

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO MARCHELLO DUPREE,

Defendant-Appellant.

FOR PUBLICATION

May 28, 2009

9:00 a.m.

No. 281408

Wayne Circuit Court

LC No. 06-008543-01

Advance Sheets Version

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

M. J. KELLY, J.

Defendant Roberto M. Dupree appeals by delayed leave granted his jury conviction of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction (felon-in-possession), MCL 750.224f. The trial court sentenced Dupree as a fourth-offense habitual offender, MCL 769.12, to serve 48 months to 30 years in prison. On appeal, Dupree argues that the trial court improperly instructed the jury on his theory that he could not be convicted of being a felon-in-possession if he only temporarily took possession of the firearm at issue in order to defend himself during a life-threatening altercation. In order to resolve this issue, we must first determine whether temporary possession of a firearm for self-defense during a life-threatening altercation constitutes an affirmative defense to being a felon-in-possession under Michigan law. We must then determine whether that defense applied in this case and whether the trial court properly instructed the jury on that defense. We conclude that there is such a defense under Michigan law, that it applied to the facts of this case, and that the trial court improperly instructed the jury on this defense. Further, because we conclude that the instructional error was not harmless, we reverse Dupree's conviction of being a felon-in-possession and remand for a new trial on this charge.

I. Basic Facts and Procedural History

A. The Fight and Shooting

Dupree's conviction arises out of a fight and shooting at a party in September 2005. On the day in question, Dupree and a female companion went to the home of Dupree's sister-in-law, Adrian Dupree, to celebrate the birthday of Dupree's brother. Adrian's niece, Ashley Horton, and Horton's boyfriend, Damond Reeves, also attended the party. The party lasted several hours and primarily took place in the backyard. After it started to become dark, the party began to wind down and the remaining guests prepared to leave. At around this time, Dupree had an altercation with Reeves in the front of the home.

At trial, Reeves testified that he was preparing to leave the party when he asked Adrian to go inside and get Horton. According to Reeves, Dupree was looking at him and then called him a name and pushed him for no reason. Reeves testified that he and Dupree “tussled” for a time in the front yard, but Dupree eventually broke away from him, went into the house, and came out with a .38 caliber revolver. Reeves stated that Dupree then shot him three times.

Horton testified that she was in the house when she heard that Dupree and Reeves were fighting. Horton stated that she went out onto the porch and saw them fighting, but let them fight awhile. Horton said that she eventually tried to break up the fight, but Dupree pulled a gun and struck her in the face with it. Although the sequence of events was not entirely clear, Horton testified that she went into and out of the house on at least two occasions and that she called the police twice. Horton further testified that, at some point, Dupree came into the house, put the gun to her chin, and pulled the trigger. She stated that the gun did not fire—“it just clicked.”

Dupree and his witnesses disputed the version of events proffered by Horton and Reeves. Fallon Dupree testified that she was Dupree’s niece and that she attended the party with her boyfriend, Brandon Monroe. Fallon stated that Horton and Reeves were very drunk and that they had been fighting throughout the party. At some point shortly before the fight, Horton went into Adrian’s house and Reeves tried to follow her. Fallon said that after Reeves came onto the porch, Adrian was in the way and Reeves pushed her off the porch. Dupree then stepped in front of Reeves and told him that he could not show such disrespect to his sister-in-law and asked him to leave. In response, Reeves pushed Dupree and, after Dupree grabbed Reeves’s shirt, both men fell off the porch. Fallon testified that when Dupree grabbed Reeves’s shirt, the shirt bunched up and she could see a gun tucked into Reeves’s waist. After she saw the gun, Fallon and Monroe decided to leave. Fallon stated that, as she was leaving, she heard a gunshot.

Monroe’s testimony at trial largely followed that of Fallon. Monroe stated that he too saw the gun on Reeves as Reeves and Dupree fell off the porch. Monroe also testified that he and Fallon decided to leave when they saw the gun.

Dupree testified that, as the party was winding down, he was on the front porch with Adrian. He stated that Horton and Reeves had had some “issue” between them throughout the party and that around the time of the altercation Horton came onto the porch. Dupree said that Adrian told Horton to go inside and Horton did. At that point, Reeves came onto the porch and tried to force his way into the house after Horton. When Adrian got in the way, Reeves pushed her off the porch. Dupree testified that he intervened and Reeves pushed him. As he lost his balance, Dupree grabbed Reeves and both men fell off the porch. Dupree said that when he grabbed Reeves, Reeves’s shirt came up and he saw a gun tucked into his waist.

Dupree said that he was immediately afraid because Reeves was a very large man—6 feet 5 inches and about 300 pounds—and armed. Dupree said Reeves went for the gun and that he also tried to grab it. Dupree stated that he continued to struggle with Reeves over the gun when it went off. As the struggle moved toward the street, Dupree said the gun went off two more times. Dupree said he told Reeves to “just stop” and to “let go” when Reeves said “I’m hit” several times. Reeves then wandered over to a neighboring house. Dupree testified that he then walked back to the porch and asked Adrian to look and see if he (Dupree) had been hit. Dupree stated that his female companion came out and said “let’s go” and he went with her. Dupree said

that as they drove off, his companion told him to get rid of the gun, and he threw it out the window. Dupree denied hitting Horton and denied putting the gun to her head.

B. The Defense and the Jury Instructions

On the basis of these events, the prosecution charged Dupree with five felonies: assault with the intent to murder Reeves, see MCL 750.83, assault with the intent to murder Horton, felon-in-possession, felonious assault against Horton, see MCL 750.82, and carrying or possessing a firearm during the commission of a felony (felony-firearm), see MCL 750.227b. Dupree's trial counsel defended against these charges by arguing that Dupree did not assault Horton in any way and that his actions against Reeves were justified as self-defense. With regard to the felon-in-possession charge, Dupree's trial counsel argued that Dupree's temporary possession was justified under the circumstances.

Although Dupree's trial counsel argued that Dupree's temporary possession could not support a conviction for felon-in-possession under the facts of the case, he did not request a specific instruction to that effect. Instead, Dupree's trial counsel only requested a standard self-defense instruction. Nevertheless, the trial court on its own initiative instructed the jury that it could find Dupree not guilty of being a felon-in-possession if it concluded that he had possessed the gun under certain limited circumstances:

As to being a felon in possession, [Dupree] claims that the gun was produced in a struggle. And of course, if that's the case that the gun was produced during the course of a struggle and you find that it happened that way, that would be a defense to felon in possession provided you find that he did not keep the gun in his possession any longer than necessary to defend himself.

After the jury left, Dupree's trial counsel objected to this instruction. Specifically, Dupree's trial counsel objected to that part of the instruction indicating that temporary possession for self-defense was a defense as long as Dupree did not keep the gun "any longer than necessary to defend himself." Dupree's counsel would rather have had the instruction state that it was a defense as long as Dupree had not kept the gun "any longer than necessary." Following this objection, the trial court asked Dupree's counsel to research the matter and present his authorities on the next trial date.

On the next trial date, Dupree's trial counsel stated that he had not found any authorities that indicated that the trial court's instruction was incorrect. However, the prosecutor suggested that the trial court should further instruct the jury regarding the felon-in-possession charge using an instruction on momentary innocent possession from a case then before our Supreme Court. The trial court agreed.

After the jury was brought in, the trial court instructed it concerning momentary innocent possession as a defense to the charge of being a felon-in-possession. The trial court indicated that the elements of this defense were

that the defendant had the gun because he had taken it from someone else who was in wrongful possession of it, or he took it from him because of necessity, because he needed to. Second, that the possession after taking the gun was brief.

And third, that it was the defendant's intention to deliver the gun to the police at the earliest possible time.

The trial court clarified that this instruction replaced the previous instruction. Dupree's trial counsel objected to this instruction as well. He stated that, although the jury could consider momentary innocent possession as a defense, it could also consider possession for self-defense as a separate defense, which did not require an intent to deliver the gun to the police.

After deliberating, the jury found Dupree not guilty on the charge of assaulting Reeves with the intent to murder him, not guilty on the charge of assaulting Horton with the intent to murder her, not guilty of feloniously assaulting Horton, and not guilty of felony-firearm. However, the jury found Dupree guilty on the charge of being a felon-in-possession.

This appeal followed.

II. Instructional Error on Dupree's Affirmative Defenses to Being a Felon-in-Possession

A. Standards of Review

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).

B. Waiver

As a preliminary matter, I believe we must first address the prosecution's argument that this Court is without authority to review Dupree's claim of instructional error because Dupree's trial counsel extinguished any error when he waived Dupree's right to have the jury properly instructed. The prosecution notes that after the trial court instructed the jury on the revised defense of innocent misconduct, the trial court asked defendant's trial counsel if he had anything further to add, to which he responded, "No, your honor." On appeal, the prosecution argues that this response constituted a waiver of Dupree's claim of error. I do not agree that this statement constituted an intentional relinquishment of Dupree's right to have the jury properly instructed on his defense theory. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

In contrast to the prosecution's claim that Dupree's trial counsel took "varying stances" on the instructional issue, I conclude that Dupree's trial counsel was both consistent and persistent in his objections. Dupree's trial counsel did not request a particular instruction regarding defenses to being a felon-in-possession. Instead, he appeared to believe that the standard self-defense instruction was sufficient and actually argued to the jury that Dupree could not be convicted of being a felon-in-possession if he took the gun in self-defense. The trial court did not agree that the standard self-defense instruction was adequate; the trial court expressed its belief that, absent a more specific instruction, the jury would have to find Dupree guilty of being a felon-in-possession. For that reason, the trial court instructed the jury that, if it found that Dupree took the gun in the fight and only possessed it as long as necessary to defend himself, the jury should find Dupree not guilty of being a felon-in-possession. Dupree's trial counsel objected to this instruction on the ground that the trial court should have limited the instruction to

“as long as necessary” rather than including the modifying phrase “to defend himself.” In response to this objection, the trial court instructed Dupree’s counsel to research the matter and present his authorities on the next trial date.

On the next trial date, Dupree’s counsel indicated that he had not found any authorities that contradicted the trial court’s earlier instruction. At this point, the prosecutor asked the trial court to reinstruct the jury on Dupree’s affirmative defense. Specifically, the prosecutor asked the trial court to modify the instruction to include elements applicable to the defense of momentary innocent possession, including the requirement that the defendant have the intent to turn the gun over to the police. Dupree’s trial counsel again objected. He noted that, although the jury might properly consider this, the law did not actually include a duty to turn the firearm over to the police. This objection was entirely consistent with the theory of Dupree’s trial counsel that possession while necessary to ensure one’s safety is an affirmative defense to being a felon-in-possession. Despite this objection, the trial court asserted that the law required this instruction, explained its reasoning, and then gave the jury the new instruction over the objection. It was only after this that the trial court asked Dupree’s trial counsel whether he had anything further. Taken in context, Dupree’s trial counsel’s response is nothing more than an assertion that he had no *further* objections. Consequently, Dupree’s trial counsel did not waive his earlier claims of instructional error.

C. Affirmative Defenses to Being a Felon-in-Possession

1. Duress and Self-Defense

An affirmative defense is not a defense that is directed at an element of the crime; rather it is one “that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it” *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997), quoting 21 Am Jur 2d, Criminal Law, § 183, p 338; see also *People v Pegenau*, 447 Mich 278, 319; 523 NW2d 325 (1994) (opinion by Boyle, J.) (noting that “an affirmative defense in effect concedes the facial criminality of the conduct and presents a claim of justification or excuse”). Michigan has long recognized the existence of two common-law affirmative defenses that are relevant to the facts of this case: duress and self-defense. See *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975) (noting that duress is a “well recognized defense”), citing *People v Repke*, 103 Mich 459; 61 NW 861 (1895); *People v Coughlin*, 65 Mich 704, 705; 32 NW 905 (1887) (examining the burden of proof when a defendant claims that a killing was justified by self-defense).

The defense of duress involves a situation in which the defendant acted under threat of death or serious bodily harm. See *Luther*, 394 Mich at 622 (noting that the defendant allegedly escaped from prison out of fear of homosexual rape). In such cases, the defense “excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act” *Id.* It is sometimes characterized as a choice of evils and is applicable to situations in which it is preferable, as a matter of social policy, to permit a person to commit a crime in order to avoid a greater harm. *Lemons*, 454 Mich at 246. In order to establish duress, the defendant must offer evidence from which a jury could conclude the following:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

D) The defendant committed the act to avoid the threatened harm.
[*Luther*, 394 Mich at 623.]

Similarly, common-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 Riddle*, 467 Mich 116, 126-127; 649 NW2d 30 (2002). The otherwise unlawful act will only be justified under this defense “if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.” *Id.* at 127.

Under the facts alleged by the defense at trial, Dupree was presented with a clear choice of evils: he had to either commit the crime of being a felon-in-possession by taking Reeves’s gun or risk death or serious bodily harm at Reeves’s hands. Thus, the defense of duress appears applicable. Likewise, Dupree presented evidence from which a jury could find—and apparently did find—that he acted in self-defense when he struggled over the gun with Reeves and ultimately shot Reeves three times. However, there are no published Michigan authorities directly addressing the application of traditional common-law defenses to MCL 750.224f.¹ Consequently, it is not clear whether or how these defenses might apply to the crime of being a felon-in-possession.

In order to determine whether possession under duress or in self-defense constitutes an affirmative defense to the prohibition against the possession of firearms by felons, I believe we must first turn to the language of the statute itself. Under MCL 750.224f, a person who has been convicted of a felony may not “possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm” unless certain conditions are met. See also *People v Perkins*, 473 Mich 626; 703 NW2d 448 (2005). Although the statute exempts persons who have had their felonies expunged or set aside or who have been pardoned, see MCL 750.224f(4), it does not otherwise provide for affirmative defenses. Normally, that would end our inquiry. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002) (stating that, if statutory language is clear, “no further construction is necessary or allowed to expand what the Legislature clearly intended to cover”).

¹ As the prosecution in this case has noted, our Supreme Court has specifically held that there is no momentary innocent possession defense to MCL 750.224f. *People v Hernandez-Garcia*, 477 Mich 1039, 1040 (2007), overruling *People v Coffey*, 153 Mich App 311; 395 NW2d 250 (1986). However, the momentary innocent possession defense adopted by the Court in *Coffey* was not premised on traditional common-law defenses such as duress and self-defense. See *Coffey*, 153 Mich App at 314-315. Further, although our Supreme Court briefly mentioned the defense of duress in *Hernandez-Garcia*, it did not directly address whether and to what extent that defense was applicable. See *Hernandez-Garcia*, 477 Mich at 1041 (order), 1042 (Cavanagh, J., dissenting).

However, at least four justices of our Supreme Court have recognized that criminal statutes must be interpreted in light of Anglo-American criminal jurisprudence and the background rules of the common law. See *Tombs*, 472 Mich at 452-459 (opinion by Kelly, J.), 465-466 (opinion by Taylor, C.J., concurring in relevant part).

