

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRUMAN MAY,

Defendant-Appellant.

UNPUBLISHED

November 26, 1996

No. 179558

LC No. 93-010502

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, 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 to serve seventeen to thirty years' imprisonment for the second-degree murder conviction and five years' imprisonment for the felony-firearm conviction. Subsequently, defendant pleaded guilty to being a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant's second-degree murder sentence was vacated and defendant was sentenced to serve seventeen to thirty years' imprisonment as a fourth habitual offender. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the second-degree murder charge because the prosecution failed to disprove defendant's theory of self-defense beyond a reasonable doubt. We disagree. Because defendant preserved his challenge to the sufficiency of the evidence by moving for a directed verdict at trial, we must consider the evidence presented up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

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

In Michigan, once a defendant introduces evidence of self-defense, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 18; 507 NW2d 763 (1993). The killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). However, a defendant is not entitled to use any more force than is necessary to defend himself. *Id.* Further, the defense is not available when the defendant is the aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *Id.*

Here, the testimonial evidence established that defendant initiated the attack against the decedent by retrieving a handgun from inside his house, that defendant overpowered his friends' attempts to restrain him and chased after the decedent, that defendant jumped the decedent and struck him three times with the gun, and that defendant shot the decedent who was being held at abeyance by his brother. The evidence further revealed that defendant was the only person in possession of a weapon. Viewing the evidence in the light most favorable to the prosecution, we find that defendant's belief of imminent danger was neither honest nor reasonable and that his use of force was excessive in light of the circumstances. Because there was not sufficient evidence of self-defense, the trial court did not err in submitting the second-degree murder to the jury.

Defendant next argues that he was denied a fair trial when the trial judge permitted the prosecutor's late endorsement of rebuttal witness Bernell Fair, a firearms examiner. Specifically, defendant alleges that he was surprised by the prosecution's decision to introduce the rebuttal witness and that, therefore, he required a continuance to find and prepare an expert for the defense. We disagree. We review a trial court's denial of a continuance for an abuse of discretion. *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In determining whether the trial court abused its discretion, we consider several factors, including whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. *Lawton, supra*, 196 Mich App 348; *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

In the present case, the only basis for defendant's request for a continuance was the prosecutor's late endorsement of Bernell Fair, a firearms examiner. A prosecutor's late endorsement of a witness is governed by MCL 767.40a(4); MSA 28.980(1)(4). The statute reads in pertinent part:

The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties. [MCL 767.40a(4); MSA 28.980(1)(4).]

In finding good cause to allow the testimony, the court reasoned that, because defendant claimed accident as a possible defense from the outset of his case in chief, he could have anticipated that

the prosecution might offer an expert to rebut the claim of accident and that he could have obtained, in advance of trial, an expert to support his own argument. Because the prosecution offered Fair's testimony to rebut an argument raised by defendant during his case in chief, we find that there was good cause to allow the late endorsement and that, therefore, the trial court did not abuse its discretion in denying defendant's request for a continuance. *People v Kulick*, 209 Mich App 258, 265; 530 NW2d 163 (1995).

Defendant next argues that the trial court erred in failing to instruct the jury that defendant had no duty to retreat. We disagree. We review jury instructions as a whole and determine whether they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

The no-duty-to-retreat rule applies only if the defendant is in inhabited physical structures within the curtilage of the home. *People v Kulick*, 209 Mich App 258, 264; 530 NW2d 163 (1995); *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988); *People v Godsey*, 54 Mich App 316, 231; 220 NW2d 801 (1974). Here, defendant exited from his home in possession of a gun and assaulted, then shot, the decedent on the driveway. The decedent never entered nor attempted to enter defendant's home. Because the circumstances did not give rise to the requested instruction, we find that the trial court did not err in declining to read the no-duty-to-retreat rule.

Defendant also maintains that the prosecutor's remarks during closing and rebuttal closing arguments denied defendant a fair and impartial trial. We disagree. Because defendant failed to object below to the prosecutor's alleged improprieties, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). When reviewed in context, we find that the unobjected to remarks were proper. Further, we find that the trial court's instructions to the jury cured any potential for prejudice.

Lastly, defendant argues that trial counsel's failure to object to each and every instance of prosecutorial misconduct deprived defendant of effective assistance of counsel. We disagree. To establish a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney as guaranteed by the Sixth Amendment to the United States Constitution. Further, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy. As well, the defendant must demonstrate that any deficiency was prejudicial to his case. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Claims of ineffective assistance of counsel based upon defense counsel's failure to object when failure to object could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Because the prosecutor's remarks did not unfairly prejudice defendant, counsel's failure to object below did not impinge upon defendant's chances of acquittal. *Id.*; *Tommolino*, 187 Mich App 17. As such, counsel's failure to object to the prosecutor's allegedly improper remarks did not render counsel's assistance ineffective.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Timothy P. Pickard