STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2011
v	No. 296078 Montcalm Circuit Court
DALE EDWARD CUTLER, Defendant-Appellant.	LC No. 296078

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

SHAPIRO, J. (*dissenting*).

Because I conclude that defendant was entitled to the self-defense instruction and that the trial court's failure to provide it was not harmless beyond a reasonable doubt, I respectfully dissent.

The complainant's testimony in this case was compelling and more than sufficient for a jury to conclude that defendant purposefully and without excuse brutally assaulted the complainant because of his sexual orientation. Further, the jury was free to reject defendant's version of events. Nevertheless, on its face, defendant's testimony was clearly sufficient to support a self-defense instruction. Defendant testified that, while in a helpless position, i.e., asleep, he was sexually assaulted and, upon waking and resisting, he was punched in the face. According to defendant, the two then struggled and fell from the bed to the ground with defendant on top of complainant. Defendant claimed that when they hit the ground, the complainant's hold on him broke and that he then punched complainant four or five times because "I wanted to make sure he couldn't do anything to me." In my view, if the jury concluded that defendant had, in fact, been sexually assaulted and struck in the face, it should have been allowed to consider whether his actions thereafter constituted lawful self-defense.

The jury instructions themselves also support defendant's assertion that he was entitled to have the jury instructed on self-defense.[1] First, the use note for CJI2d 7.20 provides that the self-

[1] I recognize that Michigan Criminal Jury Instructions do not have the official sanction of our Supreme Court. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Nevertheless,

defense instruction "should be given where there is some evidence of self-defense. If there is *no* evidence of self-defense, no instruction on self-defense should be given" (emphasis in original). Here, defendant's testimony amounted to at least *some* evidence of self-defense. Accordingly, defendant was entitled to the instruction. In addition, CJI2d 7.22 provides, in relevant part:

> (2) . . . Remember to judge the defendant's conduct according to how the circumstances appeared to him at the time he acted.
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> * * *
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> (6) . . . When you decide whether the force used appeared to be necessary, you may consider whether the defendant knew about any other ways of protecting himself, but you may also consider how the excitement of the moment affected the choice the defendant made.

If the jury accepted defendant's testimony, it was for them to determine how the "circumstances appeared to him" and "whether the force used appeared to be necessary" in light of defendant's other options for defending himself and "the excitement of the moment." In addition, because self-defense only lasts as long as it seems necessary for the purpose of protection, the jury must determine what the appropriate amount of time is.

In my view, the majority parses defendant's testimony and the brief moments it describes with a level of precision that fundamentally ignores the setting and rapid timing of the events. Taking defendant's testimony as true, the majority nevertheless concludes as a matter of law that defendant's right to self-defense ended the instant that complainant's hold broke even though the two were in the midst of a struggle in the complainant's dark bedroom, had fallen from the bed to the floor, and seconds earlier defendant, according to his testimony, awoke to find himself being sexually assaulted and struck in the face. The same is true regarding the necessity of the multiple punches and wanting to keep the complainant from coming after him.

I respectfully suggest that the trial court and the majority each concluded *sub silencio* that defendant's testimony was not worthy of belief and it is this conclusion that underlies their rulings, not the conclusion that even if defendant's description of the events were to be believed, there was no basis for a self-defense finding. Having read the record, I can understand why the trial judge and the majority find the defendant's testimony suspect. However, it is neither for us nor the trial court to make credibility determinations; it is for the jury. Simply because a defendant appears to judges to lack credibility is not a basis to limit his or her right to have a jury consider and decide whether they find him credible.

I would expect that the majority would not have affirmed had the defendant been a woman. In that circumstance, I think the majority would readily recognize the injustice in not even permitting the jury to consider self-defense because taking the defendant's testimony as true, there was an instant, in the dark, after falling from a bed, and after being assaulted, that she

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they are "entrenched" in our jurisprudence and enjoy "widespread reliance." *People v Canales*, 463 Mich 1003; 624 NW2d 918 (2001) (CORRIGAN, C.J., *dissenting*).

could have foregone any violence, gotten up off the floor and hopefully escaped before being hit or sexually assaulted again.

Having concluded that defendant was entitled to the self-defense instruction, I would reverse defendant's conviction and remand for a new trial because I conclude that the error was not harmless. Indeed, given the evidence in this case, and the fact that we do not know whose testimony the jury believed, the trial court's decision not to give the self-defense instruction amounted to a directed verdict of guilty.

The failure to give a self-defense instruction constitutes non-structural constitutional error. *Taylor v Withrow*, 288 F3d 846, 851 (CA 6, 2002) ("[T]he right of a defendant in a criminal trial to assert self-defense is one of those fundamental rights, and that failure to instruct a jury on self-defense when the instruction has been requested and there is sufficient evidence to support such a charge violates a criminal defendant's rights under the due process clause."). In *People v Anderson*, 446 Mich 392; 521 NW2d 538 (1994), our Supreme Court held that for errors that violate the federal constitution, non-structural errors require the application of harmless beyond a reasonable doubt. *Id.* at 404-406.

The failure to give the instruction in this case cannot be considered harmless. As the United States Supreme Court held in *Neder v United States*, 527 US 1, 15; 119 S Ct 1827; 144 L Ed 2d 35 (1999), where an instruction has omitted an element of an offense, the test is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15, quoting *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967). Where the omitted element is uncontested, the error is harmless, but "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," the omission is not harmless. *Id.* at 19. Here, self-defense was a contested element and, as explained above, defendant raised sufficient evidence to support a finding that it was self-defense. Accordingly, the failure to provide the instruction cannot be considered harmless beyond a reasonable doubt and defendant is entitled to a new trial.

/s/ Douglas B. Shapiro