In *Tombs*, Justice Kelly analyzed whether a defendant had to possess the criminal intent to distribute or promote child pornography in order to be convicted of violating MCL 750.145c(3). *Id.* at 452. Justice Kelly first noted that the statutory language did not include an explicit *mens rea* requirement. *Id.* Nevertheless, Justice Kelly rejected the contention that this silence reflected a legislative intent to permit convictions without proving any *mens rea*. Instead, Justice Kelly noted that the common law traditionally disfavored offenses that did not require criminal intent, *id.* at 453-454, citing *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952), and cited with approval federal authority for the proposition that criminal statutes must be construed “in light of the background rules of the common law,” *Tombs*, 472 Mich at 455, quoting *Staples v United States*, 511 US 600, 605; 114 S Ct 1793; 128 L Ed 2d 608 (1994). For that reason, “[a]bsent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature’s intent not to eliminate” the common-law requirement of criminal intent. *Tombs*, 472 Mich at 456-457.²

Using this same reasoning, I conclude that the Legislature’s enactment of MCL 750.224f must be construed against the background of Anglo-Saxon common law, which includes the defenses of duress and self-defense. See *United States v Panter*, 688 F2d 268, 271 (CA 5, 1982). As the court in *Panter* aptly noted, the Legislature’s “failure to provide specifically for a common-law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense. This conclusion is unassailable; statutes rarely enumerate the defenses to the crimes they describe.” *Id.*, citing *United States v Bailey*, 444 US 394; 100 S Ct 624; 62 L Ed 2d 575 (1980). Indeed, to conclude that the traditional common-law defenses do not apply would ascribe an effect to MCL 750.224f that is “more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.” *Panter*, 688 F2d at 271, quoting *Morissette*, 342 US at 250. And I will not lightly presume that the Legislature intended to deprive persons—even ex-felons—of the fundamental right to defend against a sudden and potentially deadly attack. See *Panter*, 688 F2d at 271 (“We do not believe that Congress intended to make ex-felons helpless targets for assassins.”). Because there is no indication that the Legislature intended to abrogate or modify the application of traditional common-law affirmative defenses to MCL 750.224f, I conclude that the defenses of duress and self-defense are still applicable to a charge of being a felon-in-possession.

² I note that Michigan courts have already determined that statutes criminalizing the possession of weapons generally require proof that the person charged knowingly possessed the weapon even in the absence of statutory language to that effect. See *Hernandez-Garcia*, 477 Mich at 1040 n 1 (noting that, in order to be convicted of carrying a concealed weapon, MCL 750.227, the accused must have knowingly possessed the weapon); *People v Davis*, 126 Mich App 66, 69; 337 NW2d 315 (1983) (noting that, in order to be convicted of carrying or possessing a firearm during the commission of a felony, MCL 750.227b, the defendant must have knowingly possessed the firearm).

2. The Justification Defense

Courts in many foreign jurisdictions have recognized that a defendant might be justified in temporarily possessing a firearm—even though the possession is unlawful—if the possession is immediately necessary to protect the defendant or another from serious bodily harm. However, there is no consensus on the proper label for this defense; courts have used the terms duress, necessity, self-defense, and justification.³ Furthermore, several courts have recognized that, in felon-in-possession cases, the distinction between the defenses of duress and self-defense is largely immaterial. *United States v Butler*, 485 F3d 569, 572 n 1 (CA 10, 2007) (recognizing that these defenses have become merged in modern decisions); see also *State v Padilla*, 114 Hawaii 507, 513-514; 164 P3d 765 (Hawaii App, 2007). I agree with those courts and, for the sake of simplicity, shall use the term “justification” to describe the defense at issue.

Although I have determined that a defendant may raise a justification defense to a charge of being a felon-in-possession, I nevertheless conclude that this defense must be analyzed in the context of the purpose underlying MCL 750.224f. See *Butler*, 485 F3d at 575, quoting *United States v Perez*, 86 F3d 735, 737 (CA 7, 1996) (“We must take care not to transform the narrow, non-statutory justification exception . . . into something permitting a felon to possess a weapon for extended periods of time in reliance on some vague ‘fear’ of street violence. Indeed, ‘[i]f ex-felons who feel endangered can carry guns, felon-in-possession laws will be dead letters.’”); *State v Castrillo*, 112 NM 766, 771; 819 P2d 1324 (1991) (noting that the elements of duress must be analyzed in the context of the purpose behind the prohibition against the possession of firearms by felons). With the enactment of MCL 750.224f, our Legislature determined that those persons who have committed felonies should not be permitted to possess or use firearms. The purpose behind the prohibition is to ensure that those persons who are more likely to misuse firearms do not maintain ready possession of them. See *People v Tice*, 220 Mich App 47, 51-52; 558 NW2d 245 (1996); *Castrillo*, 112 NM at 771 (“Its purpose is to keep firearms from felons

³ See *State v Padilla*, 114 Hawaii 507, 513-514; 164 P3d 765 (Hawaii App, 2007) (recognizing a justification defense to being a felon-in-possession if the possession is immediately necessary to protect the defendant or another from serious physical harm); *State v Parker*, 127 Wash App 352, 354-355; 110 P3d 1152 (2005) (recognizing a necessity defense to felon-in-possession statute and listing elements); *People v Jones*, 4 Misc 3d 782, 787; 781 NYS2d 852 (NY Sup Ct, 2004) (recognizing justification defense for felon-in-possession); *Humphrey v Commonwealth*, 37 Va App 36, 47-48; 553 SE2d 546 (2001) (holding that, because the legislature did not abrogate the common-law defenses applicable to the felon-in-possession statute, the defendant could proffer the affirmative defense of necessity); *Commonwealth v McCambridge*, 44 Mass App 285, 291; 690 NE2d 470 (1998) (recognizing necessity defense); *Ex parte Taylor*, 636 So 2d 1246, 1247 (Ala, 1993) (recognizing that self-defense is a defense to a charge of possession of a firearm); *State v Castrillo*, 112 NM 766, 770-773; 819 P2d 1324 (1991) (holding that duress is an affirmative defense to the otherwise nearly strict liability imposed by New Mexico’s prohibition against possession of firearms by felons); *Marrero v State*, 516 So 2d 1052, 1054-1055 (Fla App, 1987) (recognizing a limited justification defense to being a felon-in-possession); *People v Govan*, 169 Ill App 3d 329, 336; 523 NE2d 581 (1988) (describing defense of necessity); *State v Crawford*, 308 Md 683, 698-699; 521 A2d 1193 (1987) (recognizing a necessity defense to a charge of being a felon-in-possession); *State v Blache*, 480 So 2d 304 (La, 1985) (adopting defense of justification for charge of being a felon-in-possession).

because the law presumes they are more likely to unlawfully use firearms or to resort to force in violation of the law.”). This purpose would be severely undermined if former felons were permitted to arm themselves whenever they happened to have some generalized fear of being attacked. See *Perez*, 86 F3d at 737 (noting that former felons are likely to live in areas where they are exposed to danger and engage in behaviors that expose them to danger). For that reason, I conclude that a defendant who is otherwise prohibited from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another from death or serious physical harm. See *Lemons*, 454 Mich at 247 (noting that, under a duress defense, the threatening conduct must be imminent); *Riddle*, 467 Mich at 127 (noting that self-defense is available only if the defendant reasonably believes that the threat of death or serious bodily injury is imminent). Likewise, the defendant’s unlawful possession must end as soon as the immediacy of the threatened harm has passed:

The defendant is entitled to maintain possession of the firearm so long as the imminent need for the protection persists. The defendant cannot obtain possession of the firearm before the imminent need for protection arises, see *United States v Hudson*, 414 F3d 931, 933-934 (CA 8, 2005); *Perez*, 86 F3d at 736-37, and must terminate possession of the firearm at the earliest possible opportunity once the danger has passed. See *Butler*, 485 F3d at 572-573; *United States v Paolello*, 951 F2d 537, 540-542 (CA 3, 1991); *United States v Beasley*, 346 F3d 930, 935-936 (CA 9, 2003). [*Padilla*, 114 Hawaii at 513-514 (citation format modified).]

I further agree with those authorities that have held that a defendant may only raise justification as a defense to otherwise unlawful possession of a firearm if the defendant did not recklessly or negligently place himself or herself in a situation where he or she would be forced to engage in criminal conduct. See *Riddle*, 467 Mich 127 n 19 (noting that one who starts a fight or goes someplace expecting a fight cannot claim self-defense); *Perez*, 86 F3d at 737 (“More often than not the basis of his fear will be his own involvement in illegal activities; and when the danger that gives rise to the fear results from engaging in such activities—from ‘looking for trouble’—the defense is barred.”); *United States v Agard*, 605 F2d 665, 668 (CA 2, 1979) (noting that the defense of duress is not available if the defendant initiated the altercation). Likewise, a defendant may only resort to unlawful possession as a last resort; that is, the defendant must have no reasonable legal alternative to violating the law in order to avoid the threatened harm. See *Hudson*, 414 F3d at 934 (noting that the defendant could have reported her fear about a rogue officer to the police instead of arming herself); *Perez*, 86 F3d at 737 (noting that the defendant could have called the police and asked them to investigate the suspicious persons sitting in a car outside his home). Thus, using the elements of duress as the foundation, see *Lemons*, 454 Mich at 247, I conclude that a defendant may raise justification as a defense to being a felon-in-possession by introducing evidence from which the jury could conclude all the following:

(1) The defendant or another person was under an unlawful and immediate threat that was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, and the threat actually caused a fear of death or serious bodily harm in the mind of the defendant at the time of the possession of the firearm.

(2) The defendant did not recklessly or negligently place himself or herself in a situation where he or she would be forced to engage in criminal conduct.

(3) The defendant had no reasonable legal alternative to taking possession, that is, a chance to both refuse to take possession and also to avoid the threatened harm.

(4) The defendant took possession to avoid the threatened harm, that is, there was a direct causal relationship between the defendant's criminal action and the avoidance of the threatened harm.

(5) The defendant terminated his or her possession at the earliest possible opportunity once the danger had passed.

3. Nature of the Instructional Error

In the present case, Dupree introduced evidence from which a reasonable jury could have concluded that each element of the justification defense had been met. Dupree, Fallon, and Monroe testified that Reeves started the fight at issue when he pushed Dupree and that Reeves was armed. Dupree further testified that he feared Reeves not only because he saw the gun, but also because Reeves was very large. Dupree also stated that he began to struggle with Reeves over the gun when Reeves tried to grab it and that the gun went off three times during the struggle. Thus, there was evidence that Dupree was placed under an unlawful and immediate threat of death or serious bodily harm and that the threat was sufficient to have caused in the mind of a reasonable person the fear of death or serious bodily harm.

Moreover, there was testimony that suggested that Dupree was lawfully present at his brother's birthday party, was not armed before the fight with Reeves, and only took possession of the gun at issue during the struggle. Given this testimony and the testimony that Reeves started the fight, a reasonable jury could have concluded that Dupree did not recklessly or negligently place himself in a situation where he would be forced to engage in criminal conduct and that there was no reasonable legal alternative to his taking possession of the gun in order to avoid the threatened harm.

Finally, although there was evidence from which a jury could have concluded that Dupree failed to timely terminate possession of the gun, there was also evidence from which a reasonable jury could have concluded that Dupree did terminate his possession at the earliest possible moment after the danger had passed. Dupree testified that the struggle over the gun finally ended after he told Reeves to "just stop" and to "let go," after which Reeves said "I'm hit" several times and then moved off. This testimony suggested that Reeves was still struggling over the gun even after being shot and that it was Reeves who ultimately broke off the fight. There was testimony that, after Dupree and Reeves separated, Reeves went across the street and sought help from a neighbor and eventually went back into the street, where he was picked up by some passers-by. Dupree said that he kept the gun after his separation from Reeves and walked back to the house, where he asked Adrian to check and see if he had been hit. Dupree still possessed the gun when his female companion came out and urged him to get into her truck and leave. Dupree testified that he finally got rid of the gun while driving away from the scene. Thus, although there is testimony that the physical struggle had ended and that the parties had separated, it is not entirely clear whether Reeves actually left the scene before or after Dupree

left with his female companion. Given this testimony, a jury could have found that it was reasonably necessary for Dupree to maintain possession in order to ensure that Reeves did not return and try to retake possession of the gun. Consequently, Dupree introduced sufficient evidence to present a justification defense.

Although Dupree was entitled to a jury instruction on his justification defense to being a felon-in-possession, Dupree's trial counsel did not request such an instruction. Instead, Dupree's trial counsel apparently relied on a the self-defense instruction when he argued to the jury that Dupree could not be convicted of being a felon-in-possession if he acquired possession during the fight. Hence, the trial court did not err by failing to give a modified duress or self-defense instruction similar to the one discussed above. Nevertheless, the trial court determined on its own initiative that it should instruct the jury that if it found that Dupree acquired the gun from Reeves during the fight, Dupree would not be guilty of being a felon-in-possession if he had only kept the gun as long as necessary to defend himself. With this instruction, the trial court essentially recognized that the justification defense applies only as long as the defendant relinquished the unlawful possession at the earliest possible opportunity once the danger has passed. Hence, this instruction was not entirely inaccurate and might not have prejudiced Dupree's defense.

Nevertheless, on the following day the prosecution asked the trial court to modify its earlier instruction by telling the jury that it could only find Dupree not guilty of being a felon-in-possession if it also found that Dupree intended to turn the gun over to the police within a reasonable time. Dupree's trial counsel objected to this instruction because he felt that his theory of self-defense did not require a finding that Dupree intended to turn the gun over to the police; rather, Dupree's unlawful possession was excused as long as his possession was necessary to ensure his protection. Dupree's trial counsel was correct; although the jury might have been instructed under the now-defunct momentary innocent possession theory as an alternative basis for excusing Dupree's continued possession after the fight ended, see *People v Hernandez-Garcia*, 477 Mich 1039, 1040 (2007), overruling *People v Coffey*, 153 Mich App 311; 395 NW2d 250 (1986), this defense was distinct from the justification defense presented by Dupree's trial counsel. And Dupree presented evidence from which the jury could have found that Dupree's continued possession was excused under a duress or self-defense theory.

Finally, I cannot agree with the prosecution's assertion that any error in the instruction was harmless.⁴ As I have noted, Dupree was entitled to present a justification defense to being a

⁴ The prosecution relies on the fact that Dupree was not entitled to have an instruction on momentary innocent possession for the proposition that the trial court's instructions could not have prejudiced Dupree. This argument assumes that either Dupree was not entitled to present a defense of duress or self-defense to a charge of being a felon-in-possession or that the instructions did not adversely affect Dupree's defense. However, as discussed earlier, I have concluded that Dupree was entitled to present a justification defense based on duress or self-defense. Likewise, to the extent that the jury might have been able to consider self-defense as a justification, the trial court specifically instructed the jury that its momentary innocent possession instruction modified its earlier instruction that Dupree would not be guilty of being a felon-in-possession if he acquired the gun during the struggle and only kept it as long as

(continued...)

felon-in-possession, yet by reinstructing the jury in the way that it did, the trial court effectively eliminated the possibility that the jury could find that Dupree's continued possession after his separation from Reeves was justified. There was no evidence that Dupree intended to turn the gun over to police; indeed, Dupree testified that he threw the gun out of the window as his female companion drove him from the scene of the fight. Assuming that the jury followed the trial court's final instructions, see *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the trial court effectively directed a verdict of guilty on the charge of being a felon-in-possession. Therefore, this error was not harmless. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). For this reason, we reverse Dupree's conviction on the charge of being a felon in possession of a firearm, vacate his sentence for that offense, and remand for a new trial consistent with this opinion.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Kelly

(...continued)

necessary to defend himself. Thus, the latter instruction effectively nullified Dupree's defense to this charge.