

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAEEM T. MCCOY,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 199631

Recorder's Court

LC No. 96-001926

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions 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). We affirm.

Defendant's first argues that he was denied a fair trial as a result of the trial court's failure to give a requested self-defense instruction regarding the lack of duty to retreat in one's own dwelling. This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *Id.* Given the facts of this case, we conclude that the evidence did not support the requested instruction. On direct examination, defendant testified as follows:

Q [by defense counsel]: What did he [the decedent] do after he went into the kitchen?

A [by defendant]: He went back into the living room . . . [a]nd I asked him was he going to leave because I was tired. And he said he was just about to leave. So that's when I journeyed my way to the door and went to open the door and unlock the door.

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

And I was looking at him through my peripheral view, and that's when he charged. And I turned around and he threw me against the wall and pinned me there.

Q: Let me stop you. When he threw you against the wall, were you facing [the decedent] directly, or was your face to the wall looking away from [him]?

A: I had turned around directly facing him.

Q: So you were facing him, true?

A: Yes, I was.

* * *

Q: Okay. Now, what did you do then?

A: That's when I tried to struggle my way out. And that's--

Q: Where was his hands at?

A: Around my neck, like this. He had me pinned against the wall, the corner of the wall in the hallway.

Q: What did you do?

A: That's when I freed my hands and searched for the gun and I shot one time. But he didn't release me. He kept pushing on me. That's when I felt scared for my life and I didn't know what to do, so I started shooting again.

Q: How many times did you shoot?

A: Three times.

Q: That was after the first shot?

A: That was after, yes, it was after the first.

Q: Okay. And were the shots all in succession and right away?

A: Yes.

Q: Or were they separate?

A: No, they were altogether.

Defendant's version of events was corroborated by a prosecution witness who saw the shooting. Accordingly, where the evidence was undisputed that defendant was not in a position to retreat, we

conclude that he was not deprived of a fair trial by the court's failure to give CJI2d 7.17, the "no duty to retreat" instruction.

Defendant next argues that the trial court erred in instructing the jury when it referred to the first-degree murder statute on three occasions in defining second-degree murder and when it informed the jury that the lesser offense of careless, reckless or negligent discharge of a firearm is a misdemeanor. Because defendant failed to preserve this issue for review by objecting in the lower court, our review is limited to a determination whether relief should be granted in order to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545, 553; 494 NW2d 737 (1993). Viewing the record as a whole, we conclude that no error occurred by the trial court referencing the first-degree murder statute so as to provide context to the instructions on the charged offense of second-degree murder. Also, because we find on these facts that defendant was not entitled, in the first instance, to the instruction on the misdemeanor offense of reckless/negligent discharge of a firearm, we conclude that manifest injustice has not been shown. *Id.*

Lastly, we find that defendant was not deprived of a fair trial by the medical examiner's references to homicide being the result of a deliberate act. Defendant's defense at trial was one of self-defense, therefore, the characterization of the homicide as a "deliberate act" as opposed to an accident, was not inconsistent with defendant's theory of the case. Moreover, during cross-examination of the medical examiner, defense counsel clarified for the jury that the witness was testifying regarding the medical, rather than the legal, definition of homicide. Accordingly, we find no error.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Robert P. Young, Jr.

/s/ James M. Batzer