

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP LEE HARRINGTON,

Defendant-Appellant.

UNPUBLISHED

May 25, 2004

No. 246329

Wayne Circuit Court

LC No. 02-008163

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of assault with intent to murder, MCL 750.83, for which he was sentenced as a fourth habitual offender, MCL 769.12. We affirm.

On appeal defendant first argues that his conviction was not supported by sufficient evidence because the assault was justified. We disagree. To determine whether sufficient evidence existed to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and decide if a reasonable juror could find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

To sustain a conviction for assault with intent to murder, the prosecution had to establish (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder, i.e., it occurred under circumstances that did not justify, excuse, or mitigate the crime. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988). Defendant claims that because he acted in defense of others, the third element was not established beyond a reasonable doubt, i.e., if Jonathan Chapman would have died after defendant stabbed him, defendant could not have been convicted of murder. See *id.* Defendant also argues that the prosecutor failed to disprove beyond a reasonable doubt his defense of others theory. See *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant used deadly force against Chapman. Defendant is correct that deadly force may be used in defense of others; however, one may not use more force in defense of the third person than reasonably believed necessary to protect the defended person. See *People v Heflin*, 434 Mich 482, 508-509; 456 NW2d 10 (1990); *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002). The record evidence was sufficient for the jury to conclude that such deadly

force was not immediately necessary and that any such belief was unreasonable. See *Heflin*, *supra* at 502.

Defendant's friend, Willis Rand, started a fight with Chapman and, without the use of any weapon, Chapman knocked Rand unconscious. Defendant's other friend, Edgar Lopez, then attacked Chapman, and he too was knocked unconscious without the use of any weapon. During the fight between Lopez and Chapman, however, defendant went up behind Chapman and stabbed him in the neck, and cut it from front to back. There were several witnesses to this parking lot fight because after it started inside the bar, the bartender told everyone to leave. Although Chapman was seen kicking Rand and Lopez while they were on the ground and before defendant stabbed Chapman in the neck, the evidence does not establish that *deadly* force was necessary to protect either Lopez or Rand from Chapman. If Chapman had died from the stabbing, defendant could have been charged with, and successfully convicted of, murder. If defendant had only intended to stop Chapman from kicking his friends, stabbing him in the neck and leaving a sixteen to twenty centimeter in length cut was not reasonably necessary. For these same reasons, the evidence did not preponderate heavily against the verdict and defendant's claim that the verdict was against the great weight of the evidence is without merit. See *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Further, defendant's imperfect self-defense argument fails since that defense is not available in instances where the defendant used excessive force or unreasonably believed himself or others to be in imminent danger. See *People v Kemp*, 202 Mich App 318, 325; 508 NW2d 184 (1993); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992).

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski