STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND L. BELL,

Defendant-Appellant.

UNPUBLISHED
May 8, 1998

No. 195866
Detroit Recorder's Court
LC No. 95-010121

Before: Corrigan, C.J., and Hoekstra and Young, Jr., JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court initially sentenced defendant to consecutive terms of imprisonment of thirty-two to forty-eight months for assault and two years for felony-firearm. The court then set aside defendant's sentence for assault and sentenced him as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a term of imprisonment of ten to fifteen years. We reverse and remand for a new trial.

Defendant argues that the trial court erred in denying his request for an instruction on self-defense. We agree. This Court reviews jury instructions in their entirety to determine if error occurred requiring reversal. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). In this case, the trial court denied defendant's request because it believed that the facts did not support the instruction. The court reasoned, in part, that "[you] can't be out on a public street armed with a gun and ask for self-defense."

We agree with defendant that the trial court erred in denying his request to instruct the jury on self-defense. Upon the defendant's request, the trial court must instruct the jury regarding a defense unless the evidence does not support the defense. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995); *People v Squire*, 123 Mich App 700, 708; 333 NW2d 333 (1983); CJI2d 7.15, *Use Note*. The court may properly decline to give the requested instruction if no evidence exists to support the defense. *People v Bailey*, 451 Mich 657, 675; 549 NW2d 325 (1996); *Mills, supra* at 82. The test

for determining whether a defendant acted in lawful self-defense consists of three factors: (1) the defendant honestly and reasonably believed that he was in danger; (2) the degree of danger he feared was death or serious bodily harm; and (3) the action taken by the defendant appeared at the time to be immediately necessary, i.e., the defendant is entitled to use the amount of force necessary to defend himself. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985); CJI2d 7.15. Although possession of a weapon may in itself constitute a crime, MCL 750.227; MSA 28.424, proof of lawful possession of the weapon is not a requirement to invoke self-defense.

In this case, the victim, an off-duty police officer, testified that he stopped his van at the side of the road because he had a flat tire. According to the victim, defendant parked his car in front of the van as he changed the tire. The victim then retrieved his gun from the van. Defendant's passenger first approached the victim and inquired whether he needed assistance. The victim declined and the passenger returned to defendant's car. Moments later, defendant approached the victim as he leaned into the rear of the van. Defendant pointed a revolver at the victim and ordered him not to move. The victim nevertheless straightened upright, prompting defendant to flee. The victim identified himself as a police officer, whereupon defendant turned and fired a shot at him.

Defendant told a different story. Defendant testified that after his passenger returned to the car, he approached the victim to offer assistance because the victim was acting in a strange manner and staggering. According to defendant, the victim shot at him as he approached the victim's van. Defendant drew his gun from the waistband of his pants because he feared for his life. Defendant testified that as he fled, he turned toward the victim and observed the victim pointing a gun at him. Defendant then fired a shot in the victim's direction. He stated that he did not aim at the victim and did not intend to shoot the victim. Defendant maintained that he was merely defending himself.

We conclude that the trial court erred in refusing to instruct the jury on self-defense because defendant presented evidence that he acted in self-defense after the victim pointed a weapon at him. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978); see *People v McGinnis*, 402 Mich 343, 346-347; 262 NW2d 669 (1978). Given the conflicting testimony, the trial court erred in excluding a material defense from the instructions. *Perez-DeLeon, supra* at 53.

We next consider whether the court's error was harmless. See *People v Mateo*, 453 Mich 203, 216-217; 551 NW2d 891 (1996), and *People v Anderson (After Remand)*, 446 Mich 392, 404; 521 NW2d 538 (1994). Our Supreme Court has held that a trial court's failure to give a requested instruction on the defendant's theory constitutes error requiring reversal. *Hoskins, supra* at 95 (self-defense instruction); *McGinnis, supra* at 347 (alibi instruction). Some federal courts have, however, concluded that the failure to instruct on a defendant's theory can constitute harmless error, whereas others, chiefly the Ninth Circuit Court of Appeals,[1] have held that the error is reversible per se. *United States v Lewis*, 53 F3d 29, 35 (CA 4, 1995) (noting apparent conflict); *People v Nunez*, 841 P2d 261, 267 n 13 (Colo, 1992) (cases collected). We need not reach the issue whether the failure to give a self-defense instruction is subject to harmless error analysis because, even applying a harmless error analysis, the error was not harmless in this case. We cannot say that the error had a slight or negligible influence on the verdict, *Mateo, supra* at 221, or that the error was harmless beyond a

reasonable doubt, *Anderson*, *supra* at 406, because the court's error precluded the jury from considering defendant's theory of self-defense in a case that turned on witness credibility. Accordingly, we reverse defendant's conviction and remand for a new trial.[2]

Reversed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra
/s/ Robert P. Young, Jr.

[1] *United States v Morton*, 999 F2d 435, 437 (CA 9, 1993) (self-defense instruction); *United States v Escobar de Bright*, 742 F2d 1196, 1201-1202 (CA 9, 1984).

[2] In light of our decision to reverse, we need not consider defendant's argument that the trial court abused its discretion in sentencing him to a term of imprisonment of ten to fifteen years.