STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2000
v	No. 212111 Wayne Circuit Court
MARCEL R. RIDDLE, Defendant-Appellant.	LC No. 97-006731

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of fifteen to thirty years' imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court improperly refused to give a no-duty-to-retreat instruction to the jury.[1] We disagree. Whether there is a duty to retreat from a garage adjacent to one's home is a question of law that is reviewed de novo. See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Further, a claim of instructional error is reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Generally, a person has a duty to retreat if retreat is safely possible before he may exercise deadly force to repel an attack. *Pond v People*, 8 Mich 150, 176 (1860). However, where the person is assaulted in his own home, there is no duty to retreat, but "he must not take life if he can otherwise arrest or repel the assailant." *Id*. at 177. The trial court must instruct the jury as to the

[1] Although the prosecutor claims that this issue is unpreserved, we disagree. While defense counsel did offer to withdraw the request for the no duty to retreat jury instruction, the trial court rejected the offer and made a ruling, denying the request based on the facts and evidence of the case.

applicable law and fully and fairly present the case to the jury in an understandable manner.

People v Moore, 189 Mich App 315, 319; 472 NW2d 1 (1991). Jury instructions are to be read as a whole rather than piecemeal. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "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." *Id*. The trial court is required to give jury instructions on any theories or defenses if there is evidence to support them. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

In the present case, the issue is whether, in connection with defendant's claim of self-defense, defendant was entitled to a jury instruction that he was under no duty to retreat from his own home. See CJI2d 7.17. It is undisputed that the shooting occurred outside defendant's house, next to his garage. However, because the shooting occurred outside defendant's home but within the home's curtilage, the parties dispute whether the no-duty-to-retreat instruction should have been given. We conclude that the trial court properly refused to give the instruction.

In *People v Kulick*, 209 Mich App 258, 264-265; 530 NW2d 163 (1995), remanded on other grounds 449 Mich 851 (1995),[2] this Court stated:

> In *People v Godsey*, 54 Mich App 316, 321; 220 NW2d 801 (1974), this Court held that the no-duty-to-retreat rule extended "only to inhabited outbuildings located within the curtilage of the home." The Court specifically rejected the notion that the rule extended to the outdoor portions of a curtilage. *Id*.
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> Here, all the witnesses testified that the altercation between defendant and complainants . . . occurred outside defendant's home. Accordingly, the lower court did not err in failing to give the requested jury instruction. See also *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988), which states that a defendant is excused from a duty to retreat only if the defendant is in inhabited physical structures within the curtilage of his home.

Like *Kulick*, previous decisions of this Court also have concluded that there is a duty to retreat when a person is attacked within the curtilage of the home but outside the physical walls of the home, unless the person is attacked in an inhabited outbuilding. See, e.g., *People v Drake*, 142 Mich App 357, 361; 370 NW2d 355 (1985) (the defendant was not entitled to the no-duty-to-retreat jury instruction where the defendant "was outside of his house and the supposed burglar was almost across the lot line of [the] defendant's property"); *Godsey, supra* at 321.

In *Godsey, supra* at 318, the case on which the *Kulick* Court relied, the defendant claimed

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[2] Contrary to defendant's assertion, *Kulick* is still good law on the issue of the no-duty-to-retreat rule. We recognize that *Kulick* is no longer good law on the issue of prosecutorial misconduct because it was remanded by our Supreme Court on the issue, 449 Mich 851 (1995), and, on remand, this Court issued an unpublished opinion finding no misconduct and affirming the defendant's conviction, *People v Ullah*, 216 Mich App 669, 681; 550 NW2d 568 (1996).

that he heard his neighbor throwing rocks and pieces of concrete at his house. The defendant went out on his porch and was struck by a piece of concrete. He then grabbed a baseball bat and confronted the victim, who was holding another piece of concrete, and standing on or near their property line. *Id*. The defendant struck his neighbor with the bat twice, killing him. *Id*. The victim's body was found on his own side of the property line. *Id*. The defendant claimed self-defense. The issue on appeal was whether the trial court erred in not giving a no-duty-to-retreat instruction. *Id*. at 318, 323.

The Court in *Godsey* examined the Supreme Court case of *Pond, supra*, and read *Pond* as extending the right of self defense without retreat "only to inhabited outbuildings located within the curtilage of the home." *Id*. at 321. The *Godsey* Court stated that

> the contrary rule - that a man may utilize deadly force without retreat whenever attacked in the curtilage of his home - would effectively limit the applicability of the prevailing retreat requirement to situations in which the defendant was on another's property. Such a result, to us, is both an unwarranted extension of Michigan law and inconsistent with the high value placed on human life by any enlightened society. [*Id*.]

Because the altercation occurred on or near the lot line separating the defendant's property from the victim's, and because the decedent's body was found on his side of the lot line, our Court concluded that the defendant was not in his dwelling at the time of the killing, so the trial court did not err in failing to instruct the jury with respect to the no-duty-to-retreat rule. *Id*.

In *Pond, supra* at 166-167, the defendant requested a no-duty-to-retreat instruction, and the trial court refused the request. The defendant in *Pond* lived in a fishing community with his wife and children. *Id*. at 151. The door of the defendant's house faced the door of a net-house, which was about thirty-six feet from the defendant's house and which he also owned. *Id*. at 151-152. The defendant's two hired men slept in the net-house, a one-room building measuring about sixteen feet by fourteen feet. *Id*. at 152.

On the day before the killing in *Pond*, three men, including the victim, encountered the defendant while he was away from his home, threatened, and hit him. *Id*. at 153-154. The defendant escaped, but later, the men came to the defendant's home and his net-house looking for him. *Id*. at 154. The men did not find the defendant at either place. *Id*. at 154-155. The next day, the men again threatened the defendant. *Id*. at 155-156. Later that night, the three men returned to the defendant's net-house and proceeded to tear boards off the roof and wall. *Id*. at 156. Thereafter, the men went to the defendant's door and demanded that the defendant come outside. *Id*. at 156-157, 179. The men spoke to the defendant's wife through the door, while the defendant hid under the bed. *Id*. at 157, 179. At one point, when the defendant's wife slightly opened the door, one of the men squeezed the wife's arm until she fainted. *Id*. at 157, 180. After the men left, the defendant went to his brother-in-law's house, obtained a gun, and went home. *Id*. at 158, 180. Later, the three men returned to the defendant's home. When the wife would not open the door, the men went to the defendant's net-house and began to tear it down and assault one of the defendant's hired men, who was sleeping. *Id*. at 160, 180. The defendant came out of his home, heard his hired man "hallooed" as if he were in pain, and

ordered the men to "[l] eave or I'll shoot." *Id*. at 160, 180-181. The defendant shot and killed one of the three men. *Id*. at 160-161, 181.

At trial, the court instructed the jury on self defense, defense of others, and defense of one's property. *Id*. at 163-164. The trial court specifically instructed the jury that, if possible, the defendant had the duty to retreat. *Id*. at 163. The defendant argued that he did not have a duty to retreat because the net-house was part of his dwelling. *Id*. at 165-167. The court refused to give the instruction because the attack was not on the defendant's dwelling occupied by his wife and children. *Id*. at 168.

On appeal, our Supreme Court noted that a person attacked has a duty to retreat if possible, but that '[a] man is not, however, obliged to retreat if assaulted in his dwelling," and may use deadly force to defendant himself, if necessary. *Id*. at 176-177. The Court also noted: "Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion." *Id*. at 173. In concluding that the trial court had erred in refusing to give the no-duty-to-retreat instruction requested by the defendant, the Court stated:

> A question was raised whether the net-house was a dwelling or a part of the dwelling of Pond. We think it was. It was near the other building, and was used not only for preserving nets which were used in the ordinary occupation of Pond, as a fisherman, but also as a permanent dormitory for his servants. [*Id*. at 181.]

After the *Pond* case, our Supreme Court decided *People v Lilly,* 38 Mich 270 (1878). In *Lilly, supra* at 273, the defendant discharged one of his farmhands, and a dispute developed regarding how much the defendant owed the farmhand for his last wages. When the two encountered each other in town, the farmhand threatened the defendant. *Id*. Later that evening, the farmhand went to the defendant's home to retrieve his belongings and ran into the defendant outside in "the passage way between" the defendant's old home and a new home he was building "a few feet" away. *Id*. at 274. The dispute over the farmhand's wages erupted again, and other workers overheard the defendant telling the farmhand to "take his hands off and not strike him again." *Id*. at 274-275 (emphasis omitted). A struggle ensued, and the defendant stabbed the farmhand with a pocket knife, killing him. *Id*. at 275.

At trial, the court instructed the jury that if the defendant "could have saved himself from all serious harm by retreating or calling for assistance," but did not do so, and, instead, "stood his ground and resisted," the killing would not be justifiable or excusable. *Id*. at 275. The Supreme Court ordered a new trial after holding that the instruction was "improper and misleading" because it suggested to the jury that "it was incumbent upon [the defendant] to fly from his habitation where his wife and children were, in order to escape danger instead of resisting the aggressor. Such is not the law." The Court opined that, "[i]n these cases of personal peril," the person attacked has a right and a duty to defend himself, and the law does not impose "any obligation to remain supine and attempt to shift this duty upon other private persons" who have no obligation to help. *Id*. at 276-277.

Although instant defendant argues to the contrary, we are of the opinion that *Godsey* and *Pond* are not inconsistent with *Lilly*. In *Lilly*, the primary focus was not on the no-duty-to-retreat rule, but

rather on self defense. The Court was concerned that the trial court had instructed the jury that (1) the defendant had to call for assistance from others and wait to see if others would come to his aid before he could exercise self defense, and (2) that the defendant had to flee from his home to resist the aggressor even though in doing so, his wife and children would remain there at the mercy of the aggressor. The *Lilly* Court never said that the defendant was entitled to a no-duty-to-retreat instruction.

In contrast, the *Pond* Court was confronted with the question whether a no-duty-to-retreat instruction should have been given because the net-house was a dwelling or part of defendant's dwelling from which he had no duty to retreat. The Supreme Court could have easily resolved the case by stating that the no-duty-to-retreat rule applied because the net-house was located within the curtilage of the defendant's home. However, the Court did not do so. Instead the Court looked at the specific details of the case: the net-house was close to the defendant's home (i.e., the structure was within the curtilage); the net-house was used for preserving items that the defendant used in his occupation, and it was permanently inhabited by the defendant's servants. Our Court in *Godsey*, which was relied on by the *Kulick* Court, interpreted *Pond* as requiring that an outbuilding located within the home's curtilage must be inhabited before the no-duty-to-retreat rule applies. We agree with this interpretation of *Pond*, which is consistent with the *Pond* Court's concern, that "[h]uman life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion." *Id*. at 173. Defendant urges us to accept the interpretation that a person has no duty to retreat when although outside the home he is within the home's curtilage and without regard to whether the out building is inhabited. We believe this conclusion would be contrary to the *Pond* Court's concern about whether the outbuilding was inhabited.

Further, considering defendant's testimony in the present case that he immediately reached for his rifle upon seeing the victim pull out a dark object that he thought was a gun, we note that the focus in the present case was not on whether defendant had an opportunity to retreat before using deadly force, but on whether defendant was required to act immediately upon perceiving the alleged threat of the victim pulling out a gun. Thus, it is questionable whether the jury was even required to reach the issue of retreat.

Next, defendant argues that he was denied a fair trial because the prosecutor committed misconduct by asking defendant whether he believed that the prosecution's main witness, defendant's friend, was lying. We disagree. Because defendant failed to object, review is precluded unless the resulting prejudice is so great that it could not have been cured by a timely requested instruction or unless the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich App 643, 687; 521 NW2d 557 (1994).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Claims of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate the prosecutor's remarks in context. *Id.* A prosecutor is prohibited from asking a defendant to comment on the credibility of a witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

During direct examination, defendant stated that witness Billingsley's story about the victim's making a disrespectful comment about defendant's girlfriend was "not true at all." On cross-examination, the prosecutor asked defendant whether Billingsley was "lying" when he said that defendant went into the house and came out with a weapon. Defendant indicated that he had no idea, and agreed that he, Billingsley, and the victim were all "buddies."

Our review of the transcripts indicates that Billingsley did not testify that he *saw* defendant come out of the house with the weapon. Billingsley testified that he heard the screen door behind him shut and that all of a sudden defendant started firing. This testimony is not necessarily inconsistent with defendant's testimony that the gun was right next to the garage door and that he just reached in, grabbed it, and shot it. Moreover, the question the prosecutor posed was asked as a follow-up to defendant's comment that Billingsley's version of the events was not true. Thus, because defendant opened the door on the subject during direct examination, cross-examination on the subject was proper. *Paquette*, *supra; People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988). Further, no prejudice resulted because the jury found defendant guilty of second-degree murder, not premeditated murder, thus, impliedly finding that defendant did not coolly enter the house to get the weapon with the intent to come back out and kill the victim. In any event, any prejudice could have been cured by a timely requested instruction. Defendant was not denied a fair trial, and reversal is not warranted on this basis.

In a supplemental brief filed by defendant after oral argument, defendant raises the issue that the trial court improperly denied him the right to be tried by a jury composed of persons drawn only from the City of Detroit in accordance with Local Rule 6.410 of the Third Judicial Circuit, 3rd Circuit LCR 6.410. We disagree. The construction of a court rule is a question of law that this Court reviews de novo. *People v Levandoski*, 237 Mich App 612, 617; 603 NW2d 831 (1999).

On the first day of trial before the jury was selected, the following dialogue occurred between defense counsel and the court:

> [DEFENSE COUNSEL]: Judge, I did file a motion for a Detroit jury panel in this matter.
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> THE CLERK: I don't have a motion for a Detroit jury in the file.
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> THE COURT: We're going to bring the jury in in a moment. I don't see, we don't see a motion for a Detroit jury in the file. And the pretrial conference , or the final conference in this matter was I think October 24th.
>
> In any event, assuming that somehow Mr. Riddle would be entitled to a jury from a pool of citizens from Detroit only, I believe proceeding with this jury, with a county-wide jury does not result in any prejudice whatsoever to this defendant. I'm sure that his jury can be as fair as any other potential jury pool in the county of Wayne. With that, we'll proceed.

3rd Circuit LCR 6.410, which became effective on October 1, 1997, and deals with the selection of juries for trials of former Recorder's Court cases, provides:

> **(A) Application.** This rule only applies to defendants who are
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> (1) charged with committing a felony in the City of Detroit, and
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> (2) arraigned on the warrant or complaint before October 1, 1997.
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> **(B) Selection of Jurors.** For trials of defendants described in subrule (A), the court will draw potential jurors fom all of Wayne County, unless the defendant elects in writing, on or before the final pretrial conference, to be tried by a jury composed of persons drawn only from the City of Detroit.

The lower court record indicates that subsection (A) of 3rd Circuit LCR 6.410 is satisfied because defendant was charged with committing a felony in Detroit and was arraigned in August 1997, i.e., before October 1, 1997. With regard to subsection (B) of the rule, although defendant takes issue with the court's statement that a "motion" was never filed rather than a "writing" as required by the rule, there is no writing or any indication in the lower court record that defendant ever stated in writing that he desired to be tried by a jury composed of persons drawn only from the City of Detroit. Nor is there any indication in the October 24, 1997, final pretrial conference that such a request had been made to the trial court. The plain language of the rule is clear, and every word in the court rule must be given meaning and not treated as surplusage. *People v Schmitz*, 231 Mich App 521, 529; 586 NW2d 766 (1998). The court rule clearly states that potential jurors will be drawn from Wayne County, "unless the defendant elects in writing, on or before the final pretrial conference," to be tried by a jury composed of persons from Detroit. Because there is nothing in the record to suggest that a request was made in writing, defendant's argument must fail.

We affirm.

/s/ Roman S. Gribbs
/s/ Joel P. Hoekstra
/s/ Jane E. Markey