STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC WILLIAM TAYLOR,

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 187231
Washtenaw Circuit Court
LC No. 93-1633-FC

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possessing a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in refusing to instruct on self-defense. We disagree. We review jury instructions de novo to ensure that they fairly present the issues to be tried and adequately protect the defendant's rights. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Defendants are entitled to have a properly instructed jury consider the evidence against them. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). The trial court must give any requested instruction that is supported by the evidence. *Id*., p 81. Although a defendant is entitled to argue inconsistent defenses, *People v Fuqua*, 146 Mich App 133, 138; 379 NW2d 396 (1985), the court is not required to instruct regarding theories unsupported by the evidence, *Mills*, *supra*, 81.

According to defendant's own testimony, he did not intentionally fire the gun to protect himself. Rather, the gun "went off" during a struggle. Thus, the trial court properly refused to instruct the jury regarding self-defense. We reject defendant's argument based on *People v Hoskins*, 403 Mich 95; 267 NW2d 417 (1978). There, our Supreme Court found that self-defense instructions were proper because circumstantial evidence supported self-defense and the defendant, the only person in a position

to testify as to what happened, did not testify. *Id*., p 100. Here, by contrast, defendant did testify, and his testimony is incompatible with self-defense.

Defendant next argues that the trial court erred in failing to instruct on imperfect self-defense. Again, we disagree. Imperfect self-defense is a qualified defense which can mitigate an act of second-degree murder to voluntary manslaughter. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). The doctrine applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Where imperfect self-defense is applicable, it serves as a method of negating the element of malice in a murder charge. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993).

From this definition it is clear that the trial court properly denied defendant's request for an imperfect self-defense instruction. Essentially, imperfect self-defense and self-defense are the same to the extent that they both excuse a defendant's conduct on the grounds that such conduct was necessary for defense of self. The only difference is that imperfect self-defense expands the availability of self-defense to even those situations where the defendant was the initial aggressor. *Deason, supra*, p 32. Because the theory of self-defense is not properly invoked on these facts, then, by definition, neither is the theory of imperfect self-defense.

Defendant next claims that the trial court erred in barring evidence that the victim was known to carry a gun. Defendant contends that this evidence was admissible to show self-defense and, under *People v Anderson*, 147 Mich App 789; 383 NW2d 186 (1985), to shed light on whether the killing was intentional or accidental. The claim is without merit. As noted above, defendant's theory was that he shot the victim accidentally, not in self-defense. Furthermore, *Anderson, supra*, is factually distinguishable from this case. In *Anderson*, this Court ruled that the trial court erred in precluding the defendant from offering evidence of the victim's combative nature because that was a "pertinent trait of character" under MRE 404(a)(2) which, if believed, would have made the defendant's version of the incident more credible. *Id*. In this case, on the other hand, according to defendant's testimony the gun went off in a struggle with two other people. Evidence of the victim's character was therefore irrelevant.

Defendant's final argument is that error requiring reversal occurred when two judges, other than the one who presided at the trial and who initially instructed the jury, gave additional instructions to the jury in light of the unavailability of the initial judge. Defendant concedes that he waived this issue, but contends that the error nevertheless requires automatic reversal. The argument is without merit. See *Brown v Swartz Creek Memorial Post 3720-VFW, Inc*, 214 Mich App 15, 21; 542 NW2d 588 (1995).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy