STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2010
v	No. 281384 Oakland Circuit Court
CLIENTE J. BUCKNER, Defendant-Appellant.	LC No. 2006-211290-FC

ON REMAND

Before: WHITBECK, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

This case returns to this Court on remand from the Michigan Supreme Court for further proceedings. A jury convicted defendant, Cleinte Buckner, of manslaughter[1] and possession of a firearm during the commission of a felony.[2] The trial court sentenced Buckner to consecutive sentences of two years in prison for the felony-firearm conviction, and 40 months to 15 years in prison for the manslaughter conviction. This Court reversed Buckner's conviction on the ground that the prosecution had failed to adequately rebut the theory of self-defense.[3] On appeal, the Michigan Supreme Court reversed this Court's decision and remanded the case for consideration of the remaining issues in Buckner's original appeal.[4] We now address the issues of the trial court's jury instructions regarding Buckner's duty to retreat and the trial court's sentence scoring of offense variable (OV) 3. We affirm.

[1] MCL 750.321.

[2] MCL 750.227b.

[3] *People v Buckner*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 281384).

[4] *People v Buckner*, 486 Mich 906; 780 NW2d 838 (2010).

I. FACTS

This case stems from a homicide that took place in August 2006. Buckner did not deny shooting the victim, but he maintained that he acted in self-defense. With respect to the open murder charge, the trial court instructed the jury on first- and second-degree murder, as well as manslaughter. Further, the trial court instructed the jury regarding the defenses of self-defense and defense of another. After deliberations, the jury initially indicated that it was unable to reach a verdict. The trial court then instructed the jury as follows:

> A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding if the defendant honestly and reasonably believed he needed to use deadly force in self-defense. However, a person is never required to retreat after a sudden fierce and violent attack, nor is he required to retreat from an attacker he reasonably believes is about to use a deadly weapon.

After further deliberations, the jury returned a verdict of guilty of voluntary manslaughter and felony-firearm.

At resentencing, the trial court assessed Buckner a total of 80 OV points and zero prior record variable (PRV) points, for a minimum sentencing guidelines range of 29 to 57 months. More specifically, Buckner was assessed 25 points for OV 3 based on the trial court's finding that the victim suffered "[l]ife threatening or permanent incapacitating injury[.]"[5]

II. DUTY TO RETREAT

A. STANDARD OF REVIEW

Buckner argues that the trial court erred when it instructed that jury that he had a duty to retreat. According to Buckner, because he was the victim of a sudden, violent attack, and not the aggressor, he had no duty to retreat.

This Court generally reviews de novo jury instructions that involve questions of law and reviews for an abuse of discretion a trial court's determination whether an instruction is applicable to the facts of the case.[6] However, this Court reviews unpreserved issues for plain error affecting substantial rights.[7]

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[5] MCL 777.33(1)(c).

[6] *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

[7] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. ANALYSIS

We conclude that the challenged self-defense instruction was proper. The trial court's instruction, as quoted above, in fact set forth no duty to retreat. Instead, the trial court advised the jury that it could consider any opportunity for Buckner to retreat when evaluating whether he honestly and reasonably thought he was endangered. This instruction comported with the common-law rules of self-defense.[8]

According to the Michigan Supreme Court, under common law, "the killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself."[9] The Supreme Court emphasized that this was a doctrine born of necessity and stated that "[a]n accused's conduct in failing to retreat, or to otherwise avoid the intended harm, may in some circumstances—other than those in which the accused is the victim of a sudden, violent attack—indicate a lack of reasonableness or necessity in resorting to deadly force in self-defense."[10] The Court elaborated: "[W]here a defendant 'invites trouble' or meets nonimminent force with deadly force, his failure to pursue an available, safe avenue of escape might properly be brought to the attention of the factfinder as a factor in determining whether the defendant acted in reasonable self-defense."[11] The Court clarified that there is no duty to retreat from a sudden and violent attack.[12] There is also no duty to retreat when the provocation occurs in the defender's home.[13] But the Court recognized that there is an affirmative duty to retreat when the defendant, acting outside of his or her home, voluntarily engages in "mutual, non-deadly combat that escalates into sudden deadly violence."[14]

The challenged instruction here did not include the latter rule, which is the only situation where the common-law affirmative duty to retreat exists. Therefore, because the challenged instruction specified no duty to retreat, and otherwise comported with the common law, we conclude that there is no merit to this unpreserved claim of error.

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[8] We note that the statutory codification of the law of self-defense, including its changes to the duty to retreat, MCL 780.972, became effective on October 1, 2006, shortly after the events engendering this case. 2006 PA 309. Because that legislation had only prospective effect, it does not bear on this case. See *People v Conyer*, 281 Mich App 526, 530-531; 762 NW2d 198 (2008).

[9] *People v Riddle*, 467 Mich 116, 127; 659 NW2d 30 (2002).

[10] *Id.*

[11] *Id*.

[12] *Id*. at 128.

[13] *Id*. at 134

[14] *Id.* at 131-132.

We note that Buckner grafts onto this argument the assertion that defense counsel was ineffective for failing to object to the challenged instruction. However, because the challenged instruction was a proper one, no claim of ineffective assistance of counsel can stand on counsel's disinclination to object at trial.[15]

III. SCORING OFFENSE VARIABLE 3

A. STANDARD OF REVIEW

Buckner argues that, contrary to the Michigan Supreme Court's decision in *People v Houston*,[16] the trial court erred in scoring 25 points under OV 3 when the sentencing offense was a homicide.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."[17] However, to the extent that a scoring issue calls for statutory interpretation, this Court's review is de novo.[18]

B. ANALYSIS

OV 3, which addresses physical injury to the victim, states, in pertinent part, as follows:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and *by assigning the number of points attributable to the one that has the highest number of points*:
>
> (a) A victim was killed ..... 100 points
>
> * * *
>
> (c) *Life threatening or permanent incapacitating injury occurred to a victim*..... 25 points
>
> (d) Bodily injury requiring medical treatment occurred to a victim ..... 10 points
>
> (e) Bodily injury not requiring medical treatment occurred to a victim ..... 5 points

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[15] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position.").

