STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2010
v	No. 293733 Macomb Circuit Court
LARRY DONELL FORBES, Defendant-Appellant.	LC No. 2008-005176-FH

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of metallic knuckles, MCL 750.224(1)(d). The trial court sentenced defendant to a two-year term of probation, which included five months of electronic monitoring. Defendant appeals as of right, and we affirm.

Defendant's convictions stem from his September 2008 assault of Lisa Jastrzemski, the victim. While the victim and defendant proceeded southbound on Gratiot in Eastpointe, defendant, who was driving a motorcycle, perceived that the victim cut him off by edging into his lane of travel. The victim testified at trial that she moved her car back into the lane she had previously occupied and noticed a man driving a motorcycle a short distance behind her, in the lane to her left. Although the victim had rolled up her car windows, she recalled hearing the man on the motorcycle call her a bitch. The victim recounted that (1) she ended up directly behind the motorcycle in the same Gratiot turnaround; (2) as the motorcycle ventured from the turnaround onto northbound Gratiot the driver motioned for her to follow him to a nearby store parking lot; and (3) she pulled into the lot and parked her car while the other driver parked his motorcycle on the road.

The victim explained that she got out of her car intending to apologize to the motorcycle driver, but that before she left the car she took "a canister of pepper spray" she had in her pursue because she felt "a little scared." The victim described that as she and defendant approached each other, her fear intensified when she saw the driver holding "nunchucks . . . [that] he started to swirl." According to the victim, she opted to use her pepper spray when the motorcycle driver had approached to some point within four to eight feet of her and she could see that "he wasn't about to do any talking," given that he continued "spinning . . . the nunchucks." The victim testified that the spray had no discernible effect on the motorcycle driver, who wore a helmet, and that the driver struck her at least twice with his nunchucks, including in the victim's

forehead.[1] The driver fled the scene. The victim identified the motorcycle driver at trial as defendant.

Two other trial witnesses offered their recollections of the assault. Shad Missine, another driver on southbound Gratiot, testified that he saw in a store parking lot "a black gentleman" strike an almost six-foot-tall blonde woman at least twice with "an object," which from a distance of 20 to 30 yards resembled "a stick" "about three feet long." Missine identified defendant at trial as the assailant, and denied that he noticed the victim exhibit any aggressive behavior. Like defendant and the victim, Missine turned around and headed north on Gratiot, in pursuit of defendant's motorcycle as he drove away from the assault. Missine called the police on his cell phone while he shadowed defendant during a short drive to an Eastpointe residence on Roxanna Street. On the day of the assault, the police arrested defendant at 23832 Roxanne and discovered a pair of metal knuckles and some knives inside saddlebags attached to defendant's motorcycle.[2]

Jamie Fuhr added her observations of the assault, which Fuhr made as her fiancé drove her and their children north on Gratiot in the far right lane. Fuhr first noticed a motorcycle parked in a fashion that partially blocked a store parking lot entrance, and heard her fiancé declare, "Oh, my God. That man's beating that woman." Fuhr next observed a man twice strike a tall woman. As the man walked away, Fuhr saw him holding "a black object . . . close to his chest," and heard the man remark, "she's a crazy bitch," and inquire, "What, you haven't had enough?" Fuhr and her fiancé stopped to assist the woman, who had blood "[r]unning down her head . . . [and] on her shirt." Fuhr identified defendant as the woman's assailant.

Defendant testified that a car had cut off his motorcycle in its southbound lane of travel, he locked his brakes and honked his horn once, and simply continued toward the Gratiot turnaround and his destination. Defendant recalled that he headed toward the store parking lot, but could not proceed directly in because the car that had cut him off again "cut across at [his] motorcycle with his window down" and parked in the store lot. Defendant watched the car driver "open[] the door and lean[] down to reach under the seat," prompting in defendant fears that the person might have obtained a gun or other weapon. When the person got out of the car and approached defendant, defendant noticed a small can in the person's hand and heard the person announce an intent "to fuck [defendant] up."[3] Defendant reached into a saddlebag and retrieved "a fit bar," which he described as a hard "alloyed bar [of between six to eight inches in length] that's rubber coated and . . . used in the automotive industry to adjust things and strike hinges . . . ." According to defendant, the other driver approached within six feet of defendant

[1] An emergency room physician testified that he treated the victim for injuries she reportedly sustained when someone struck her with nunchucks. The victim had a laceration on her head "that required sutures" and a fractured right thumb.

[2] The arresting officer testified that he detected no signs of pepper spray exposure on defendant.

[3] Defendant repeatedly testified to his belief that the victim was a man. Defendant averred that the other car's driver "was in my opinion . . . about six-two, about 260, 270 pounds, had a cutoff muscle t-shirt, had on sweat pants, . . . and had a very nasty disposition, mean look on their face."

and began spraying mace toward him over his verbal protests to stop; defendant "started retreating," but as a last resort swung the fit bar two or three times when "[t]he person . . . stuck their hand back up to spray me for the third time."

Defendant first maintains on appeal that the trial court misdirected the jury by reading final instructions that erroneously authorized the jury to find that defendant acted in self-defense only if he faced a threat of deadly force. Defendant insists that the trial court's reading of the mistaken instruction, and its repetition of the instruction during deliberations, essentially precluded the jury from finding "that the [victim's] use of pepper spray instilled [defendant] with an honest and reasonable belief 'that he was in danger of being killed or seriously injured.'" When the parties and the trial court initially discussed potential jury instructions, defense counsel expressed his view that the prosecutor's proposed instructions appeared acceptable. However, the trial court questioned the propriety of reading CJI2d 7.16 ("Duty to Retreat to Avoid Using Deadly Force"), asking specifically, "Is deadly force an issue?" Defense counsel and the prosecutor agreed that the case did not involve deadly force, although the prosecutor noted "it's more than simple force." The trial court replied:

> I understand, but the instruction [CJI2d 7.16] is a deadly force instruction. A person can use deadly force in self defense only when it is necessary to do so. *We have [CJI2d] 7.15*, the self defense, and I could see number two of [CJI2d] 7.16 following [CJI2d] 7.15 which is, "however, a person is never required to retreat if attacked, nor if the personable [sic] reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden fierce, and violent attack." I'm not sure mace is a deadly weapon but we could— [Emphasis added.]

Defense counsel interjected, "I could follow the Court's interpretation, and since there was no deadly weapon, I don't think [CJI2d] 7.16 is necessary," and the prosecutor assented.

As the court had indicated concerning its preferred self-defense instructions, the court later read the jury an instruction tracking the entirety of CJI2d 7.15, which is entitled, "Use of Deadly Force in Self-Defense," and CJI2d 7.20, which sets forth the prosecutor's burden to "prove beyond a reasonable doubt that the defendant did not act in self-defense." On completing the recitation of the jury instructions, the trial court queried the prosecutor and defense counsel whether they had "[a]nything with respect to instructions[,]" to which defense counsel responded, "None with the instructions, your Honor." During deliberations, the jury urged the court to "[r]eread instruction count one," and the court announced to the prosecutor and defense counsel that it intended "to read the self defense as well." In response to the court's question about the acceptability of its proposal, defense counsel declared, "It's acceptable, your Honor." The trial court reread the jury instructions encompassing CJI2d 7.15 and CJI2d 7.20, again asked the attorneys for "[a]nything additional[,]" and defense counsel answered, "Not at this time."[4]

[4] Later, the jury asked the trial court "for the legal definition of intent," which the court viewed as necessitating a rereading of "all the instructions again." Defense counsel offered no objection when the court a third time read the jury instructions covering CJI2d 7.15 and CJI2d 7.20.

The record thus reflects that on at least three occasions defense counsel either expressly approved the self-defense instructions proposed and read by the trial court or disavowed any criticism of the trial court's instructions, including CJI2d 7.15. Defense counsel's repeated and intentional abandonment of any objections to the trial court's self-defense instructions constituted a waiver of his present appellate challenge, which extinguishes any error. *People v Dobek*, 274 Mich App 58, 64-66; 732 NW2d 546 (2007); *People v Lueth*, 253 Mich App 670, 668; 660 NW2d 322 (2002).

In a related contention, defendant maintains that his counsel was ineffective for failing to object to the improper self-defense jury instructions. Even assuming that the trial court improperly instructed the jury pursuant to CJI2d 7.15 (use of deadly force in self-defense) instead of CJI2d 7.22 (use of nondeadly force in self-defense), and that defense counsel objectively and unreasonably neglected to interject an objection to the improper instructions, we discern no reasonable probability that but for counsel's error the result of defendant's trial would have differed. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004). Overwhelming evidence supported defendant's convictions. The victim and defendant agreed that the events leading to the assault commenced when the victim moved her car into defendant's lane of travel. The victim and defendant differed with respect to their recollections of which of them motioned the other toward the store parking lot, but they also agreed that as they approached one another the victim held a small canister of pepper spray while defendant held a more substantial striking weapon, in the form of either his fit bar or nunchucks. The victim testified that as defendant moved toward her with his weapon raised she unsuccessfully sprayed her canister toward defendant, and that he struck her, including on the head, at least twice; defendant also broke the victim's right thumb. The trial accounts of two passing motorists conformed with the victim's memory of the details of the assault; the motorists saw defendant strike the victim at least twice with a stick-like object and noticed no signs of aggression on the victim's part. And one of the passing motorists followed defendant when he fled to his residence after the assault. The motorist called the police, who apprehended defendant shortly after the assault and confiscated "martial arts" style weapons from the saddlebags of his motorcycle. Undisputed evidence established defendant's identity as the victim's assailant, including his concession that he had struck the victim. Defendant testified that the victim had behaved in an aggressive manner, and that he struck the victim only after she ignored his efforts to speak with her and her repeated efforts to coat him in pepper spray. However, the jury evidently deemed his account incredible. See *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003) (noting that "questions regarding the credibility of witnesses are to be resolved by the trier of fact," and that "[t]his Court should not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses").

In summary, defendant has failed to substantiate a reasonable probability that his trial counsel's lack of an objection to the self-defense instructions would have altered the outcome of his trial.

Defendant lastly submits that the trial court incorrectly excluded at trial evidence that the victim had had a sex change operation, which precluded defendant from mounting a trial defense. A trial court's "decision whether evidence is admissible is within the trial court's

discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Immediately before jury selection, the prosecutor moved in limine to preclude any reference to a past gender reassignment operation of the victim, and the trial court ruled as follows that it would grant the prosecutor's motion:

> I would agree under those circumstances, the gender is not a relevant fact. . . . [The defense] can indicate, if you want, how she was dressed, if she was dressed like a man, if she had men's clothes on, that's fine. But the fact that she's had a sex change operation really doesn't fly.

The Michigan Rules of Evidence authorize the admission of relevant evidence, MRE 402, which MRE 401 defines as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Contrary to defendant's position on appeal that "[t]he fact that the [victim] used to be a man pertained to the subjective element of the self-defense instruction," the instant record gives rise to no inference that defendant had any reason to know or suspect at the time of his confrontation with the victim that she had undergone a gender reassignment operation. A defendant pursuing a self-defense claim generally must persuade a jury that he reasonably acted in self-defense under "all the circumstances as they appeared to the defendant at the time" of the charged crime. CJI2d 7.15; see also *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976) (observing that a self-defense claim must rest on "the circumstances as they appeared to defendant, and not as they actually existed," and that "those circumstances as they appeared to the defendant must result in a reasonable belief that he . . . is in danger . . . ."). Because nothing in the record suggests that defendant knew of the victim's gender reassignment when he assaulted her, that an operation may have occurred had no probative value toward substantiating defendant's perceptions at the time he committed the charged crime. Also contrary to defendant's position on appeal about his inability to present a defense, he had a fair opportunity to introduce evidence supporting his belief at the time of the assault that the victim was a man, a fact to which defendant repeatedly testified at trial. We conclude that the trial court did not abuse its discretion when it excluded evidence of the victim's gender reassignment.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly