

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

No. 281408

Wayne Circuit Court

LC No. 06-008543-01

Advance Sheets Version

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

MURRAY, P.J. (*dissenting*).

We granted defendant's delayed application for leave to appeal to decide whether defendant's conviction for being a felon in possession of a firearm, MCL 750.224f, should be reversed. For the reasons that follow, and with all due respect to my colleagues, I would affirm the conviction.

The only issue properly raised on appeal is whether the trial court erred in instructing the jury on the defense of temporary innocent possession as a defense to the charge of felon-in-possession. As explained below, although the trial court erred in giving the instruction on temporary innocent possession, the error was harmless.

Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the charged offenses and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005); *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Instructional errors are presumed to be harmless, MCL 769.26, but the presumption "may be rebutted by a showing that the error resulted in a miscarriage of justice," *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999).

Following closing arguments, the trial court instructed the jury on the elements of felon-in-possession¹ and informed the jury that the parties stipulated that defendant had been

¹ Specifically, the trial court accurately instructed the jury that the prosecution

(continued...)

previously convicted of a specified felony. Additionally, and without any request from defendant or the prosecutor, the trial court provided the jury with an instruction on the defense of temporary innocent possession to the charge of felon-in-possession. The instruction was as follows:

As to being a felon in possession, he 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 was excused from the courtroom, defense counsel objected to the language that the weapon could not be held “any longer than necessary to defend himself.” The trial court, after again noting that defendant had not requested any defense instruction for this charge, requested that defense counsel provide any law that supported a modified instruction.²

Three days later, before the jury was to begin its deliberations, defense counsel was unable to provide the trial court with any relevant law on the issue. However, the prosecution noted that pending before the Supreme Court was *People v Hernandez-Garcia*, 474 Mich 1000 (2006), in which the Court was faced with a similar issue whether a “momentary innocent possession” defense existed to a charge of carrying a concealed weapon. The trial court then noted that on the basis of *People v Coffey*, 153 Mich App 311; 395 NW2d 250 (1986), *People v Weeder*, 469 Mich 493; 674 NW2d 372 (2004), and *United States v Mason*, 344 US App DC 91; 233 F3d 619 (2001), the prior instruction should be modified to include a requirement that defendant intended to “deliver the gun to the police at the earliest possible time.” Over defense objection,³ the trial court then gave the jury another instruction that expanded on the temporary innocent possession defense:

I'm not going to repeat what the elements of [felon in possession of a weapon] are. But the defense is—there is a defense to that. And if the person had a brief or momentary possession of the weapon based on necessity, that's a defense to being a felon in possession. And the elements to that are 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

(...continued)

has to prove the following two elements: First, the defendant possessed or used a firearm in this State. Second, that the defendant was convicted of a specified felony which precludes him from being eligible to possess or use a firearm in this State—possess, use or transport a firearm in this State.

² The jury did not begin deliberations that day and was ordered to return to court three days later to begin deliberations.

³ Although defendant had no caselaw to support his objection, he argued that there was no legal requirement that “the defendant’s intention [was] to deliver the gun to the police at the earliest possible time.” But as the trial court correctly concluded, our caselaw at that time provided for that exact defense to a charge of carrying a concealed weapon. *Coffey, supra* at 315 (applying that defense to carrying a concealed weapon).

needed to. Second, that the possession after the taking of 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 law imposes that duty as a concomitant part of that.

After this modified instruction was read to the jury, and at the conclusion of its deliberations, defendant was convicted of felon-in-possession.

In reviewing de novo this assertion of instructional error, *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002), I agree with the majority that the trial court erred in instructing the jury on the defense of temporary innocent possession to the felon-in-possession charge. However, I disagree that this was not harmless error.

Although not decided at the time the trial court instructed the jury, since then the Michigan Supreme Court addressed a similar issue in *People v Hernandez-Garcia*, 477 Mich 1039, 1040 (2007), in which it held that momentary innocent possession of a concealed weapon was not a defense to a charge of unlawfully carrying a concealed weapon. In so holding, the Court overruled *Coffey*, one of the three cases explicitly relied on by the trial court and from which the language for the instruction seems to have come. *Id.* Hence, the Michigan law that supported the trial court's instruction is no longer good law, and the instruction provided was erroneous.⁴

As with carrying a concealed weapon, *People v Hernandez-Garcia*, 266 Mich App 416, 418; 701 NW2d 191 (2005), affirmed in part and vacated in part on other grounds 477 Mich 1039 (2007), and felony-firearm, *People v Burgess*, 419 Mich 305, 308; 353 NW2d 444 (1984), felon-in-possession is a general intent crime. A general intent crime requires only "the intent to perform the physical act itself." *People v Fennell*, 260 Mich App 261, 266; 677 NW2d 66 (2004) (citation and quotation marks omitted). The felon-in-possession statute prohibits a person convicted of a felony from possessing a firearm. MCL 750.224f. Because momentary innocent possession is not a defense to general intent crimes involving possession of a weapon, the trial court erred when it instructed the jury that this was a defense to felon-in-possession.⁵

This instructional error was clearly harmless. Indeed, providing the instruction was *beneficial* to defendant's cause and gave defendant an opportunity to have his misconduct (illegally possessing a firearm) excused by the jury. This holds true because, as noted

⁴ Though *Weeder* contains some discussion about the evidence needed to support a requested instruction that was not given, see *Weeder, supra* at 499 n 3, it does not address the specific instruction at issue here.

⁵ *Mason*, to the extent that it—like *Coffey*—held that there is a momentary innocent possession defense, stands in isolation amongst the federal landscape on this issue. That the opinion stands alone, however, is not necessarily reason enough to reject its analysis. But, in my view, the more recent appellate authority that rejects the *Mason* court's analysis as inconsistent with the plain language of the federal felon-in-possession statute is much more persuasive. See, e.g., *United States v Baker*, 508 F3d 1321, 1325-1327 (CA 10, 2007); *United States v Johnson*, 459 F3d 990, 996-997 (CA 9, 2006), and *United States v Gilbert*, 430 F3d 215, 218-220 (CA 4, 2005), and the cases they cite.

throughout this opinion, defendant never requested an instruction on any defense to this charge. In other words, because defendant stipulated that he had committed a specified felony, and because no defense instruction was requested and defendant admitted possessing a gun, his chances of acquittal were nonexistent. Thus, the incorrect instruction at least gave defendant some slight ability to defend against this charge, more than had no instruction been given at all. The trial court even recognized that fact when defendant objected to part of the initial justification instruction. Unfortunately for defendant, however, the jury apparently did not find that the facts supported this defense. Consequently, defendant would have been in no better position had the instruction not been given, and because the instruction on the elements of the crime was otherwise correct, the instructional error was harmless.

A finding of harmless error would normally conclude the analysis. However, the lead opinion does not simply reject the temporary innocent possession defense, but goes on to propose that a federal justification defense that was neither requested nor provided should be recognized in Michigan. However, as I will explain later, the facts as testified to by defendant do not support an instruction under the hybrid defense of justification (which incorporates some elements of the defenses of duress and self-defense) as adopted by the lead opinion.

Before addressing the lack of a factual basis for that type of instruction, it is important to emphasize that defendant *never* requested any instructions on justification, self-defense, or duress in relation to the felon-in-possession charge. Indeed, the trial court specifically noted, and defense counsel acknowledged, that defendant *never* requested instructions with regard to *any* defenses to felon-in-possession,⁶ and only objected to a part of the temporary innocent possession instruction that the trial court raised and gave sua sponte. For that reason, any argument to our Court that a justification, self defense, or duress instruction should have been provided has been waived, unless the failure to provide the instruction resulted in manifest injustice. *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997).⁷ Here, even if Michigan law recognized any one of these as a defense to a felon-in-possession charge, because the evidence did not support a self-defense, duress, or justification instruction to the charge of felon-in-possession, the failure to so instruct did not constitute manifest injustice. This conclusion does not, as suggested by the concurring opinion, usurp the jury's fact-finding role. Instead, it assumes the truth of defendant's own testimony and concludes whether that testimony can legally support the defense. This is completely proper in application of the harmless error test. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).

The defense of self-defense permits a defendant who is in reasonable fear of imminent danger to push back against the attacker with that amount of force necessary to defend himself.

⁶ Both the lead opinion and the concurrence seem to overlook that fact, but the whole premise of their conclusion is based on transforming a duress defense (that was never requested) into a justification defense (that was never requested).

⁷ Or it could also be safely concluded that defendant has waived the issue by failing to raise the issue before the trial court. As noted, defendant never requested any defense instruction on this charge, so he should be precluded from now seeking appellate relief on an issue not raised below. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

People v Riddle, 467 Mich 116, 119; 649 NW2d 30 (2002); *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Defendant was charged with, and acquitted of, an offense that involved the use of force against another. The charge of felon-in-possession, however, did not necessarily arise specifically from that incident. Indeed, the charge also arose out of defendant's continued possession of the firearm after Reeves had left the premises. Since the jury could have reasonably concluded that defendant possessed the firearm after the physical confrontation ended (a fact that defendant testified to at trial), the evidence did not support the defense of self-defense.⁸ See, e.g., *People v Truong (After Remand)*, 218 Mich App 325, 328, 337-338; 553 NW2d 692 (1996) (finding no imminent danger to support a claim of self-defense when the decedent had attacked the defendants two days earlier and had threatened to kill the defendants in the future); *Kemp, supra* at 321-323 (finding self-defense inapplicable when the defendant proceeded into a house after the victim, who was holding a gun, had already closed the door as the defendant approached the house).

The evidence similarly did not support the defense of duress, which is applicable in situations in which the crime was committed to avoid a greater harm. *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). A successful duress defense excuses the defendant from an otherwise-criminal act because he was compelled to commit the act, the compulsion or duress overcame the defendant's free will, and his actions lacked the required *mens rea*. *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975). Again, defendant testified that he continued to hold onto the gun after Reeves had left the premises and after he had entered his girlfriend's vehicle and driven away. Clearly, there was no duress at that point in time, and so the evidence did not support a duress instruction.⁹

Finally, rather than adopting the federal justification defense to a felon-in-possession charge, I would hold that because the facts do not reasonably support the defense, it should not be established in this case as a new rule of law in this state. The justification defense recognized by many state and federal courts is “very narrow[]” and is to be used only in “extraordinary circumstances” where there is “imminent danger.” *United States v White*, 552 F3d 240, 247 (CA 2, 2009), quoting in part *United States v Deleveaux*, 205 F3d 1292, 1297 (CA 11, 2000) and *United States v Perrin*, 45 F3d 869, 874-875 (CA 4, 1995).

In light of the evidence in this case, the defense is unavailable because defendant possessed the firearm longer than absolutely necessary after any threat of “imminent danger” ended. See, e.g., *United States v Lemon*, 824 F2d 763, 765 (CA 9, 1987) (finding that no imminent danger existed when the defendant's attacker had left the scene); see, also, *United States v Nolan*, 700 F2d 479, 484 (CA 9, 1983) (holding that the justification defense was

⁸ Indeed, defense counsel's objection to part of the “innocent possession” instruction was the concern that the jury could convict defendant on the basis of the fact that he possessed the gun after the incident was over.

⁹ The concurring opinion states that recognition of the duress defense to felon-in-possession “should not be a matter of great debate,” yet only cites opinions that have either “presumed” or “assumed” (but not decided) that such a defense exists to similar crimes. *Ante* at 1-2. Apparently the “great debate” has not yet crystallized into a decision on this exact issue.

inapplicable when the defendant pursued the alleged assailant after the assailant left the bar). Indeed, “[i]t has been only on the rarest of occasions that our sister circuits have found defendants to be in the type of imminent danger that would warrant the application of a justification defense.” *Perrin, supra* at 874. Instructive is *United States v Williams*, 389 F3d 402, 404 (CA 2, 2004), in which the defendant admitted that he took a firearm from a 15 year old to “get the gun off the street,” and while he was headed for an incinerator to dispose of the gun, he dropped it when confronted by the police. While assuming that a necessity defense was available to a federal firearm possession charge, the court held that the defendant’s possession “extended . . . possession of a firearm far beyond the fleeting sort of possession” illustrated by the caselaw. *Id.* at 405.

In sum, I would affirm defendant’s conviction because the trial court’s instruction was harmless error and defendant has waived any argument that a justification or other similar defense should have been provided. Additionally, even if defendant had made such a request, it would not have applied in this case.

I would affirm.

/s/ Christopher M. Murray