[16] *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005).

[17] *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[18] *Id*.

(f) No physical injury occurred to a victim ..... 0 points

(2) All of the following apply to scoring offense variable 3:

* * *

(b) *Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.*[19]

In interpreting OV 3, the Michigan Supreme Court has declined to read subsection (2)(b) as prohibiting a trial court from scoring *any* points for OV 3 when the sentencing offense is homicide.[20] In *People v Houston*, the defendant was convicted of second-degree murder for the shooting death of the victim.[21] During sentencing, the trial court scored 25 points under OV 3 because the victim suffered an injury—a gunshot wound.[22] The defendant argued that, based on subsection (2)(b), he should not have been assessed any points for OV 3 because his sentencing offense was a homicide and none of the other point levels were applicable to circumstances where the victim was killed.[23]

In declining to disallow any scoring where a homicide occurred, the Supreme Court reasoned that, in the process of killing the victim, the defendant first caused a physical injury to the victim.[24] And the Court observed that subsection (1)(f) calls for zero points *only* when *no* physical injury occurred to the victim.[25] The Court explained, "The Legislature has explicitly eliminated the option of assessing one hundred points in homicide cases, but not the requirement of assessing the 'highest number of points' possible."[26] The Court posited:

> If the Legislature . . . had intended to preclude the scoring of *any points* where the sentencing offense is a homicide, why did it only specifically preclude the scoring of *one hundred points*? Indeed, that the Legislature precluded the scoring of *one hundred points* where the sentencing offense is a homicide suggests that the

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[19] MCL 777.33 (emphasis added).

[20] *Houston*, 473 Mich at 402.

[21] *Id.* at 401, 402.

[22] *Id.* at 401.

[23] *Id.* at 401, 405.

[24] *Id.* at 402, 406.

[25] *Id.* at 406.

[26] *Id*. at 409.

> Legislature intended *some points* to be scored where the sentencing offense is a homicide.[27]

The Court concluded that scoring was therefore appropriate under the remaining subsections when there was physical injury, even though the injury resulted in death.[28] The Court clarified that even a death that occurs instantaneously is still the result of an injury and capable of scoring under OV 3.[29] Therefore, according to the Court, subsection (1)'s direction that the highest possible number of points must be assessed, meant that the proper scoring choice was 25 points under subsection (1)(c).[30]

Writing for the dissent, Justice CAVANAGH insisted that there is a difference between a "life-threatening" injury and a "life-*ending*" injury.[31] Therefore, he disagreed with the majority that OV 3 applies to a situation when the victim dies.[32] According to Justice CAVANAGH, "an ordinary reading of the statute's phrase 'life threatening . . . injury' indicates a situation in which a person receives an injury that threatens, but does not take, the person's life."[33] Therefore, Justice CAVANAGH expressed his disinclination to equate the two terms.[34] Justice CAVANAGH found "unpersuasive the argument that had the Legislature intended to exclude a situation in which a victim dies from the '[l]life threatening or permanent incapacitating injury' condition specified by MCL 777.33(1)(c), it would have said so."[35] Justice CAVANAGH explained that, plainly read, a "life threatening" or "permanent incapacitating injury" presumes that the person has survived the attack.[36] He contended that "[h]ad the Legislature intended that a potentially fatal injury include an injury actually causing death, it would have said so."[37] Justice CAVANAGH opined that "the Legislature likely did not foresee an attempt to equate a potentially fatal injury with a fatal one."[38] According to Justice CAVANAGH, "The majority's reasoning . . . illuminates that its position is not true to the plain language of the statute or the Legislature's

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[27] *Id.* at 406 n 15 (emphasis on original).

[28] *Id.* at 407.

[29] *Id*. at 407 n 16.

[30] *Id.* at 407.

[31] *Id*. at 411 (CAVANAGH, WEAVER, and Marilyn KELLY, JJ., *dissenting*) (emphasis in original).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 411-412.

[35] *Id*. at 412.

[36] *Id*. at 413.

[37] *Id.* at 412.

[38] *Id.*

intent."[39] Thus, Justice CAVANAGH concluded, "If homicide is an element of the sentencing offense, a defendant should not be assessed any points for OV 3, even if the victim could be considered to have suffered an 'injury' before dying."[40]

Buckner concedes that the majority's opinion in *Houston* is dispositive of this issue, but argues that the dissent in *Houston* gives the proper interpretation. Buckner explains that he raises this argument in hopes of creating a chance to bring it before the Michigan Supreme Court and then urge that Court to overrule *Houston*. While we see merit in the *Houston* dissent, it is the Supreme Court's obligation to overrule or modify its decisions.[41] And until that Court takes such action, the Supreme Court's decision in *Houston* binds this Court and all lower courts.[42]

Therefore, applying the *Houston* interpretation to this case, although the trial court could not have assessed 100 points under MCL 777.33(2)(b) because a homicide was the sentencing offense, the trial court properly scored Buckner's offense at 25 points under MCL 777.33(1)(c) for inflicting a "life threatening . . . injury . . . to a victim."

We affirm.

/s/ William C. Whitbeck
/s/ Douglas B. Shapiro

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[39] *Id.* at 413.

[40] *Id.* at 415.

[41] *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009).

[42] *Id.*