STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD TYRONE EVANS,

Defendant-Appellant.

UNPUBLISHED
September 20, 1996

No. 170005
LC No. 93-65835

Before: Markey, P.J., and McDonald and M. J. Talbot*, JJ.

PER CURIAM.

Following a jury trial defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28424(2). Thereafter defendant plead guilty to being an habitual offender, second offense, MCL 769.11; MSA 28.1083 and was sentenced to the mandatory 2-year prison term for the felony-firearm conviction and a consecutive term of 35 to 60 years for the assault conviction. Defendant now appeals from his convictions and sentences as of right. We affirm.

The trial court did not abuse its discretion in permitting the contested rebuttal testimony. *People v Travis*, 443 Mich 668; 505 NW2d 563 (l993). The testimony rebutted portions of defendant's testimony and was germane to the issue of self-defense. *People v Vasher*, 449 Mich 494; 537 NW2d 168 (1995). We also find no clear error in the court's determination the prosecution exercised due diligence in attempting to produce a missing witness. *People v Wolford*, 189 Mich App 478; 473 NW2d 767 (1991). The test for due diligence is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it. *People v Watkins*, 209 Mich App 1; 530 NW2d 111 (1995).

Assuming, for purposes of this appeal, the doctrine of imperfect or qualified self-defense has been recognized by the Michigan Supreme Court,[1] the rule only applies to mitigate second degree murder to voluntary manslaughter where the accused was the initial aggressor. *People v Wytcherly*, 172 Mich App 213; 431 NW2d 463 (1988). Here, no death occurred and defendant alleges he shot

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

the victim when the victim began walking toward him and appeared to reach for a gun. There was, therefore, no error in the court's failure to sua sponte instruct the jury on this doctrine or defense counsel's failure to request it.

Given the victim's medically weak condition, the trial court did not abuse its discretion in finding good cause to adjourn defendant's preliminary examination, *People v Crawford*, 429 Mich 151; 414 NW2d 360 (1987), and no violation of the 180 day rule occurred where the record reveals but for the victim's condition, the prosecutor made a good faith effort to bring the case to trial within the 180-day period. MCR 6.004(D)(1).

Finally, the facts surrounding the shooting, defendant's extensive criminal history and the fact he was on parole when he committed the instant offenses demonstrates the minimum sentence of 35 years was not an abuse of the trial court's sentencing discretion. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995). The sentence is proportionate to both the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot

[1] In *People v Heflin*, 434 Mich 482; 456 NW2d 10 (1990), Justice Riley stated the imperfect self-defense theory had not yet been considered by the Supreme Court. The dissent in *People v Kemp*, 202 Mich App 318; 508 NW2d 184 (1993) notes the Michigan Supreme Court has neither adopted nor analyzed the doctrine. However, the order entered in *People v Springer*, 411 Mich 867; 306 NW2d 100 (1981) appears to recognize the doctrine.