

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

March 2, 1999

Plaintiff-Appellee,

v

No. 202939

EASTER GILMORE,

Kent Circuit Court

LC No. 96-009569 FH

Defendant-Appellant.

Before: McDonald, P.J., and Hood and Doctoroff, JJ.

MEMORANDUM.

Defendant appeals of right from her conviction of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The charge arose out of a street altercation between defendant and Mary Perkins in which defendant contended that she stabbed Perkins in order to protect her daughter. Prior to trial, plaintiff moved to exclude evidence that approximately two years before the incident, defendant lost two children and her fiance in a fire. Defendant indicated that the evidence would go to her state of mind during the altercation. The trial court excluded the evidence, finding that a parent would be expected to act to protect a child, regardless of whether that parent had lost a child.

At trial Perkins admitted that during the incident she hit or pushed defendant's fourteen-year-old daughter Shawanda. Perkins maintained that she did not do so until after she had been stabbed. Defendant testified that when she and Perkins started fighting Shawanda attempted to separate them. Perkins pushed Shawanda. Defendant testified that she thought that she saw a knife in Perkins' hand. Defendant indicated that as a result of her fear that she would lose another child, she retrieved scissors from her car, made certain that Shawanda was out of harm's way, confronted Perkins, and then stabbed her.

The jury found defendant guilty as charged. The trial court sentenced defendant to two to ten years in prison.

On appeal, defendant argues that the trial court's exclusion of evidence of her loss of two children in a fire constituted an abuse of discretion and denied her the constitutional right to present a defense. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). To constitute lawful self-defense, the evidence must show that the defendant or the person the defendant was protecting was in imminent danger of death or serious bodily harm, and that the action taken appeared at the time to be reasonably necessary. The defendant's belief must be both honest and reasonable. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). Evidence that defendant lost two children under circumstances completely dissimilar to those that existed in this case would not tend to establish that she harbored an honest and reasonable fear for Shawanda's safety. This is especially true in light of the fact that defendant testified that before she stabbed Perkins, she made certain that Shawanda was out of the way of harm. The evidence sought to be introduced was not relevant to any fact in issue and was without probative force. MRE 401; see also *People v Brooks*, 453 Mich 511, 517-518; 557 NW2d 106 (1996).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is presumed to have afforded effective assistance. A defendant can overcome that presumption by showing that counsel's failure to perform an essential duty resulted in prejudice. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987).

Defendant's argument that trial counsel rendered ineffective assistance by failing to recognize that her diagnosis of post-traumatic stress disorder (PTSD) was admissible and by failing to attempt to introduce evidence of the diagnosis is without merit. The evidence that defendant lost two children under totally different circumstances was not relevant to the issues in this case. Exclusion of the evidence was not an abuse of discretion, and was at most harmless error. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998). Defendant was not prejudiced or denied a fair trial by exclusion of the evidence. *Strickland, supra*.

Affirmed.

/s/ Gary R. McDonald
/s/ Harold Hood
/s/ Martin M. Doctoroff