STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALONZO WALLACE JR.,

Defendant-Appellant.

UNPUBLISHED
April 15, 1997

No. 178917
Detroit Recorder's Court
LC No. 93-013871

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549. Subsequently, defendant pleaded guilty to being a fourth habitual offender, MCL 769.12; MSA 28.424(2). The trial court sentenced defendant to a term of fifteen to thirty years' imprisonment for the murder conviction. That sentence was vacated, and defendant was sentenced to a term of twenty to forty years' imprisonment as an habitual offender. Defendant appeals as of right. We reverse.

Defendant argues that the trial court erred by failing to instruct the jury that deadly force could be used to resist a sexual assault. We agree.

Even when a trial court gives the standard jury instructions on self-defense, it should additionally instruct the jury that a person may use deadly force in self-defense to repel a criminal sexual assault when confronted with force that the person reasonably believes could result in imminent death or serious bodily harm. *People v Landrum*, sub nom *People v Heflin*, 434 Mich 482, 512; 456 NW2d 10 (1990). However, because defendant did not request this additional instruction and because there was no objection to the jury instructions that were given at trial, we will only reverse the decision of the trial court if it resulted in manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *Landrum, supra*, p 513.

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

The error here in omitting the additional instruction was not harmless. In *People v Barker*, 437 Mich 161, 164; 468 NW2d 492 (1991), the Michigan Supreme Court found that the trial court's omission of an instruction on the right to use deadly force to thwart a sexual assault was harmless, holding that "no reasonable juror could have believed such force was necessary to prevent rape by the enfeebled deceased." In that case, the decedent was eighty-one years old, walked with a cane, and was described as being unsteady on his feet. *Id.* The defendant was in her early twenties, five feet, seven inches tall, and weighed 170 pounds. *Id.* The defendant in that case bludgeoned the deceased ten times and stabbed him thirty-two times. *Id.*

Here, in contrast, the facts are different. Defendant was forty-five years old, five feet, nine inches tall, weighed 150 pounds, and had a broken left wrist at the time of the incident. Complainant was twenty-eight years old, was taller and heavier than defendant, and was in good health at the time of his death. The decedent died of multiple blunt impact injuries to the head. In contrast to *Barker*, a reasonable juror here could have believed that the amount of force used was necessary to prevent a sexual assault.

The facts here are also distinguishable from those in *Landrum*, *supra*. In both this case and *Landrum*, the trial court read the standard jury instructions on self-defense. However, in cases involving the use of deadly force to defend against rape, the traditional instructions do not totally and accurately present the crucial issue to the jury. See *People v Moye*, 194 Mich App 373, 379; 487 NW2d 777 (1992), rev'd on other grounds 441 Mich 864; 491 NW2d 232 (1992). The danger in the standard self-defense instructions is that a juror might not consider a threat of a sexual assault to be a threat of bodily harm. *Landrum*, *supra*, pp 527 (Archer, J., dissenting), 558 (Levin, J., dissenting); *People v Barker*, 179 Mich App 702, 711; 468 NW2d 492 (1991) (Marilyn Kelly, J., concurring), aff'd ["for the reasons stated in Judge Marilyn Kelly's concurring opinion"] 437 Mich 161; 468 NW2d 492 (1991).

In *Landrum*, *supra*, p 514, the Court held that no manifest injustice was caused by the failure to give the additional instruction because of a variety of factors. However, the Court's opinion focuses on arguments made by the defense counsel. See *id.*, pp 513-514. In particular, the Court relied on the fact that the defense counsel focused his voir dire inquiry on the issue of whether any potential juror would have difficulty in returning a verdict of not guilty if the defendant had used deadly force in her self-defense to defend against a rapist. *Id.*, p 513. In addition, defense counsel made the following remarks during closing argument:

> I asked you, ladies and gentlemen, is there any question in the minds of any one of you as to whether there could be a rape or an attempted rape of a prostitute and you all indicated by your silence that yes, there can be, and you are right. *I asked you if there was any question in your mind as to whether or not rape is an act of great bodily harm.* I submit to you that each of you, using your common sense, would definitely say yes. *The rape of any woman, ladies and gentlemen, can cause her not only great bodily harm and mental harm, but it may last for a lifetime.*

* * *

> There is no question but that Henry Green Thomas died and is a probability that he, himself, fell in the tub and there is also that reasonable possibility that the acts of Celestine Landrum, what she did, may have caused or contributed to the death of Henry Green Thomas. *What she did, did she have a right to do? There again, I stated to you that defending herself against a rape or an attempted rape is an absolute right and if she did so in order to prevent that rape or in order to prevent great bodily harm, the Court will instruct you that then she had a right to do anything that she could do even to the point of taking a life.* [*Id.*, pp 513-514. Emphasis in original.]

Here, we have not been provided with a transcript of defense counsel's voir dire. Accordingly, we can not use counsel's voir dire to analyze whether the jury was adequately instructed of defendant's theory of the case. During closing argument, the closest that defense counsel came to making a statement similar to the one made by counsel in *Landrum* was the following statement:

> Now you will hear an instruction on self-defense that the judge will give you, and the judge will tell you in that instruction that that if Mr. Wallace has a reasonable belief that something is going to happen to him – and he told you that he believed that he was going to be penetrated sexually or sodomized – that he has a right to protect himself.

In contrast to the statement in *Landrum*, this statement did a poor job of instructing the jury of defendant's theory of the case. Defense counsel in *Landrum* made the crucial argument that acts of sexual assault can cause great bodily harm. Specifically, counsel stated:

> I asked you if there was any question in your mind as to whether or not rape is an act of great bodily harm. I submit to you that each of you, using your common sense, would definitely say yes. The rape of any woman, ladies and gentlemen, can cause her not only great bodily harm and mental harm, but it may last for a lifetime."

Here, defense counsel made no connection at all between sexual assault and great bodily harm. This is precisely the reason that the standard jury instructions on self-defense are inadequate. *Landrum*, *supra*, pp 527 (Archer, J., dissenting), 558 (Levin, J., dissenting); *Barker*, *supra*, 179 Mich App 702, 711 (Marilyn Kelly, J., concurring).

The second critical distinction between this case and *Landrum* is that counsel in *Landrum* stated exactly how a defendant confronted with the appropriate level of danger may legally respond. First, counsel in *Landrum* stated, "defending herself against a rape or an attempted rape is an absolute right." *Landrum*, *supra*, p 513. Counsel continued that the defendant "had a right to do anything that she could do even to the point of taking a life." *Id.*, p 514. In contrast, defense counsel here never made such a statement. Rather, she merely said that defendant "has a right to protect himself." This argument begs the question of whether a defendant may appropriately use *deadly force* in an effort to "protect himself." Although we would hesitate normally to focus on the inadequacy of defense

counsel's statements in holding that a new trial must be conducted, such an analysis is mandated under *Landrum*. *Id.*, p 514.

The dissent focuses on other arguments by defense counsel which supported defendant's theory of the case. However, aside from the portion of counsel's closing argument which was cited *supra*, the arguments cited by the dissent all concerned the factual basis of defendant's theory. These arguments as to the factual basis of defendant's theory did nothing to present the jury with the legal underpinnings of defendant's theory, namely that 1) a threat of sexual assault can be equated with a threat of serious bodily harm, and 2) deadly force can be used to prevent an act of rape. We hold that, under the facts of this case, the trial court's instructions did not adequately present defendant's theory of the case, and that such failure caused manifest injustice. Accordingly, we reverse defendant's conviction and remand for a new trial.

We briefly address defendant's remaining allegations of error. First, contrary to the cases which defendant cites, the jury instruction here on defendant's state of mind properly stated that the jury *may* infer malice from the circumstances of the killing, not that it *must*. Second, there is no evidence that the judge had information about the crime that was not presented to the jury. Accordingly, the trial court did not abuse its discretion in scoring offense variable 3 consistent with the jury verdict. Michigan Sentencing Guidelines, p 77, Instruction A (2d ed, 1988). Third, although a prosecutor may not make a closing argument which does little more than appeal to a juror's sympathy, *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988), the prosecutor here did not ask the jury to suspend its judgment and decide the case based on sympathy. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Fourth, the prosecutor's closing argument did not improperly express a personal belief in defendant's guilt. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992); *People v Jansson*, 116 Mich App 674, 693-694; 323 NW2d 508 (1982). Finally, the trial court did not err in failing to obtain defendant's personal consent to the waiver of the production of endorsed witnesses. *People v Johnson*, 70 Mich App 349, 350; 247 NW2d 310 (1976).

Reversed and remanded for proceedings consistent with this opinion.

/s/ Myron H. Wahls
/s/ Harry A. Beach