# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 14, 2000 |
| v | No. 211365<br>Wayne Circuit Court |
| DAVID E. BELL,<br><br>Defendant-Appellant. | LC No. 97-001489 |

Before: Griffin, P.J., and Holbrook, Jr. and J.B.Sullivan*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for felonious assault, MCL 750.82; MSA 28.277, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).[1] Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, four to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and one to four years' imprisonment for the felonious assault conviction. The assault sentences are to run concurrent to one another and consecutive to the felony-firearm sentence. We affirm.

[1] This was defendant's second trial. Defendant was originally charged with five counts of assault with intent to murder, MCL 750.83; MSA 28.278 and one count of felony-firearm. Following a jury trial, defendant was found not guilty as to three of the counts of assault with intent to murder, and the jury was unable to reach a verdict as to the remaining counts. The trial court entered an order of acquittal as to the three counts that the jury agreed upon. Subsequently, the prosecutor filed an amended information for the two remaining counts of assault with intent to murder and felony-firearm and a second trial was conducted. It is from the second trial that defendant appeals.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

On appeal, defendant first argues that the trial court erroneously instructed the jury by giving both the "duty to retreat" (CJI2d 7.16) and "no duty to retreat" (CJI2d 7.17) instructions, notwithstanding that defendant admitted the shootings, was within the curtilage of his home and claimed self-defense and defense of family. We disagree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error, and even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Jury instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses and theories for which there is evidence in support. *Id.* The use-note for CJI2d 7.16 (duty to retreat) provides, "use CJI2d 7.17 if the act occurred in the defendant's dwelling or in inhabited buildings within its curtilage; in those situations, do not use this instruction."

Defendant relies heavily upon the use-note to support his position that the court erred in giving CJI2d 7.16 (duty to retreat), and in failing to explain the legal concept of curtilage. However, there were two separate and distinct theories set forth at trial. Members of the Stewart family testified that none of them had any weapons, that none of them approached defendant's property, that the shooting was unprovoked and that each was shot while quite a distance from defendant's home. In contrast, defendant and members of his family testified that they were in their home when it was suddenly rushed by armed members of the Stewart family, three of whom were in defendant's home and several others of whom were on his porch. It was incumbent upon the jury to determine which version of the facts to believe. If the Stewart family's version was believed, and assuming that one of them was armed, defendant arguably had a duty to retreat as set forth in CJI2d 7.16. However, if the jury concluded that defendant's testimony was more credible and that the Stewarts were armed, on his porch and in his home, defendant would have had no duty to retreat as set forth in CJI2d 7.17. Because of the two competing theories at trial, the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Daniel, supra,* at 53. Defendant's claim that the trial court erred in failing to explain the concept of curtilage fails because defendant did not request that instruction. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). In any event, the disputed issue at trial was whether defendant was being attacked when he shot the various persons.

Defendant next argues that the prosecutor did not meet his burden to disprove defendant's self-defense claim beyond a reasonable doubt. We disagree. The standard for deciding a sufficiency of the evidence issue is whether a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find the elements of the crime to have been proven beyond a reasonable doubt. *People v Truong (Aft Rem)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Questions of credibility are best left to the trier of fact. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). If a person honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm, the killing of another in self-defense is justifiable homicide. *Truong, supra*. Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *Id.* In *Truong*, the defendants claimed that they feared the decedent because of prior assaults and threats. This Court found that there was no threat of imminent danger when the defendants shot the decedent in the back, and that such a "preemptive strike" was not self-defense.

In the case at bar, even though there was evidence that the Stewarts had threatened to kill defendant if he continued to call the police on them, the jury believed the testimony of the Stewarts that they were just walking down the street unarmed when defendant started shooting at them without provocation. The jury chose not to believe defendant's theory of the case, a credibility determination which was within the sole power of the jury and should not be upset on appeal. *Daoust, supra*. A rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find the elements of the crimes to have been proven beyond a reasonable doubt. *Truong, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joseph B. Sullivan