

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL LEAR,

Defendant-Appellant.

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UNPUBLISHED

September 24, 1999

No. 209401

Kalamazoo Circuit Court

LC No. 97-0789 FH

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant James Michael Lear was convicted of domestic violence, third offense, MCL 750.81(4); MSA 28.276(4), and assault and battery, MCL 750.81(1); MSA 28.276(1). Defendant was sentenced to serve a three-year term of probation for the domestic violence conviction, the last ninety days to be served in the Kalamazoo County Jail with credit for nine days served. The trial court reserved execution of the jail sentence subject to review of defendant's conduct while on probation. Defendant also received a sentence of nine days' incarceration for his assault conviction, again with credit for the nine days already served. Defendant appeals his convictions as of right. We affirm.

Defendant contends that the trial court erred in finding insufficient evidence to support his claim of self-defense. We disagree. Whether a defendant acted in self-defense is a question of fact. *People v Prather*, 121 Mich App 324, 330; 328 NW2d 556 (1982). Findings of fact by the trial court will not be set aside unless they are clearly erroneous, giving due regard to the special opportunity of the trial court to assess the credibility of witnesses. MCR 2.613(C). See *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding or decision is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996).

While the trial court did not elaborate on the factual basis for its finding a claim of self-defense inapplicable in this case, the court indicated that it had reviewed the instructions regarding that defense and concluded that based upon the proofs presented, no viable claim could be made under either of the charges. The instructions regarding use of nondeadly force in self-defense are set forth in CJI2d 7.22, which provide in pertinent part at CJI2d 7.22(3):

First, when [he / she] acted, the defendant must have honestly and reasonably believed that [he / she] had to use force to protect [himself / herself / \_\_\_\_\_]. If [his / her] belief was honest and reasonable, [he / she] could act at once to defend [himself / herself / \_\_\_\_\_], even if it turns out later that [he / she] was wrong about how much danger [he / she / \_\_\_\_\_] was in.

While Michigan Criminal Jury Instructions do not have the official sanction of our Supreme Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), we note that CJI2d 7.22(3) correctly sets forth the law of self-defense applicable to this case. “Self-defense requires both an honest and reasonable belief that the defendant’s life was in imminent danger or that there was a threat of serious bodily harm.” *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). See also *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

The evidence at trial established that on the evening of July 5, 1997, Kathy Lear was at the Duck In Waddle Out bar in Kalamazoo Township with her boyfriend, Joseph Terry Vickery and other friends. Defendant, Lear’s ex-husband, entered the bar with the couple’s five-year-old son. Lear testified that as defendant approached her table, she walked away from defendant while admonishing him for bringing the child into the bar. Lear further testified that as she bent over to pick up the child, she felt something strike her from behind, causing both her and the child to fall to the floor. Lear suffered bruises around her eye and on her buttocks as a result of the fall. Vickery testified that defendant kicked her in the buttocks, causing her to bounce against a cigarette machine and fall to the floor. Vickery also testified that defendant struck Lear in the face before kicking her, although Lear did not recall defendant striking her in that manner. Vickery further testified that after defendant struck Lear, he placed himself between Lear and defendant and told defendant to “just leave her alone.” According to Vickery, defendant then struck him in the face, which knocked him to the floor.

At trial, defendant denied ever striking or kicking Lear. Defendant testified that Lear ran toward him when he entered the bar, crouched down to speak to the child, and then made a physical gesture to his chest area while criticizing him for bringing the child into the bar. Defendant characterized Lear’s physical contact as “not really a slap or a push.” Defendant testified that he told Lear not to touch him and shoved her away, after which Vickery “nudged up” against him and told him, “You ain’t shit,” and “Go away and leave her alone.” In response, defendant testified that he “stepped back,” “nailed” Vickery and “laid him on the floor.” At the conclusion of the evidence, the trial court found defendant guilty as charged, relying heavily on the facts as set forth by defendant and rejecting any claim of self-defense.

Contrary to defendant’s contention on appeal, our review of the record indicates that Lear did nothing to create a reasonable belief that defendant was in any immediate threat of harm and would need to protect himself from her. Similarly, even if we relied solely on defendant’s testimony regarding his confrontation with Vickery, we do not believe that the confrontation presented defendant with an honest and reasonable belief that he faced a threat of serious bodily

harm so as to excuse his actions as self-defense. Accordingly, we hold that the trial court's findings that defendant had no basis for a claim of self defense were not clearly erroneous.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Michael R. Smolenski