STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDERSON WALKER, JR.,

Defendant-Appellant.

UNPUBLISHED
April 16, 1999

No. 204711
Recorder's Court
LC No. 96-001099

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to thirty to forty-eight months' imprisonment for each of the felonious assault convictions, and two years' imprisonment for each of the felony-firearm convictions; however, the sentence for the second felony-firearm conviction was vacated. Defendant was ordered to serve concurrent sentences for the felonious assault convictions which will run consecutively to the felony-firearm sentence. Defendant now appeals as of right. We affirm.

On appeal, defendant first argues that he was denied his right to effective assistance of counsel because his trial counsel allegedly failed to have a handgun found near one of the victims tested for fingerprints and to have the victim's clothing tested for gun powder residue in an effort to buttress defendant's self-defense theory. We disagree.

Defendant failed to move for a new trial or an evidentiary hearing before the trial court. In addition, this Court denied defendant's motion to remand the case to the trial court for an evidentiary hearing. Accordingly, this Court's review of the issue is limited to errors apparent on the record below. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

In order to successfully assert a claim of ineffective assistance of counsel, the defendant must establish that (1) his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 121;

545 NW2d 637 (1996); *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Plummer, supra* at 308. A defendant must also overcome the presumption that the challenged conduct was sound trial strategy. *Johnson, supra* at 124; *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

We find that the record is devoid of any evidence to support defendant's allegation that he received ineffective assistance of counsel. First, given the absence of an evidentiary hearing below, there is no record of whether testing was indeed conducted on either the clothing or gun which proved unfavorable to defendant's self-defense argument. Similarly, the record does not disclose any evidence that an investigation of the clothing and gun would have revealed information beneficial to defendant. See *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Furthermore, defendant cannot overcome the presumption that counsel's decision not to have the gun and clothing tested was trial strategy. *Leonard, supra* at 592. There are several reasons that defense counsel may have chosen not to proceed with the testing. First, the information, even if favorable to defendant, was not exculpatory nor even very probative of defendant's self-defense theory because fingerprints on the gun and gun powder residue on the clothing would not demonstrate that defendant acted in self-defense when he shot the victim. In addition, the victim was shot by defendant in the back of the leg which suggests that the victim was retreating from defendant when he was shot, thereby undermining defendant's self-defense theory. Finally, defense counsel may not have pursued the testing of the gun and clothing because the testing may not have revealed information implicating the victim as the initial aggressor, which would essentially destroy defendant's theory of self-defense. Thus, after reviewing all of the evidence, defense counsel apparently decided that defendant's chances of acquittal were much better if he argued that a reasonable doubt existed as to defendant's guilt, rather than relying on the self-defense theory. The fact that defense counsel's strategy did not work does not establish ineffective assistance of counsel. *Plummer, supra* at 309. Moreover, although defendant may have disagreed with his counsel's trial strategy, a difference of opinion between defendant and defense counsel on trial tactics does not equate to ineffective assistance of counsel. *People v Cicotte*, 133 Mich App 630, 637; 349 NW2d 167 (1984). Therefore, we find no merit to defendant's claim.

Defendant next argues that the trial court committed reversible error when it failed to re-read the self-defense instruction to the jury after the jury requested "the definitions of all charges against defendant." We disagree. A trial court's refusal to issue a jury instruction will be reversed on appeal only if there has been an abuse of discretion. *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998).

This Court has consistently held that a trial court is not required to repeat instructions that the jury has not specifically requested. *Parker, supra* at 681; *People v Bonham*, 182 Mich App 130, 134-135; 451 NW2d 530 (1989); *People v Darwall*, 82 Mich App 652, 663; 267 NW2d 472 (1978). In the present case, the jury's request for repeat instructions on "the definitions of all charges against defendant" cannot reasonably be construed to include a request for the self-defense instruction. A "charge" is an accusation while a "defense" is an answer to an accusation. *Random House Webster's College Dictionary* (1997). The distinction between a "charge" and "defense" is not so

minimal as to be confusing to jurors. Further, we are confident that the jury would have requested that the court repeat the self-defense instruction if that was the instruction it desired. Accordingly, the trial court did not abuse its discretion in denying defendant's request. *Parker*, *supra* at 681; *Darwall*, *supra* at 663.

Affirmed.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder