STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIGMUNT JOHN SZCZEPKOWSKI,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 185891
Recorder's Court
LC No. 94-009327

Before: Jansen, P. J., and Reilly and E. Sosnick,* JJ

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with intent to do great bodily harm, MCL 750.84, MSA 28.279, and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent prison terms of eight to fifteen years for the assault with intent to murder conviction and six to ten years for the assault with intent to do great bodily harm conviction, to be served consecutively to a mandatory prison term of two years for the felony-firearm conviction. We reverse.

Defendant argues that he presented evidence supporting self-defense and that the trial court's denial of his request for an instruction on this defense constitutes reversible error. We agree.

Jury instructions are reviewed in their entirety to determine whether the error that occurred requires reversal. Imperfect instructions are acceptable so long as they fairly present the issues to be tried and sufficiently protect the rights of the defendant. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). It is the duty of the trial court to instruct the jury regarding the law applicable to the case. MCL 768.29; MSA 28.1052. Instructions should include material issues, defenses, or theories supported by evidence. Where there is evidence to support a defense instruction, the trial court is obliged to so instruct. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Thus,

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

the issue presented in this case is whether there was evidence to support a defense instruction on self-defense.

The convictions in this case arise from events that occurred in the late night and early morning hours of August 6 and 7, 1994, which culminated in a shooting at defendant's residence.

According to complainant Michael Magasark, he and a man named Jodie had an argument about money that Jodie owed Magasark. That argument and a physical struggle occurred at Magasark's friend Scott's house, which was less than two blocks from the house where Jodie lived with defendant. After Jodie left, Magasark found a pager. A short time later, the pager indicated that a call had been placed. Magasark dialed the phone number indicated and spoke to defendant. In a series of phone calls, Magasark and defendant argued about return of the pager and the money owed by Jodie. Defendant threatened to sue Magasark and Scott because of the earlier fight involving Jodie. After the arguments calmed down, defendant told Magasark to bring the beeper and he would take a look at the receipt indicating that Jodie owed Magasark money. Magasark, his girlfriend Christine and complainant Steve Brown went in a car to defendant's house at approximately 4 a.m. Magasark approached the house carrying a baseball bat. After setting the bat down on the porch by the side of the door, he opened the screen door and knocked on the window of the front door. (On cross-examination, Magasark testified that he knocked on the front window before knocking on the window of the door.) Defendant told him to come in. As soon as Magasark opened the front door (and took one step, according to Magasark's redirect examination testimony), he was shot in the "belly" and the chest. He ended up on his stomach partially on the sidewalk and partially on the grass. Defendant came down some of the steps with a gun in his hands. As he stood on the third or fourth step from the bottom, about five feet away from Magasark, defendant started shooting. He shot Magasark once in the jaw and once in the right arm. Magasark admits that he drank six beers in a three hour period before the shooting.

Complainant Steve Brown provided testimony that corroborated Magasark's testimony in some respects and contradicted it in others. Brown agreed that Jodie and Magasark fought, but said that the fight ended when Jodie ran. Brown was not aware of the series of phone calls between Magasark and defendant. He did not see the bat that Magasark said he took on the front porch. More importantly, Brown testified that he saw Magasark open the screen door, and saw defendant open the other door and start shooting. Magasark landed "[t]owards the railing" and then defendant started shooting at Brown. Brown ran back to the car, where Christine was waiting, and drove away as defendant shot towards the car. Brown drove back to Scott's house, told Scott that Magasark had been shot and then returned to defendant's home with Scott and his brother. When they arrived, the police were there.

Christine's testimony for the most part corroborated Magasark's. However, she testified that the fight between Magasark and Jodie ended when Magasark walked away after he picked up the beeper. According to Christine, Magasark told Jodie that Magasark was going to keep the pager for collateral until Jodie paid Magasark back. Christine also testified that she returned to defendant's house with Scott and the police were not there.

Scott testified that he was at his home talking on the phone with defendant when Magasark, Christine, and Brown left to go to defendant's house. He and defendant were not arguing. Defendant said "like come in and then he said hold on." Scott thought defendant put the phone down and then Scott heard a "bunch of ruckus." He couldn't recall at trial if he heard shots. Defendant got back on the phone and "he said call the police, someone was shot."

The prosecution introduced evidence of a statement made by defendant to the police. An officer read from the statement in pertinent part as follows:

> A. Okay. "On August 8 – August 7, 1994 at 5:30 a.m. did you shoot or shoot at Mike or Steve Brown? " Answer, "Yes, I think I shot Mike."
>
> Okay. Question, "Why did you shoot at Mike?" Question – correction, the answer, "They smashed out my three windows and glass on my door. They were trying to break in. They had a disagreement with my roommate Jodie.
>
> * * *
>
> A. Question, "When you shot at Mike, where was he at at the time?" "In my" – Answer, "In my living room."
>
> Question, "How did Mike get into the living room?" . . . . The answer was, "Forced entry, forced the door open."
>
> Okay. Next page, Question, "So there is" – question by me, "So there is fresh damage to your door?" Question I asked. The answer was yes.
>
> The next question I asked was, "Where did the gun come from?" The answer was, "One of the guys had a – one of the guys had on a brown shirt had it." [Sic.]
>
> ["]How did you get control of the weapon?["] Answer, "We struggled for it, me and those guys."
>
> Question by me, "How many shots did you fire?" Answer, "It was maybe two."
>
> My next question was, "What happened to the gun" "I dropped" – the answer was, "I dropped it on the front porch. They left, then came back and got it."
>
> Question, "Did you fire any shots outside your dwelling?" The answer was no.

The same officer testified that when he arrived at defendant's house, apparently some days after the incident occurred, an elderly woman was sweeping and picking up debris. One of the windows of the front entry door was broken and the glass was in the trash can. The officer also noticed that the screen on the front window had been cut. He observed damage to defendant's car, which was parked

on the street, specifically, a dent, "fresh paint missing from the rear" and "toward the rear window, there appeared to be a bullet hole." Another officer testified that he responded to the radio run regarding the shooting and saw the broken window of the front door.

A neighbor, Joe, who lives diagonally across the street from defendant testified that he was watching a videotape waiting for his wife to come home when he noticed the lights of a car that had pulled up. He saw two men get out of the car. One went on the porch, the other stayed on the sidewalk, but walked "like he may have had something in his pocket or holding something . . . [s]ort of stiff leg like." The man on the porch banged on the glass of the door and was yelling, then banged on the window and then came back to the door. When he got back to the door, he "fell up against the door like" and his left hand disappeared, possibly inside the door. In his right hand, the man had a bat. He was standing sideways when his arm disappeared and then the door came open. The man stepped inside and disappeared from Joe's sight. Joe left the window to light a cigarette from the stove. When he came back, the man was coming back out of the door stumbling. At about the third step, the man fell off of the porch on the ground. The other man got in the car and left. After awhile, the car returned with other people, including a girl, with the second man. Joe identified Magasark as the man who was on the porch.

A woman named Latifa who lives in the same house as defendant also testified regarding the events that culminated in the shooting. She stated that more than three people came into the house that night, "shouting and cussing word and breaking door and windows." She said they wanted money and asked for Jodie. However, on cross-examination, Latifa indicated that she came out of her bedroom after the shooting and that she did not see anyone other than defendant inside the house.

Defendant testified that Jodie came home drunk at approximately 3 a.m. with his face swollen, two black eyes, scratches on his face and his clothes torn. Later, defendant received a phone call from Magasark concerning Jodie. Although "numerous" phone calls between defendant and Magasark occurred, defendant did not invite Magasark to come to the house. Defendant was speaking to Scott on the phone when defendant heard glass breaking. He got up to see what it was and someone's shoulder hit his chest. Defendant described the altercation that occurred. In short, according to defendant's testimony, several unidentified persons forced entry into his home and engaged him in a struggle during which a gun was pointed at his face and later discharged as he attempted to get it away from his assailants. Contrary to his statement to the police, in his trial testimony, defendant denied having been the person who discharged the weapon. Defendant testified, in pertinent part:

Q. Okay. Now, your hand is on the hand of the guy that's got the gun?

A. Correct.

Q. Are you touching the gun?

A. No.

Q. Where on his hand or where on his arm do you have your hand?

A. On his wrist such as this.

Q. Okay. Is it level, is the gun level?

A. I don't know.

Q. Okay. What happened then?

A. Somebody grabbed my arm and then my wrist and we're swinging and the gun discharged.

Q. Was your finger anywhere near the trigger of that gun the first time it discharged?

A. No.

Defendant explained the circumstances of the second and third discharges as follows:

A. . . . . I was able to see the hand that was holding the gun and I just grabbed the arm. Okay. And at that point there I was bending it back and I grabbed the wrist and then everybody grabbed it. We were tugging it this way, tugging it that way and I was –

Q. Is this the first time or the second time?

A. This is the second time.

Q. So it's the same thing happened [sic] again.

A. Correct. And I -- we were all banging the hand down on the coffee table inside the living room. You're going down like this with the gun, and then at that point it was much easier because there was [sic] more hands on top of mine to go up and down moving it this way and that way and the gun just discharged.

