

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUSTIN JAMES MILLER,

Defendant-Appellant.

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UNPUBLISHED

October 14, 2003

No. 241757

Branch Circuit Court

LC No. 01-117457-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317 and was sentenced to a term of twenty-nine to fifty years imprisonment. He appeals of right and we affirm.

After defendant had a fight with his girlfriend, who was living with him in his grandmother's home, she left and went to a friend's home down the road. Defendant left the area and drank heavily during the day. That evening, a number of men, including the victim, George Back, were visiting the neighbor's house where defendant's girlfriend was. Defendant went to the neighbor's home and asked to speak with his girlfriend. She refused, and in anger, as he was walking away, he threw the liquor bottle he was carrying, making a loud noise.

Upon hearing the noise, a number of the men who were visiting came outside to see what was happening. Frank Bailey, one of the men at the house, entered into a face-to-face confrontation with defendant in which they were shouting at each other. It ended when Bailey head-butted defendant.

Defendant then went to his grandmother's home vowing to "take care of you'ns." As he ran down the street, Bailey pulled a sign from a nearby telephone pole, apparently to use for protection or as a weapon. Defendant entered the house and immediately came back out with an eight-inch kitchen knife in his hand.

Joseph Back, the victim's eighteen-year-old son, was the closest person to defendant, both of them standing in the middle of the street. George Back came up to his son and pushed him away yelling to defendant not to "mess with my son." As he did so, defendant turned and thrust the knife into George's stomach and then again into his chest, killing him. Defendant

confessed to the killing, but claimed it was in self-defense. The trial court, in a bench trial, concluded that neither self-defense nor imperfect self-defense was applicable.

On appeal, defendant argues that the trial court erred in its application of the law to the facts in its failure to find that defendant acted in self-defense. A defendant acts in self-defense if: (1) the defendant honestly and reasonably believes that he is in danger of death or great bodily harm; (2) the action taken appears to be immediately necessary at the time; and (3) the defendant is not the initial aggressor. *People v Riddle*, 467 Mich 116, 119-120; 649 NW2d 30 (2002). Once a defendant introduces evidence of self-defense, the prosecution then has the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). The trial court reasoned that: “[T]he defendant abandoned any reasonable argument for self-defense when he left the safety of his grandmother’s home and returned to the road, angry and upset with a knife in hand.”

We agree with the trial court. Once defendant entered his grandmother’s house, he could not thereafter honestly and reasonably believe that he was in imminent serious danger. The stabbing was also, therefore, not “immediately necessary.” Moreover, the initial altercation ended when defendant entered his grandmother’s house, and when he reappeared with the knife, he became the aggressor.

Furthermore, to assert self-defense, a defendant must not use more force than is reasonably necessary. *Riddle, supra*. Defendant, who was not attacked and who was not in any apparent danger, faced an unarmed victim, thrusting a knife with great force into the victim’s abdomen, not once but twice, each time to a depth of more than six inches, with the second blow being the blow that killed the victim. The amount of force was not reasonable in relation to any threat, nor was it immediately necessary. We hold that defendant has no grounds to claim self-defense.

Finally, in returning to the altercation from his grandmother’s house, defendant became a willing participant in the fight. “A participant in voluntary mutual combat will not be justified in taking the life of another until he is deemed to have retreated as far as safely possible.” *Id.* Defendant could have easily retreated a second time to his grandmother’s house, but he did not make any attempt to do so.

Defendant also argues that the trial court erred in not applying the doctrine of imperfect self-defense, a qualified defense used to mitigate a second-degree murder to manslaughter. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430. It applies only when a defendant would have been entitled to self-defense if he were not the initial aggressor. *Id.* Defendant’s argument fails here as well. As discussed, defendant was not entitled to claim self-defense.

Defendant next argues that his sentence is disproportionate to the crime committed, and therefore should be remanded for resentencing. Defendant does not cite any scoring errors nor does he cite any erroneous information relied upon by the trial court in sentencing. Defendant’s minimum sentence is within the legislative guidelines range. MCL 769.34(10) states:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing, absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Therefore, by legislative mandate there shall be no remand for resentencing.

However, defendant argues that MCL 769.34(10) is unconstitutional as violative of separation of powers, due process, and the right to an appeal. Our Supreme Court has already addressed the constitutionality of the above statute in *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001), where it stated:

[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the Judiciary.

Finally, defendant argues that because defendant's trial counsel failed to object to the appearance of three dismissed juvenile charges in defendant's presentence investigation report, counsel was ineffective. To establish an ineffective assistance of counsel claim, defendant must show that counsel committed an error resulting in prejudice to defendant. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). He cannot.

Defendant does not argue that the court relied upon the dismissed juvenile charges in determining his sentence. He asserts that the information regarding the changes would have been removed if challenged and thus, he "would not have been subjected to potential adverse repercussions as to his incarceration, treatment, and parole." However, nothing in the record indicates that the listing of the dismissed charges resulted in any "adverse repercussions" to defendant. Therefore, defendant has not shown that he was prejudiced.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Janet T. Neff  
/s/ Christopher M. Murray