

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL A. HIPPLER,

Defendant-Appellant.

UNPUBLISHED

December 15, 1998

No. 207352

Oakland Circuit Court

LC No. 97-152874 FH

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced as a fourth habitual offender, MCL 769.13; MSA 28.1085, to a prison term of two to twenty years for the firearm conviction, and to a concurrent prison term of two to fifteen years for the felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in failing to instruct the jury sua sponte regarding the no retreat rule for the defense of another in defendant's home. We disagree.

Jury instructions should be considered as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Bell, supra*, 209 Mich App 276. Defendant did not object to the omission of the instruction regarding the no duty to retreat rule. When a defendant does not object to the omission of a jury instruction, reversal is only required where manifest injustice would result. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Moreover, erroneous jury instructions will result in reversal only where the error was prejudicial as determined by its effect on substantial rights or on the verdict. *People v Clark*, 453 Mich 572, 587-588; 556 NW2d 820 (1996) (Mallett, J).

A defendant does not have a duty to retreat to protect himself or another if the defendant is in his own home. *People v Davis*, 216 Mich App 47, 54-55; 549 NW2d 1 (1996). However, if the issue of the duty to retreat is not raised in the facts presented in the trial court, it is not reversible error to fail to instruct with respect to the no retreat rule. *Davis, supra*, 216 Mich App 55; *People v Szymarek*, 57 Mich App 354, 357; 225 NW2d 765 (1975).

Here, the jury was instructed that:

[T]he defendant must have honestly believed that he had to use force to protect Bridget Peterson. If his belief was honest and reasonable, he could act at once to defend that other person. If his belief was honest and reasonable, he could act at once to defend that other person, even if it turns out later that he was wrong about how much danger the person was in. . . .

Second, a person is only justified in using the degree of force that seems necessary at the time to protect the other person from danger. The defendant must have used the kind of force that was appropriate to the attack made and the circumstances as he saw them.

When you decide whether the use of --- whether [the] force used was what seemed necessary, you should consider whether the defendant knew about any other way of protecting the other person. But you may also consider how the excitement of the moment affected the choice the defendant made.

Third, the right to defend another person only lasts as long as it seems necessary for the purpose of protection.

Fourth, the person claiming self-defense must not have acted wrongfully and brought on the assault.

The omitted instruction provides:

If a person [assaulted the defendant in the defendant's own home/forcibly entered the defendant's home], the defendant did not have to try to retreat or get away. Under those circumstances, the defendant could stand [his/her] ground and resist the [attack/intrusion] with as much force as [he/she] honestly and reasonably believed necessary at the time to protect [himself/herself]. [CJI2d 7.17.]

Here, there was no evidence that defendant or Bridget Peterson were assaulted by Dennis Drew or that Dennis Drew forcibly entered the home. Therefore, the omitted instruction was not supported by the evidence. Under the facts of the instant case, the self-defense instruction given by the trial court sufficiently protected defendant's rights. Accordingly, the omission of the instruction did not result in manifest injustice and does not require reversal.

Defendant next argues that the prosecution failed to present sufficient evidence to disprove that he acted in the defense of another. We disagree. When reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

A prosecutor bears the burden of proof with respect to disproving a defendant's claim of self-defense or defense of others. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Proof that a defendant's belief of imminent danger was not honest or reasonable is sufficient to defeat a claim of self defense or defense of others. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Similarly, the use of excessive force negates a self-defense justification. *In re Gillis*, 203 Mich App 320, 322; 512 NW2d 79 (1994).

Defendant argues that the prosecutor failed to prove that he did not have an honest or reasonable belief regarding the imminent danger posed to Bridget Peterson by Dennis Drew and Drew's companions. However, the evidence presented at trial was sufficient to disprove defendant's claim that he was defending Bridget when he assaulted Dennis Drew. Bridget Peterson testified that she was scared because "[t]hey looked very angry," and that she screamed immediately before defendant came around the corner with a gun. However, there was no evidence that Dennis Drew or any of his companions threatened Bridget with physical harm. In addition, the evidence indicated that neither Dennis Drew nor any of his companions had a weapon. Thus, from the evidence elicited by the prosecutor at trial, a rational factfinder could conclude that defendant did not have an honest or reasonable belief that Bridget was in imminent danger.

Furthermore, a reasonable juror could have concluded that the use of a gun under the circumstances was a show of unreasonable force. The evidence indicated that defendant not only wielded a gun at Dennis Drew while he was in the house, but that defendant followed Drew and his companions out of the house and stood on the porch pointing the gun at them as they were clearly attempting to leave the premises. A reasonable factfinder could have concluded that the continued use of the gun when defendant's girlfriend was clearly out of danger was unreasonable. Accordingly, viewing the evidence in a light most favorable to the prosecution, a reasonable factfinder could have concluded that the prosecution disproved defendant's claim of defense of another.

Affirmed.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald