

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATIQUEKA TANAYE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

February 8, 2005

No. 244903

Wayne Circuit Court

LC No. 01-012732

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

HOEKSTRA, P.J., (*dissenting*).

I respectfully dissent. I concur and join with the majority on the issues of the sufficiency of the evidence and the denial of an instruction on self-defense, but unlike the majority, I conclude that the failure to give a defense of others instruction was, at most, harmless error.

To support the giving of an instruction for the defense of others, the evidence must support a finding that defendant honestly and reasonably believed that her children were in danger of being killed or seriously hurt, and honestly and reasonably believed that the use of deadly force was immediately necessary for their protection. *People v Helfin*, 434 Mich 482, 502; 456 NW2d 10 (1990); CJI 2d 7.21. For a claim of defense of others, the third party steps into the shoes of the individual threatened. *Id.* at 511-512 n 26. Further, a claim of defense of others requires that the defendant acted in response to an assault. *City of Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999).

Here, the only evidence that remotely supported giving a defense of others instruction was defendant's testimony on direct examination that she shot her gun into the air as the victim drove off in a reckless manner in the direction of her children. However, on cross-examination defendant repudiated that testimony and instead maintained that the victim's car was still in her driveway when she fired and that the car drove off after she fired the shot. Under these circumstances, even if it was error not to instruct on defense of others, the error was not outcome determinative and therefore was harmless. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). (When the failure to give a requested instruction is error, it amounts to nonconstitutional preserved error that is harmless unless a defendant persuades the reviewing court that it is more probable than not that the error was outcome determinative.)

I would affirm.

/s/ Joel P. Hoekstra