

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 13, 2013

v

CARLOS JAMES VASQUEZ,

Defendant-Appellant.

No. 311759
Ingham Circuit Court
LC No. 11-000910-FH

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Carlos Vasquez of felonious assault, MCL 750.82. Defendant's conviction is based on his threats to stab a gas station employee with a box cutter when the employee instructed defendant to leave the business premises. Defendant challenges the trial court's refusal to instruct the jury on self-defense. Because the instruction was not supported by the evidence, we affirm.

I. BACKGROUND

On October 7, 2011, defendant was allegedly panhandling outside a Speedway gas station in Lansing. Customers complained that defendant's behavior was hostile and threatening. The gas station manager, Clint Dickerson, and an employee, Minette Jackson, approached defendant and instructed him to leave the property. Defendant refused. When Dickerson stated his intent to call the police, defendant pulled a box cutter from his back pocket. Defendant pointed the box cutter at Dickerson and Jackson, which actually could have supported two felonious assault charges. Dickerson followed through on his threat and called the police. Defendant fled the scene on foot and was arrested a few blocks away.

At trial, defendant theorized that the station manager failed to identify himself and began "yelling at [him] very forcefully, frightening him." Based on this theory, defendant asked the court to instruct the jury on self-defense. Defendant presented no evidence, however, supporting this theory. And the testimony of the prosecution witnesses in no way suggested that defendant was justified in his actions. The trial court therefore denied defendant's request.

Fifty-three minutes into deliberations, the jury sent a note to the judge asking, "Is there a legal scenario where the Defendant could pull out a knife in the matter it was testified he did?" The trial judge responded by instructing the jury:

[I]f there were a legal justification that applied to this case then I would have given you instruction on it so you could apply that law. The instructions that I have given you are all of the law there is that you are to apply to this case. And, with that I will send you back to the jury room to resume your deliberations.

The jury reached a guilty verdict nine minutes later.

II. ANALYSIS

Defendant's sole contention on appeal is that the trial court violated his constitutional rights to a properly instructed jury and to present a defense by refusing to instruct the jury regarding self-defense. We review de novo instructional errors involving questions of law. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). We review for an abuse of discretion a trial court's determination whether a jury instruction applies to the facts of a case. *Id.* An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A "defendant is entitled to have a properly instructed jury consider the evidence against him." *Dupree*, 486 Mich at 712 (quotation marks and citation omitted). And a trial court must give a requested jury instruction if supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Self-defense is an affirmative defense that legally "justifies otherwise punishable criminal conduct . . . 'if the defendant honestly and reasonably believes'" that he is in immediate danger of unlawful bodily harm and that use of a reasonable amount of force is necessary to avoid this danger. *Dupree*, 486 Mich at 707, quoting *Riddle*, 467 Mich at 127. The Self-Defense Act (SDA), MCL 780.971, *et seq.*, codifies this common law rule. MCL 780.972(2) states:

An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.^[1]

The defendant bears the burden of "producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exists." *Dupree*, 486 Mich at 709-710.

¹ The SDA replaced the common-law rule of self-defense that precluded a defendant from raising the defense if he was the first aggressor or if he could have safely retreated from the situation. See *People v Turner*, 37 Mich App 226, 229; 194 NW2d 546 (1971) (outlining the elements of the common-law defense).

Defendant asserts that the jury's question during deliberation "is evidence that the burden of production had been met." He further contends that the evidence could establish his fear for his safety given that "he was outnumbered by Dickerson and Jackson" and because the pair was screaming at defendant within close range. "Any assault from the employees under these circumstances," defendant argues, "could have easily ended with [defendant] tumbling into traffic." Defendant points to the following testimony of Dickerson regarding his "advance[ment]" against him and how defendant was moved from the parking lot to the sidewalk:

It wasn't cut and dry. It wasn't like he just—I walked up and he just went all the way to the sidewalk. We were just kind of both moving, shifting back and forth for a bit. And, eventually I told him, you know, I told him numerous times that it was private property. He kept yelling at me saying it was private. This went back and forth for, you know, quite some time. We were moving, not only north and south, but kind of east and west too. I mean, it wasn't—we weren't just standing still.

Defendant also points to Dickerson's "stern kind of stance" during the confrontation. Defendant conveniently omits evidence that Dickerson and Jackson were forced to drive defendant from the property because he refused to leave, while swearing and yelling at them.

First, we reject the prosecution's claim that defendant was not entitled to resort to self-defense because he was engaged in the commission of a crime. Panhandling is prohibited by MCL 750.167(1)(h). However, the prosecution presented no evidence that defendant was actually panhandling at the gas station. Rather, Dickerson and Jackson testified regarding the statements of customers, who were not presented as witnesses, to give context to their decision to approach defendant. Such hearsay evidence would have been insufficient to convict defendant of the uncharged crime of panhandling and should not be used against him in deciding whether to instruct the jury on self-defense.

Yet the record evidence is far too tenuous to support that he "honestly and reasonably believe[d] that the use of [non-deadly] force [was] necessary to defend himself . . . from the imminent unlawful use of force by another individual." Dickerson witnessed defendant speaking hostilely and aggressively to a gas station customer. Dickerson testified that he had seen defendant at the gas station before. Although Dickerson was not wearing a uniform, he was wearing a nametag. And Jackson was wearing a uniform with the Speedway logo on it. Accordingly, defendant's claim that he was unaware that Dickerson and Jackson were gas station employees with the right to oust him from the property is disingenuous. There is no evidence that Dickerson or Jackson threatened to use force against defendant; the only threat made was to contact the police. As defendant could not reasonably believe that Dickerson and Jackson were about to use unlawful force against him, he could not reasonably believe that he had the right to threaten them with a box cutter.

We also reject defendant's unpreserved claim that he was denied his constitutional right to present a defense. Because defendant did not preserve this constitutional claim, our review is limited to plain error affecting defendant's substantial rights. *People v Shafer*, 483 Mich 205, 219-220; 768 NW2d 305 (2009).

A defendant's right to present a defense is a fundamental component of due process. *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). However, this right is not absolute. *Id.* Instead, the Sixth Amendment grants defendants "a meaningful opportunity to present a complete defense." *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011) (quotation marks and citation omitted). Defendants must conform to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence." *Chambers*, 410 US at 302. For example, in *Orlewicz*, this Court held that the trial court's exclusion of psychiatric testimony did not violate the defendant's right to present a defense because it was inadmissible under MRE 401. Defendant here was not entitled to a jury instruction on self-defense because he did not offer evidence of each of the statutory elements of self-defense. Therefore, the trial court did not violate defendant's constitutional rights by refusing to give that instruction.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher