# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE WRIGHT,

Defendant-Appellant.

UNPUBLISHED
January 22, 1999

No. 203761
Recorder's Court
LC No. 96-502450

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court sentenced defendant, as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of imprisonment of seven and one-half to fifteen years. Defendant appeals as of right. We affirm.

Defendant argues that the trial court committed error requiring reversal when it refused defendant's request for jury instructions on intoxication and the use of non-deadly force in self-defense. We disagree. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47; 53; 523 NW2d 830 (1994). Instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *Id*. Conversely, an instruction should not be given that is without evidentiary support. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). In any event, imperfect instructions do not require reversal if they fairly presented the issues to be tried and adequately protected the rights of the accused. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997).

In the instant case, defendant requested CJI2d 7.22, covering the use of non-deadly force in self-defense. That instruction explains that the elements of that defense are (1) that the defendant honestly and reasonably believed that force was necessary for protection of self, (2) that the defendant used only the amount of force that reasonably seemed necessary to repel the apprehended harm, (3)

that the defendant confined the use of force to the duration of the apprehended threat, and (4) that the defendant did not trigger the apprehended assault through his or her own misconduct.

According to defendant's own testimony, he and the victim struggled with a knife inside a house, the victim was wounded, the victim left the house, and then defendant followed her outside. Under defendant's version of the events, then, his actions after having voluntarily left the house in pursuit of the victim took place after any threat posed by the victim had passed. Thus, defendant could not have honestly and reasonably believed at that time that he had some need to protect himself that compelled him to strike the victim in the face with a bottle until the bottle broke and then kick her while she was on the ground. Further, defendant stated that he kicked the victim because he was "upset," not to repel any assault. Additionally, once the victim was on the ground, even if defendant had reasonably feared an assault, his kicking her was a resort to force that was excessive as well as occurring after the apprehended threat had subsided. Accordingly, defendant's self-defense theory lacked evidentiary support and the trial court properly declined to provide CJI2d 7.22.

On the issue of intoxication, "[a]n instruction regarding the defense of intoxication is proper only if the facts of the case would allow the jury to conclude that the defendant's intoxication was so great as to render him incapable of forming the requisite intent." *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998).

Defendant and the victim both testified that they had been drinking and smoking crack cocaine. However, defendant testified that he was able to struggle with the victim for the knife, landing multiple blows in the process, and that he deliberately kicked the victim, stating, "after I hit her you know I was just upset." Finally, when defendant was asked on direct examination if he was drunk on the night of the incident he stated, "I wasn't feeling too much pain if that's what you mean." When defense counsel repeated the question, defendant replied, "More or less, yes, I was drunk."

Defendant's equivocation regarding the severity of his intoxication on the occasion in question, and his account of engaging in aggressive physical and mental activity at that time, defeat his claim that he was denied a fair trial for want of an intoxication instruction. Because defendant failed to offer any evidence to show that he was intoxicated to the point of being incapable of forming the intent to commit assault with intent to do great bodily harm less than murder, the trial court properly declined to instruct the jury on the intoxication defense. In sum, we conclude that the jury instructions that the trial court provided fairly presented the issues to be tried and sufficiently protected defendant's rights.

Defendant's final argument on appeal is that his sentence is disproportionate. However, defendant failed to provide this Court with a copy of his presentence investigation report as required by MCR 7.212(C)(7). Thus, defendant has waived review of this issue. See *People v Rodriguez*, 212 Mich App 351, 355; 537 NW2d 42 (1995). Further, even considering the question on its merits we find no error. Because defendant's sentence is within the range -- albeit at the high end -- recommended by the guidelines, it is presumed proportionate and thus valid. See *People v Hurst*, 205 Mich App 634, 639; 517 NW2d 858 (1994). Because we find no merit in any of defendant's

protestations that unusual circumstances should result in a more lenient sentence, we conclude that defendant has failed to meet his heavy burden in overcoming the presumption that his sentence within the range of the guidelines is proportional and thus valid. *Id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell