STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2003
v	No. 234249 Allegan Circuit Court
JOHN STEVEN WILLIAMS, Defendant-Appellant.	LC No. 00-011717-FC

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant was charged with assault with intent to murder Antonio Jackson, MCL 750.83, with assaulting Jackson's friend, Cyrel Brandon, with a dangerous weapon, MCL 750.82, and with domestic violence on Javetta Richardson, MCL 750.81(2). The trial court dismissed the charge concerning Brandon but the jury convicted defendant of assault with a dangerous weapon on Jackson and domestic violence. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to a prison term of 3 to 15 years and to a concurrent 90-day jail term for his domestic violence conviction. Defendant appeals as of right. We affirm.

The charges arose out of an altercation between defendant and Richardson followed by a separate roadside confrontation between defendant, Richardson, Jackson, and Brandon where defendant stabbed Jackson with a pocket knife. Defendant first claims the trial court erred when it did not grant his request to instruct the jury in accordance with CJI2d 7.22, use of nondeadly force in self-defense, rather than CJI2d 7.15, use of deadly force in self-defense. We disagree.

We review alleged instructional error de novo while not examining the alleged error in isolation but only as part of the entire body of instructions. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *People v Kelly*, 423 Mich 261, 270-271; 378 NW2d 365 (1985); *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002); *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Jury instructions in a criminal case 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*, 467 Mich 124; *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Instructions that lack evidentiary support should not be given. *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). The appellant 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*, 124-125; *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000).

Here, the trial court instructed the jury that self-defense applied to the main charge using standard criminal jury instructions CJI2d 7.15 (use of deadly force in self-defense), CJI2d 7.16 (duty to retreat to avoid using deadly force), CJI2d 7.24 (self-defense against persons acting in concert) and CJI2d 7.20 (burden of proof -- self-defense). Defendant argues that the phrase in CJI2d 7.16, *a person must avoid using deadly force if he can safely do so,* and the phrase in CJI2d 7.24, *before using deadly force*, created a presumption that defendant in fact used deadly force.

Read as a whole, the trial court's instructions accurately stated the law that a person may kill or cause serious injury in self-defense. The requirements for lawful self-defense are that: (1) the defendant honestly and reasonably believed that he 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 used only the amount of force necessary to defend himself); and (4) the defendant was not the initial aggressor. *People v Heflin*, 434 Mich 482, 509 n 23; 456 NW2d 10 (1990); See also CJI2d 7.15 and CJI2d 7.18. A corollary to the requirement of immediate necessity is that the law generally imposes an obligation to avoid using deadly force where safe and reasonable to do so, including retreat, if retreat can be safely accomplished, except when in one's own home or the victim of a sudden, violent attack. *Riddle, supra*, 467 Mich 119, 142.

In this case, it was undisputed that defendant stabbed the victim with a folding pocket knife causing injury that was serious enough to result in exposing the victim's intestines, requiring fifteen staples to close the wound, and resulted in two and a half days' hospitalization. Defendant testified that he was scared when Richardson threatened to get her "little gang of friends" because of what he had seen them do and because he had also seen the victim "do some damage . . . to other people." Defendant further testified that he was struck by the victim and feared for his life and that he used his knife "just to scare back" the victim, Brandon, and Richardson. Although defendant denied that he acted with intent to hurt anyone, the prosecutor alleged and presented evidence that defendant acted with the intent to kill, and the trial court instructed the jury that the prosecutor had to prove such intent. In order to prove intent to kill, the prosecutor would obviously have to prove that the force used by defendant was deadly. Because instructions are to be read as a whole, rather than piecemeal, the trial court's instruction that the prosecutor must prove the intent to kill defeats defendant's contention that the court created a presumption that defendant used deadly force in its instruction on self-defense. Even if the jury believed the prosecutor's theory, before convicting defendant the prosecutor would still be required to prove beyond a reasonable doubt that defendant did not act in self-defense. CJI2d 7.20; *People v Elkhoja*, 251 Mich App 417, 443; 651 NW2d 408 (2002); *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Thus, because the prosecutor theorized that defendant acted with intent to kill, and presented evidence that he did, and defendant testified he acted out of fear for his life or of serious injury, the trial court merely fulfilled its duty to instruct the jury on the law of a theory or defense supported by the evidence. *Riddle, supra,* 467 Mich 124; *People v Ullah*, 216 Mich App 669, 677-678; 550 NW2d 568 (1996).

Under the concealed weapons statute, MCL 705.227, an ordinary pocket knife is not dangerous per se when carried for peaceful purposes but it may be dangerous when used "as a weapon of assault or defense." *People v Vaines*, 310 Mich 500, 506; 17 NW2d 729 (1945). See also *People v Lynn*, 459 Mich 53, 58-59; 586 NW2d 534 (1998), quoting *People v Brown*, 406 Mich 215, 222-223; 277 NW2d 155 (1979) (an instrument is a dangerous weapon under the concealed weapons statute when "used, or intended for use, as a weapon for bodily assault or defense."). After reviewing the record, it is clear that defendant used his pocket knife either for the purpose of an assault or for purposes of self-defense, and inflicted serious injury with it. Therefore, the knife in question must be considered a dangerous weapon. As such, the instruction of the jury on the law applicable to deadly self-defense was necessitated because a dangerous weapon was used in self-defense and its dangerous nature as manifested by its use was not eliminated because the knife in question was only a short-bladed pocket knife.

Because it is undisputed that defendant used a knife and that serious injury resulted, the trial court properly instructed the jury on the use of deadly force for self-defense. The issue facing the jury was not whether defendant used deadly force, but whether he honestly and reasonably believed his actions were immediately necessary. The trial court's instructions properly guided the jury on the law applicable to the facts of this case. If the jury had believed defendant's testimony, it could have found that defendant acted in self-defense, as instructed by the trial court. In any event, even if we had found error, it is not more probable than not that the alleged error was outcome determinative when weighed against the facts and circumstances of the entire case. MCL 769.26; *Riddle, supra*, 467 Mich 124-125; *Rodriguez, supra*, 463 Mich 473-474.

Next, defendant argues that the trial court erred by declining his request to instruct the jury on the misdemeanor offense of aggravated assault, MCL 750.81a(1). We disagree. Our Supreme Court held that MCL 768.32(1) is a substantive law adopted by the Legislature "in connection with the prevention and detection of crime and prosecution and punishment of criminals." *People v Cornell*, 466 Mich 335, 353; 646 NW2d 127 (2002), quoting *People v Piasecki*, 333 Mich 122, 143; 52 NW2d 626 (1952). See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). MCL 768.32(1) controls what charges a jury (or the trial court in a bench trial) may consider in a criminal case. In pertinent part, the statute provides:

> upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense. [MCL 768.32(1).]

The statute permits consideration only of an offense "inferior" to the charged offense, the test being whether "the lesser offense can be proved by the same facts that are used to establish the charged offense." *Cornell, supra*, 466 Mich 354, quoting *People v Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997). *Cornell* further held that MCL 768.32(1) permits jury consideration of offenses not contained in the charging document only if the lesser offense is necessarily included in the charged offense, not merely a cognate lesser offense. *Cornell, supra*, 354-355. An offense is necessarily included where all of its elements are also

contained in the charged offense. *Id.*, 354. Moreover, even if the lesser offense is necessarily included, it is not proper to so instruct the jury where the factual issues to be resolved are the same for the charged offense as they are for the lesser offense. *Cornell*, *supra*, 356. In other words, "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it."[1] *Id.*, 357. See also *Reese*, *supra*, 466 Mich 446.

Both aggravated assault and assault with intent to murder share the common element of an assault. Aggravated assault, however, clearly requires proof that the victim sustain a "serious or aggravated injury," an element not found in the greater offense. MCL 750.81a(1); *People v Chadwick*, 301 Mich 654; 4 NW2d 45 (1942); *People v Brown*, 97 Mich App 606, 610-611; 296 NW2d 121 (1980). Because aggravated assault contains an element not found in the greater offense of assault with intent to commit murder, it is only a cognate offense, not a necessary lesser included offense. Applying MCL 768.32(1) and the rule of *Cornell*, *supra*, and *Reese*, *supra*, to the case at bar, defendant's argument fails. We find that the trial court did not err when it declined to instruct the jury on the misdemeanor offense of aggravated assault. MCL 768.32(1); *Reese*, *supra*, 466 Mich 446; *Cornell*, *supra*, 466 Mich 354-355.

Last, defendant claims the trial court committed clear error warranting reversal by not instructing the jury concerning self-defense regarding the domestic violence charge. We disagree. Defendant failed to preserve this issue when he did not request a jury instruction relative to the domestic violence charge. 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). Where an alleged instructional error has not been preserved it is forfeited and appellate review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Aldrich*, *supra*, 246 Mich App 125. The test requires, (1) an error; (2) the error must be plain (i.e., clear or obvious); and (3) the error affected substantial rights (i.e., there must be a showing of prejudice or that the error was outcome determinative). *Carines*, *supra*, 763. Even where the test is satisfied, reversal is warranted "only when the plain, forfeited error result[s] in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

In the present case, the victim of the domestic violence denied she tried to stab defendant with arrows or anything else. However, according to witness Terrence Hensley, after the victim was pushed or fell to the ground, she tried to slap defendant with an old broken arrow. Another witness, Pauline Berry, testified that the victim swung and hit defendant with what she described as "a fishing rod or pole or something," and that the victim tried to run away but defendant

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[1] Further, to the extent of any conflict, our Supreme Court specifically overruled contrary prior decisions, including *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982); *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975); *People v Chamblis*, 395 Mich 408; 236 NW2d 473 (1975); and *Jones*, *supra*, 395 Mich 379. *Cornell*, *supra*, 357-358.

caught her and hit her in the face, knocking her to the ground. Paulette Berry, Pauline's twin sister, also testified that after the victim swung a "fishing rod or something" at defendant, she tried to run away but defendant caught her with his fist. Defendant testified that the victim came at him with a razor-tipped arrow. He stated, "I side swiped her [and] I'm really pissed off at this time and yes, I slapped her in the mouth." Defendant neither argued nor requested an instruction on self-defense regarding the domestic violence charge. Rather, counsel argued that the victim was not supposed to be around defendant and she provoked the situation.

The trial court has a duty to instruct the jury on the law applicable to the case. MCL 768.29; *Ullah, supra*, 216 Mich App 677. The court must instruct the jury on each element of the offense charged, as well as any defenses and the theories of the parties that are supported by the evidence. *Riddle, supra*; 467 Mich 124; *Wess, supra*, 235 Mich App 243. Here, the evidence did not support self-defense. The Berry twins each testified that after the victim tried to hit defendant with some object, she tried to flee but defendant pursued and struck her. Defendant's own testimony was not that he acted to protect himself but because he was "really pissed off." Thus, a self-defense instruction regarding the domestic violence charge was not supported by the evidence and was not consistent with defendant's theory of the case. Hence, there was no plain error affecting defendant's substantial rights when the trial court did not instruct the jury on self-defense relative to the domestic violence charge. *Aldrich, supra*, 246 Mich App 125. Moreover, the alleged error does not warrant reversal because our review of the record does not support a finding that defendant was actually innocent or that the alleged error seriously affected the fairness, integrity or public reputation of the trial independent of defendant's innocence. *Carines, supra*, 460 Mich 763, 774.

Affirmed.

/s/ Patrick M. Meter
/s/ Janet T. Neff
/s/ Pat M. Donofrio