

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENT JONES,

Defendant-Appellant.

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UNPUBLISHED

January 23, 2001

No. 218907

Wayne Circuit Court

LC No. 98-007359

Before: Saad, P.J., and Griffin, and R. B. Burns\*, JJ.

PER CURIAM.

Defendant appeals as of right from his voluntary manslaughter conviction, MCL 750.321; MSA 28.553, following a jury trial. Defendant was sentenced to a prison term of seven to fifteen years. We affirm.

Defendant argues the court erred by instructing the jury that he had a duty to retreat and by failing to sua sponte give the “no duty to retreat” instruction set forth in CJI2d 7.17. However, our review of the record reveals that defendant expressly acquiesced in the instructions the court gave, including the instruction regarding the duty to retreat. A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). To hold otherwise would allow defendant to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Therefore, we will not review defendant’s contention that the court erred by instructing the jury that defendant had a duty to retreat.

To the extent that defendant argues the trial court erred by failing to sua sponte instruct the jury that defendant had no duty to retreat, CJI2d 7.17, we find the claimed error does not establish grounds for reversal. Under certain circumstances, a trial court is in fact obliged to sua sponte instruct the jury with respect to the no retreat rule, even when a defendant fails to request it. *People v Godsey*, 54 Mich App 316, 320; 220 NW2d 801 (1974). See also *People v Paxton*, 47 Mich App 144, 149; 209 NW2d 251 (1973). However, error requiring reversal exists only where a trial court fails to instruct the jury that a person has no duty to retreat in one’s own home and such instruction is “appropriate.” *People v Fisher*, 166 Mich App 699, 710-711; 420 NW2d

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

858 (1981), rev'd on other grounds after second remand, *People v Fisher*, 442 Mich 560; 503 NW2d 50 (1993). “The instruction is appropriate where a person is assaulted in his own home and where the degree of force used is necessary for the defense of his person.” *Id.* [Emphasis added.]

Moreover, it is well established that for the defense of self-defense to be available, a defendant charged with voluntary manslaughter cannot be the aggressor, must be under a reasonable belief that he is in imminent danger of great bodily harm or death, and must have attempted to retreat first if safely possible before using reasonable force. *People v Statkiewicz*, 247 Mich 260, 265; 225 NW 540 (1929); *People v Bright*, 50 Mich App 401, 406; 213 NW2d 279 (1973). Further, the degree of force must be proportional to the attack and the use of force must cease when its goal is attained. *Kent v Cole*, 84 Mich 579, 581; 48 NW 168 (1891). CJI2d 7.17 also makes clear that even when a defendant has no duty to retreat, i.e., if assaulted in his dwelling, *Pond v People*, 8 Mich 150, 177 (1860), he may only use as much force as honestly and reasonably believed necessary at the time to protect himself. See also CJI2d 7.15(5).

We are cognizant of the fact that in a recently released decision, *People v Geronimo Canales*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 221452, issued 12/12/00), this Court held that “the porch is part of the home for purposes of the no retreat rule. . .” (Slip op p 3.) Here, the confrontation between defendant, his brother, and the victim occurred on the front porch of defendant’s home. We nonetheless conclude the trial court did not err in failing to sua sponte instruct the jury regarding the no retreat rule under the present circumstances. Such an instruction was not appropriate in light of the proofs clearly demonstrating that defendant used excessive force, disproportional to what was necessary to repel the victim, and which did not cease when the goal of self-defense was attained.

The evidence at trial showed that defendant went out to the front porch to assist his brother in fighting the victim after the victim attempted to forcibly enter defendant’s home. Together, defendant and his brother held the victim up as they repeatedly stabbed him with a butcher knife. The investigating police officers testified that the victim was not struggling when they arrived and that when they ordered defendant and his brother to release the victim, the victim fell to the ground; his intestines were protruding from inside his body. The victim had suffered from over twenty stab wounds, some of which were inflicted in his back. Accordingly, even if defendant had no duty to retreat from his home, he acted unreasonably and used unnecessary force in stabbing the victim, with the help of his brother, over twenty times. Under these circumstances, the defense of self-defense was unavailable to defendant and, therefore, the issue of retreat was irrelevant.

Next, defendant argues that defense counsel was ineffective for failing to object to the instructions given and failing to request the giving of a “no duty to retreat” instruction. We disagree.

Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). A claim of ineffective assistance of counsel raises a

constitutional claim. *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999). Appellate courts address constitutional issues under a de novo standard of review. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999).

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and also that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Prejudice exists where a court can conclude that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In light of our analysis of defendant's first issue, defendant cannot show prejudice and his claim of ineffective assistance fails.

Defendant next argues that the court erred by rereading CJI2d 16.9 rather than CJI2d 16.8 and 16.9 in combination when the jury expressed confusion and requested a definition for manslaughter. We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Assuming without deciding that instructional error occurred, reversal is unwarranted because the jury instructions read as a whole adequately and fairly placed before the jury the elements of voluntary manslaughter and the requirements of self-defense, and were therefore sufficient to protect defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996); *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

Finally, defendant argues that the jury's finding of guilt was against the great weight of the evidence. We disagree.

A trial court's decision on a motion for new trial based on the great weight of the evidence is reviewed for an abuse of discretion. In reviewing the motion, an appellate court may not resolve issues of credibility. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Motions for new trial are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998). The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Our review of the record reveals that the evidence in this case neither preponderates heavily against the verdict nor would a miscarriage of justice occur if the verdict is allowed to stand. There was competent evidence to support defendant's conviction of voluntary manslaughter and the jury's rejection of defendant's self-defense theory. As previously noted, defendant and his brother stabbed the victim over twenty times in the front and back, to the extent that his "body parts [were] hanging out." The victim, who was not resisting when the police arrived, fell to the ground immediately when the police ordered defendant and his brother

to let him go. Therefore, the verdict was not against the great weight of the evidence, and the court did not abuse its discretion by denying defendant's motion for new trial.

Affirmed.

/s/ Henry William Saad  
/s/ Richard Allen Griffin  
/s/ Robert B. Burns