Q. How high is your coffee table?

A. Like a regular coffee table.

Q. The gun hit the coffee table, did the gun or the hand with the gun hit the coffee table?

A. Correct.

Q. The gun discharge again?

A. Correct. Two times like verbatim, like bomb-bomb, like that.

* * *

Q. Did you aim at or intend to shoot at anybody that night?

A. No.

* * *

Q. Did you shoot Mike Magasark?

A. No.

Because defendant did not admit in his trial testimony that he shot Magasark, the court refused the defense request for an instruction on self-defense. The prosecution argued that there was no support for a self-defense instruction "because defendant's testimony indicated that this was an accidental shooting." The court agreed:

> [I]t's this court's position that to give a self-defense instruction under these [sic] circumstances of this case is totally inappropriate. The court heard defendant's testimony, that is, the court heard the defendant's testimony that basically that being that [sic] he was at home when some intruders came in and there was a struggle and during the course of the struggle some unknown person fired the weapon, that person not being the defendant. Those facts do not, in this court's mind, at all warrant an instruction on self-defense and the court denied the request.

Before defendant testified, there was undoubtedly evidence to support a self-defense instruction. To be lawful self-defense, the evidence must show that: 1) the defendant honestly believed that he was in danger; 2) the danger feared was death or serious bodily harm; 3) the action taken appeared at the time to be immediately necessary; and 4) the defendant was not the initial aggressor. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). Defendant's statement to the police, corroborated in part by testimony from Joe and Latifa, indicated that individuals broke into defendant's home, one of them had a gun, a struggle ensued and defendant fired the gun. This was adequate evidence to support the court's giving a self-defense instruction, and the court had an obligation to do so. *Caulley, supra.*

The court's conclusion that, despite the evidence to support the instruction, defendant's testimony indicating that he did not fire the gun precluded the instruction was erroneous. Defendant's testimony at trial indicated that he was not culpable because he did not discharge the gun and, to the extent that his actions indirectly caused the discharges, the discharges were accidental. Because defendant's testimony did not indicate that he actually fired the gun, the court refused to give a self-defense instruction. However, a defendant in a criminal matter may advance inconsistent claims and defenses. *People v Cross*, 187 Mich App 204, 205-206; NW2d (1991). The fact that the asserted defenses are inconsistent does not justify refusal to give an instruction where there is evidence to support it. *Id.* at 206; *People v Fuqua*, 146 Mich App 133, 137-138; 379 NW2d 396 (1991); *People v*

Hansma, 84 Mich App 138, 145; NW2d (1978); *People v McLean*, 52 Mich App 182, 185; NW2d (1974).

In this case, to the extent that defendant's testimony was inconsistent with a claim of self-defense, that fact is of no consequence. *Fuqua*, at 138. The jurors were presented with many differing versions of the events from the witnesses who testified at trial. The jurors were instructed that they did not "have to accept or reject everything a witness said," but were "free to believe all, none or part of any person's testimony." Even if they concluded that a witness lied, they were told that they may "simply accept the part you think is true and ignore the rest." Thus, they could have rejected defendant's trial testimony to the extent that he denied shooting the gun and chosen to believe that he did shoot the gun as indicated by his statement to the police. If the jurors accepted those facts, it would have been important for them to know the law regarding self-defense.[1] The persuasiveness of this theory was for the jury to decide under proper instructions from the court. *People v Hoskins*, 403 Mich 100; 267 NW2d 417 (1978).

We are not faced with whether there was sufficient evidence to support the conviction. Defendant does not even suggest that there was not. Rather, the issue concerns whether there was evidence to support an instruction on self-defense. The quantum of evidence refuting the defense is irrelevant to determining whether the instructions should have been given. "Even the most guilty defendant is entitled to have the trial judge tell the jury what his theory of defense is." *People v Savoie*, 75 Mich App 248, 251; 255 NW2d 11 (1977).

Because the trial court erroneously refused defendant's request for an instruction on self-defense, the conviction must be reversed and defendant must be given a new trial. In light of our conclusion, we need not address defendant's remaining contentions.

Reversed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick

[1] We note that, in the absence of any consideration of self-defense, the verdict rendered is consistent with the juror's accepting this set of facts.