.

"In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that [her] life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, a defendant is not entitled to use any more force than is necessary to defend herself. *People v Roper*, 286 Mich App 77, 88; 777 NW2d 483 (2009). And deadly force may not be used if it reasonably appears that it would be safe to retreat. *People v Riddle*, 467 Mich 116, 119, 128; 649 NW2d 30 (2002).

Under the evidence adduced at trial, no reasonable person could conclude that defendant was under an imminent threat of death or great bodily harm. Jesus Estrada broke up the original altercation wherein Prieto struck defendant with the back of his hand and Prieto moved from the

area of the altercation. At this point, defendant became the aggressor. She pursued Prieto and began to throw objects at him. There is no evidence that Prieto physically attacked her again and there is no evidence that he was ever armed. Indeed, the evidence shows that defendant was the one who had to be restrained. After her attempts to use projectiles against Prieto failed, she retreated to the safety of the Estrada's home only to return to the porch with a butcher knife after announcing that she was going to kill Prieto. She then chased him down and stabbed him to death. Under these facts, defendant cannot plausibly claim that she was acting in self-defense.

Moreover, the facts of this case do not implicate the holding in *Riddle* that "a person is *never* required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon . . . as long as he honestly and reasonably believes that it is necessary to exercise deadly force in self-defense, the actor's failure to retreat is never a consideration" and "he may stand his ground and meet force with force." *Riddle*, 467 Mich at 119 (emphasis supplied). Here, defendant was not standing her ground against a sudden and deadly attack; rather, she decided to physically attack Prieto after the initial altercation had ended. And when her attacks were unsuccessful, she decided to *escalate* the violence by arming herself with a deadly weapon, running Prieto down, and stabbing him to death. See *Roper*, 286 Mich App at 88 (noting that the fact that the defendant pursued the victim outside after the altercation had ended belied the defendant's claim that he feared for his life); see also *Riddle*, 467 Mich at 127 n 19.

The trial court did not err when it refused to give a self-defense instruction that was not supported by the facts.

III. EXPERT TESTIMONY

A. STANDARDS OF REVIEW

Defendant also argues that the trial court deprived her of her right to present a defense when it excluded the testimony of an expert witness on battered woman syndrome. We review a trial court's decision to exclude or admit expert witness testimony for abuse of discretion. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). We review de novo whether defendant was denied her constitutional right to present a defense. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

B. ANALYSIS

"A criminal defendant has both state and federal constitutional rights to present a defense, which rights include the right to call witnesses." *Id.* at 488, citing *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). The right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

In this case, defendant wanted to present an expert on battered woman syndrome. Michigan courts have recognized that expert testimony on this syndrome can be relevant to the defense of self-defense; specifically, it can be offered to explain how a defendant might have a

reasonable belief that danger or great bodily harm is imminent. *Wilson*, 194 Mich App at 603-604. It is not, however, an independent justification or excuse for homicide.

Before the trial court could permit defendant's expert to testify, the court had to first determine whether the expert's testimony would assist the trier of fact:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [MRE 702.]

Here, the trial court heard the expert's proposed testimony and determined that the witness did not apply the principles and methods reliably to the facts of the case. The trial court did not rule that evidence of battered woman syndrome was inherently inadmissible, or that the proposed expert lacked the knowledge, skill, or experience to qualify as an expert. Rather, the expert failed to close the "analytical gap" between her expertise on battered woman syndrome and the facts of the particular case. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 783; 685 NW2d 391 (2004). We agree that that there was a gap between the proposed testimony and the facts of this case. Because the facts did not support a claim of self-defense, the proposed testimony would not have assisted the jury in understanding the evidence or in determining a fact in issue. MRE 702. Therefore, the trial court did not abuse its discretion in excluding the expert's testimony and the exclusion did not violate defendant's right to present a defense. See *Hayes*, 421 Mich at 279.

IV. CHARACTER EVIDENCE

Finally, defendant argues that the trial court erred when it excluded proposed testimony about the homicide victim's character trait for aggression.

Under MRE 404(a)(2) and MRE 405(b), a defendant may admit evidence of a homicide victim's character for aggression. When a defendant charged with murder claims self-defense, the alleged victim's character trait for violence is an important element in the self-defense claim and specific instances of the victim's violent conduct may be offered as proof. *People v Harris*, 458 Mich 310, 316, 319; 583 NW2d 680 (1998). A trial court, however, has discretion "in deciding how much of this evidence to admit." *People v Taylor*, 195 Mich App 57, 61; 489 NW2d 99 (1992), citing MRE 403. If the exclusion of the evidence is determined to be an abuse of discretion, it will nevertheless not warrant reversal "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

On the facts of this case, the trial court properly exercised its discretion when it excluded the testimony at issue. The trial court determined that the evidence was irrelevant to the case because the specific instances about which the witness was to testify occurred in 1998 and 1999. The trial court also did not completely ban evidence of the victim's character. See *Taylor*, 195 Mich App at 61. The jury heard testimony throughout the four-day trial about how the victim

had been physically violent with defendant in the past as well as on the day he was killed. The jury saw a personal protection order that defendant obtained against the victim. And, the jury heard how the victim was violent with another woman. The excluded testimony of instances of the victim's aggression in 1998 and 1999 would have told the jury little, if anything, about the victim that it did not learn through other witnesses and evidence. For that reason, even if we were to conclude that the trial court abused its discretion by excluding this specific testimony, it is not more likely than not that this error affected the outcome of the trial and it would not warrant relief. *Lukity*, 460 Mich at 495.

V. CONCLUSION

There was no evidence to support defendant's claim of self-defense. Once the initial altercation ended—and especially after she retreated to the relative safety of the Estrada's home—defendant was no longer in imminent danger.[1] Accordingly, the trial court did not err in refusing to instruct the jury on self-defense. See *Riddle*, 467 Mich at 124. Likewise, given that self-defense did not apply under the facts of this case, defendant's expert's proposed testimony would not have been relevant or helpful to the jury. MRE 402; MRE 702. For that reason, the trial court did not err in refusing to allow defendant's expert to testify about battered woman syndrome. Finally, the trial court did not abuse its discretion when it limited a portion of the evidence concerning Prieto's character for aggression.

There were no errors warranting relief.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly

[1] Although there may be cases where a woman affected by battered woman syndrome might reasonably believe that she is in imminent danger even with a separation in both time and space, this is not such a case. At some point, courts must be able to state that a defendant's separation in time and space from the victim precludes a reasonable finder of fact from finding that defendant held a reasonable belief of imminent danger notwithstanding her claim that she was affected by battered woman syndrome. To hold otherwise would give rise to troubling questions regarding the application of this defense. For instance, how much time can elapse between the initial altercation and the defendant's subsequent decision to use deadly force? Can the defendant retreat to safety for twenty minutes and then decide to arm herself and attack her assailant? Can she wait two hours, two days, or even two months before killing her assailant and still present the defense? Does the physical proximity to her assailant alter the analysis? Here, defendant retreated into the home where the altercation occurred and armed herself. Could she still have presented the defense if she had driven home, armed herself there, and then driven back to the Estradas' home to kill Prieto? Does the possible influence of the syndrome always render such questions a matter for the jury? Indeed, is there ever a circumstance where someone allegedly affected by the syndrome could be prevented from presenting self-defense as justification for homicide?