# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE EAGGER,

Defendant-Appellant.

UNPUBLISHED
May 7, 1996

No. 174910
LC No. 93-08752

Before: Reilly, P.J., and Michael J. Kelly and C.L. Bosman,* JJ.

PER CURIAM.

Defendant Bruce Eagger, was charged with assault with intent to murder, MCL 750.83; MSA 28.278. On February 23, 1994, defendant was convicted by a jury of the lesser included offense of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Subsequently, defendant was sentenced on March 11, 1994, to five to ten years in prison. Defendant appeals as of right.

The trial court instructed the jury on the offenses of assault with intent to murder and assault with intent to do great bodily harm less than murder. The court also instructed the jury on the defense of self-defense. Defense counsel objected to the instruction of reasonable doubt and burden of proof, stating that it was not clear enough for the jury to understand. The court responded that she believed the instruction to be perfectly clear. Defense counsel then objected to the self-defense instructions, stating that the court had added and deleted things from the standard self-defense instruction, which made them unclear. The court responded that she read directly from the Standard Criminal Jury Instructions, and that she had only deleted an instruction regarding sexual penetration.

During jury deliberations, the jury requested the legal definitions of assault with intent to commit murder and assault with intent to do great bodily harm less than murder. After being read the instructions, the jury resumed deliberations. Defense counsel objected that the assault with intent to

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

murder instruction did not include, in the third element, the language "under the circumstances that did not justify or excuse or mitigate the crime."

The trial judge's supplemental instruction was proper, and as in *People v Darwall*, 82 Mich App 652; 267 NW2d 472 (1978), the jury was not entitled to a re-instruction on self-defense absent a specific request. Here, the jury made no specific request regarding the instructions on self-defense. Thus, just as the defendant in *Darwell* was not entitled to a re-instruction on his defense theory of insanity, defendant here was not entitled to a re-instruction on his defense theory of self-defense. Defendant was not prejudiced, since instructions are reviewed as a whole and an adequate instruction on self-defense was given during the original charge to the jury.

The jury instructions adequately informed the jury that the prosecution has the burden of proof regarding self-defense. However, defendant claims that the following instruction is improper:

> In this case the law indicates that the defendant does not have to prove that he acted in self-defense. What is required instead is that the people must prove beyond a reasonable doubt that the defendant acted affirmatively to kill the [sic] in an effort to kill, assault with the effort to kill the complaining witness or that he specifically intended to harm the complaining witness less than an intent to murder, but that he specifically intended to do great bodily harm to the complaining witness.
>
> So the burden of proof does not change. The defendant is not required to prove beyond a reasonable doubt or to prove that he acted in self-defense. The people have the affirmative duty to prove to your satisfaction beyond a reasonable doubt that the offenses as charged were established.

A trial judge must instruct the jury as to the 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). When a defendant introduces evidence supporting the defense of self-defense, the burden of proof that the offense was not done in self-defense rests on the prosecution. *People v Jackson*, 390 Mich 621, 626; 212 NW2d 918 (1973).

In this case the instructions, read as a whole, adequately present the burden of proof regarding self- defense. The instruction given in the case is almost identical to CJI 2d 7.20, which states that "The defendant does not have to prove that he acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not act in self-defense." Here, the judge stated that the "defendant is not required to prove beyond a reasonable doubt or to prove that he acted in self-defense. The people have the affirmative duty to prove to your satisfaction beyond a reasonable doubt that the offenses as charged were established." Although the judge added a few words, the instruction was satisfactory, as there is no requirement that the instruction match exactly the standard instructions. *People v Moore* 176 Mich App 555; 440 NW2d 67 (1989). Moreover, even if the first paragraph

was extraneous, or could have been better stated, a clear explanation of the burden of proof was given in the second paragraph.

Defendant-appellant next argues that throughout the prosecution's closing argument and rebuttal, inappropriate and prejudicial comments were made to the jury, and therefore, reversible error occurred. Defendant's failure to object to the prosecutor's remarks at trial precludes this issue from appellate review, since a proper instruction could have cured any potential for prejudice, and no manifest injustice is present.

The prosecutor was not alluding to his personal beliefs or to facts unsupported by trial evidence. Instead, the prosecutor was merely opining as to the validity and plausibility of defendant's self-defense argument. As an advocate, the prosecutor is free to relate the facts to his theory of the case and to argue the evidence and all reasonable inferences from it to the jury. *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989). The prosecutor properly argued that defendant's claim of self-defense, in light of the multiple stab injuries found on Hobbs' back, was without merit. Although defendant characterizes the prosecution's comments as his personal beliefs and not related to the evidence, the prosecutor's comments were merely logical responses to defendant's theory of self-defense. Again, any impropriety as to the prosecutor's choice of words could have been cured by a cautionary instruction. There being no miscarriage of justice due to the comments, no reversal is required by this Court.

Affirmed..

/s/ Maureen Pulte Reilly
/s/ Michael J. Kelly
/s/ Calvin L. Bosman