STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAVANNA NICHOLE BRADLEY,

Defendant-Appellant.

UNPUBLISHED
May 20, 2003

No. 240338
Oakland Circuit Court
LC No. 00-173707-FH

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

PER CURIAM.

Defendant appeals by right her conviction of first-degree home invasion, MCL 750.110a, after a joint jury trial with her codefendant, Mattie Fudge. Defendant argues that the prosecutor failed to present sufficient evidence to support her conviction and that the trial court erred by not instructing the jury on self-defense. We affirm.

This case grew out of a feud between two women, Nicole Carey, a friend of defendant, and Shilia Pennyman, a friend of the victim. Both women had given birth to a child fathered by the victim's brother. The prosecutor theorized that defendant and Fudge entered the victim's residence without permission with the intent to assault the victim. Defendant, through counsel, admitted that she went to the victim's residence to confront her with her suspicion that the victim had broken a window of defendant's car. Defense counsel also admitted that defendant entered the victim's home without permission "to get a good explanation" of the broken car window. Likewise, counsel for Fudge acknowledged that his six-foot three-inch, 253-pound client entered the victim's residence without permission along with defendant. Both denied intending to assault the victim.

Defendant first argues that the prosecutor failed to present sufficient credible evidence that defendant intended to commit a felony or assault when she entered the victim's residence. We disagree.

A claim that evidence at trial was insufficient to support a conviction is an issue of law reviewed de novo, *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999), viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could have found all of the elements of the offense were proved beyond a reasonable doubt, *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v*

Wolfe, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). The trier of fact may find all of the elements of an offense beyond a reasonable doubt from circumstantial evidence and reasonable inferences therefrom. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). This Court's review of the sufficiency of the evidence must be deferential with all reasonable inferences, resolution of evidence or credibility conflicts made in favor of the jury verdict. *Id*.; *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Further, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *Nowack, supra.*

The home invasion statute that defendant was charged with violating was amended by 1999 PA 44, effective October 1, 1999, to provide:

> (2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling. [MCL 750.110a(2).]

The statute requires no judicial interpretation as the elements of the offense are clearly expressed. *People v McCrady*, 244 Mich App 27, 31-32; 624 NW2d 761 (2000). The elements of first-degree home invasion applicable to the instant case are: (1) that the defendant broke and entered a dwelling or entered a dwelling without permission; (2) that either (a) when the defendant entered the dwelling, she intended to commit an assault, or (b) that when the defendant entered, was present in, or was leaving the dwelling, she committed the offense of assault; and (3) that while the defendant was entering, was present in, or was leaving the dwelling, either of the following circumstances existed (a) she was armed with a dangerous weapon or (b) another person was lawfully present in the dwelling. CJI2d 25.2a; CJI2d 25.2c; *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002).

Here, the first and third elements were undisputed, that is, defendant entered the victim's home without permission, and the victim was lawfully present at the time. As to the second element, the victim testified that defendant assaulted her in her kitchen by trying to hit her. The victim's testimony in this regard was corroborated by Fudge's second statement to the police that upon entering the victim's residence a fight ensued between defendant and the victim. This evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that defendant assaulted the victim while present in the dwelling, proving the second element. Further, because of the difficulty of proving a person's state of mind, proof of intent may be satisfied by minimal circumstantial evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Thus, a rational jury could

reasonably have inferred that defendant possessed the intent to commit an assault when she entered the victim's home from: (1) defendant's admitted purpose of confronting the victim about a broken car window; (2) bringing three companions, including Fudge, a very large woman unknown to the victim; (3) defendant and Fudge's rapidly entering the victim's home without permission; (4) both defendants lying to the police about where the incident had occurred; and, (5) that a fight between the victim and defendant occurred.

In sum, the evidence when viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to have found all of the elements of the offense were proved beyond a reasonable doubt. *Nowack, supra* at 400; *Wolfe, supra* at 515.

Defendant also argues that the prosecutor failed to disprove beyond a reasonable doubt that she did not act in self-defense. We disagree.

Once evidence that supports a claim of self-defense is introduced, the prosecutor bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *People v Jackson*, 390 Mich 621, 625-626; 212 NW2d 918 (1973); *People v Elkhoja*, 251 Mich App 417, 443; 651 NW2d 408 (2002), modified on other grounds 467 Mich ___; 658 NW2d 153 (2003); CJI2d 7.20. However, in this case, the evidence did not support defendant's claim of self-defense; consequently the trial court correctly concluded that self-defense was unavailable, as more fully discussed, *infra*. Thus, the prosecution had no burden to disprove that defendant did not act in lawful self-defense.

Apparently recognizing that she had no claim of lawful self-defense, defendant argues that the doctrine of "imperfect self-defense" applies by analogy to the instant case. Defendant's argument is without merit.

This Court has consistently limited application of the doctrine of "imperfect self-defense" to homicide cases where the defendant would have been able to assert self-defense but for his action as the initial aggressor. *People v Kemp*, 202 Mich App 318, 323-324; 508 NW2d 184 (1993); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992); *People v Amos*, 163 Mich App 50, 56-57; 414 NW2d 147 (1987); *People v Deason*, 148 Mich App 27, 32; 384 NW2d 72 (1985); *People v Vicuna*, 141 Mich App 486, 493; 367 NW2d 887 (1985). Moreover, this Court has specifically declined to extend the doctrine to cases where no homicide has occurred. *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988), modified on rehearing 176 Mich App 714; 440 NW2d 107 (1989). Thus, the doctrine of "imperfect self-defense" has no application to the instant case.

Next, defendant argues she was deprived of a fair trial and denied her right to have the jury instructed on law and her theory of the case when the trial court declined to instruct the jury on self-defense. Again, we disagree.

Defendant preserved this issue by requesting that the trial court instruct the jury on (nondeadly) self-defense. MCL 768.29; *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Smith*, 396 Mich 362, 363; 240 NW2d 245 (1976).

The trial court has a duty to instruct the jury on the law applicable to the case, MCL 768.29; *People v Cornell*, 466 Mich 335, 341; 646 NW2d 127 (2002); *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996), and alleged error in failing to do so is reviewed de novo on appeal, *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Imperfect instructions will not require reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.*; *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Criminal jury instructions must address each element of the offense charged, as well as defenses and theories of the parties that are supported by the evidence. *Riddle, supra* at 124; *Canales, supra* at 574. Conversely, instructions that lack evidentiary support should not be given. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999); *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). The defendant bears the burden of showing that as a result of the alleged error when weighed against the facts and circumstances of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *Riddle, supra* at 124-125; *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000).

The touchstone of any claim of self-defense is necessity. *Riddle, supra* at 127. Thus, the requirements of lawful deadly self-defense are that: (1) the defendant honestly and reasonably believed that she was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary (the defendant may use only the amount of force necessary to defend herself); and (4) the defendant was not the initial aggressor. *People v Heflin*, 434 Mich 482, 509 n 23; 456 NW2d 10 (1990); *Deason, supra* at 31. A defendant's honest belief in the danger need not be accurate in fact, *People v Burkard*, 374 Mich 430, 437-438; 132 NW2d 106 (1965), but must be reasonable, *Heflin, supra* at 502-503; *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995), as measured by the circumstances as they appeared to the defendant rather than as they actually existed, *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982). For nondeadly self-defense, the real or apparent danger feared may be less than death or serious bodily harm but the rule of necessity allows a defendant to use only the degree of force necessary and appropriate to the attack. CJI2d 7.22; *Deason, supra.*

In the present case, the undisputed evidence established that defendant unlawfully entered the victim's home to initiate a confrontation over a broken car window. The trial court therefore determined that defendant was an aggressor who had forfeited her right of self-defense. The trial court ruled on defendant's request to instruct on self-defense as follows:

> I think that if the situation had been that they were outside and it's not someone's home that had been broken into by the two defendants, I would permit that self-defense, because I certainly think the evidence would permit it. However, I think because they went into the house without consent, that the self-defense is not available.

The trial court correctly ruled. "A person who, by provocative behavior, initiates a confrontation, even with no intention of killing [the] other person, cannot assert a claim of self-defense." 40 Am Jur 2d, Homicide, § 148, p 618-619. "A defendant forfeits the right of self-defense if he or she provokes another to attack the defendant, so that the defendant will have the

pretext for killing or inflicting harm upon the victim under the guise of self-defense." 40 Am Jur 2d, Homicide, § 149, p 620. Michigan law is in accord. Our Supreme Court in *Heflin, supra* at 509, opined that "an act committed in self-defense . . . in which defendant was the initial aggressor does not meet the elements of lawful self-defense." See also, *People v Minor*, 213 Mich App 682, 686 n 1; 541 NW2d 576 (1995) (a robber or other wrongdoer engaged in felonious conduct has no privilege of self-defense), and *Kemp, supra* at 323 (self-defense is not available when a defendant is the aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim). Thus, CJI2d 7.22(6) correctly states that a requirement for lawful self-defense is that "the person claiming self-defense must not have acted wrongfully and brought on the assault." *Deason, supra*. The trial court did not err by declining to instruct the jury on self-defense. *People v Van Camp*, 356 Mich 593, 600; 97 NW2d 726 (1959) (self-defense properly withdrawn from the jury where it was undisputed that the defendant was the aggressor throughout the incident and no record support existed that defendant ever considered he was in danger).

Moreover, even if the trial court erred by failing to instruct the jury on self-defense, defendant has failed to establish that the error warrants reversal because it is not more probable than not that the error was outcome determinative. MCL 769.26; *Riddle, supra* at 124-125. One alternative form of first-degree home invasion is not dependent on the commission of an assault but rather only requires that the defendant possess the intent to commit an assault at the time of entry into the dwelling. MCL 750.110a(2). As noted, *supra*, there was sufficient evidence for a rational jury to convict defendant based on finding that defendant possessed the intent to commit an assault upon entering the victim's residence without permission before any altercation occurred in the kitchen of the victim's home. Proving that an assault occurred in the kitchen, while evidence of defendant's intent, is not necessary to sustain a conviction for this form of home invasion. Thus, any error by not instructing on self-defense was not outcome determinative as to this form of first-degree home invasion. MCL 769.26; *Riddle, supra*.

Furthermore, in light of the weight and strength of the evidence, the alleged error was not outcome determinative as to the alternative form of first-degree home invasion that requires the commission of an assault in the dwelling after entry without permission. Not only did the undisputed evidence establish that defendant failed to satisfy a requirement of lawful self-defense that "the person claiming self-defense must not have acted wrongfully and brought on the assault," CJI2d 7.22(6), but defendant also failed to exercise a readily available safe avenue of retreat - - exiting the victim's home by the same path she entered it. In this regard, the pertinent standard jury instruction provides:

> A defendant who trespasses on someone else's property does not lose all right to self-defense. If someone else assaults her with deadly force, the defendant may act in self-defense, but only if she retreats if it is safe to do so. [CJI2d 7.19.]

Defendant's reliance on our Supreme Court's holding in *Riddle, supra* at 119, that "a person is *never* required to retreat from a sudden, fierce, and violent attack, nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon," (emphasis in the original), is misplaced. Our Supreme Court made clear its discussion applied to "one who is free from fault," *id.*, or a "nonaggressor" *id.* at 120, and specifically noted that, "[t]he

principles articulated in this opinion apply solely to those who are otherwise privileged to exercise deadly force in self-defense," *id.* at 120 n 8. In the light most favorable to defendant, the circumstance that existed in the kitchen of the victim's home in this case might be described as a "sudden affray," or a "chance medley," as to which our Supreme Court opined that "an affirmative obligation to retreat [is] applied to a voluntary participant in mutual combat," *id.* at 132, and quoted Perkins & Boyce, Criminal Law (3d ed), p 1121:

> One who was the aggressor in a chance-medley (an ordinary fist fight, or other nondeadly encounter), or who culpably entered into such an engagement, finds that his adversary has suddenly and unexpectedly changed the nature of the contest and is resorting to deadly force. *This . . . is the only type of situation which requires "retreat to the wall."* Such a defender, not being entirely free from fault, must not resort to deadly force if there is any other reasonable method of saving himself. Hence if a reasonable avenue of escape is available to him he must take it *unless he is in his "castle"* at the time. [*Riddle, supra* at 133; emphasis supplied by our Supreme Court.]

Here, defendant was not in her "castle." She was in the victim's castle and created a situation that instigated the victim to use force. In this situation, defendant had a duty to retreat by the safe means readily available to her by simply retracing her path of entry, before self-defense would be available to her. CJI2d 7.19; *Kemp, supra* at 323.

In summary, we do not believe the trial court erred by not instructing the jury on self-defense. Moreover, even were it error, in light of the weight and strength of the evidence, the alleged error does not warrant a new trial because it does not affirmatively appear more probable than not that the error was outcome determinative. MCL 769.26; *Riddle, supra* at 124-125.

We affirm defendant's conviction and sentence.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra