

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH M. LEWIS,

Defendant-Appellant.

---

UNPUBLISHED

July 23, 1999

No. 207354

Oakland Circuit Court

LC No. 97-152592 FC

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court sentenced defendant to four to ten years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court reversibly erred in instructing the jury on the duty to retreat, because the incident occurred in defendant's apartment. Defendant contends that the erroneous instruction was confusing and misleading because it invited the jury to find that he may have had a duty to retreat when, as a matter of law, he had no duty to retreat from his own dwelling. However, defendant failed to object to the jury instructions at trial. Therefore, this unpreserved issue will be reviewed only to prevent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

We find no manifest injustice in this case. The duty to retreat instruction was proper because the latter part of the assault occurred on the sidewalk in front of defendant's apartment complex and not within his dwelling. See *United States v Arboleda*, 633 F2d 985, 992 (CA 2, 1980), quoting *Commonwealth v Thomas*, 358 Mass 771; 267 NE2d 489, 491 (1971) (in the context of a modern urban multifamily apartment house, the area within the curtilage is limited and cannot reasonably be said to extend beyond an individual's own apartment and separate areas subject to his or her exclusive control). Thus, the instructions as a whole fairly presented defendant's self-defense theory to the jury and sufficiently protected defendant's rights. See *People v McIntire*, 232 Mich App 71, 115-116; 591 NW2d 231 (1998). After reading the general instructions on the use of deadly force in self-defense and the duty to retreat, the trial court also instructed the jury that a defendant has no duty to

retreat from his own dwelling. Therefore, the jury was adequately instructed on the duty to retreat and the appropriate self-defense standard in situations where the assault occurs both within and outside a defendant's dwelling.

In a related argument, defendant requests, for the first time on appeal, that this Court remand for an evidentiary hearing to determine whether defense counsel was ineffective for failing to object to the allegedly erroneous instruction. However, defendant did not file a motion to remand with this Court within the time provided for filing his appellate brief. MCR 7.211(C)(1). Nor did defendant file a motion for a new trial or an evidentiary hearing below. Therefore, our review is limited to the record below. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Because the instructions were proper, fairly presented the issues to the jury, and sufficiently protected defendant's rights, defense counsel was under no obligation to assert a futile objection to them. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Therefore, defendant has failed to establish that counsel's failure to object to the instructions was objectively unreasonable or caused him prejudice. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Finally, defendant argues that his four-year minimum sentence is disproportionate. We disagree. Defendant's sentence was within the recommended guidelines' range, and therefore, is presumptively proportionate. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). In light of defendant's brutal attack of the victim, in which he kicked, beat, and stabbed the victim twenty-three times, we find that defendant's employment, lack of criminal history, and claim of self-defense do not present unusual circumstances sufficient to overcome this presumption. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994); see also *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). Therefore, we find that the trial court did not abuse its discretion in imposing defendant's sentence.

Affirmed.

/s/ Richard A. Bandstra  
/s/ William C. Whitbeck  
/s/ Michael J. Talbot