

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

VALENCIA DEAN,

Defendant-Appellant.

UNPUBLISHED

March 1, 2002

No. 228675

Wayne Circuit Court

LC No. 99-011374

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83, two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right from her jury trial convictions of two counts of felonious assault, MCL 750.82, and felony-firearm, MCL 750.227b. Defendant was sentenced to concurrent terms of fourteen months to four years' imprisonment for the first felonious assault conviction, and one to four years' imprisonment for the second felonious assault conviction. Those convictions are to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

I. Ineffective assistance claims

Defendant first argues that she was denied the effective assistance of counsel. Defendant's motion to remand this case to the lower court in order to file motions for a new trial and a *Ginther*¹ hearing was denied.² Therefore, our review of this issue is limited to errors apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

This Court will not reverse a conviction based on ineffective assistance of counsel unless the defendant establishes that her counsel's performance was below an objective standard of

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² Defendant's motion for remand was denied for failure to persuade the Court of the necessity for remand. *People v Dean*, unpublished order of the Court of Appeals, entered May 23, 2001 (Docket No. 228675).

reasonableness under prevailing professional norms, and the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* This Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Nor will we assess counsel's competence with the benefit of hindsight. *Id.*

Defendant first claims that her counsel was ineffective in failing to cross-examine victim Jerry Rehe regarding damaging information contained in Rehe's medical records. The parties stipulated to the admission of Rehe's medical records subsequent to his testimony at trial. Therefore, the jury was free to consider any information in those records before rendering its verdict. Moreover, defendant admitted at trial that she intentionally pointed the gun at Rehe during an argument in which defendant was attempting to convince Rehe to leave her house. Felonious assault requires proof of an assault with a dangerous weapon, and with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *Avant, supra* at 505. Defendant's own testimony provided a sufficient basis for finding defendant guilty of the offenses in regard to Jerry Rehe. Under these circumstances, defendant was not prejudiced by defense counsel's failure to attempt to discredit Rehe on cross-examination by way of the information in his medical records. *Noble, supra; Effinger, supra.*

Defendant further claims that her counsel was ineffective in failing to call witnesses to testify regarding her good character. Defendant asserts that such witnesses would have lended credibility to her account of what occurred inside the house with Jerry Rehe. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Even had witnesses been called to testify regarding defendant's character, defendant's own testimony supported the finding that she committed the offenses in regard to Jerry Rehe. Therefore, the failure to call the character witnesses did not deprive defendant of a substantial defense. *Id.*

Defendant also claims that she was denied the effective assistance of counsel when her trial counsel failed to present expert testimony to explain the information contained in Jerry Rehe's medical records. As stated, the records were admitted into evidence and were, therefore, available for the jury to consider prior to rendering its verdict. Defendant asserts that an expert would have testified that Rehe's aggression and hostility was consistent with his drug use and history of alcohol and drug abuse. We conclude that counsel's failure to call an expert psychologist to testify did not deprive defendant of a substantial defense. Defendant testified regarding Rehe's conduct, claiming he called her a "stupid black bitch," followed her to the entrance of her bedroom, acted "edgy," and refused to leave defendant's house. Thus, defendant introduced evidence to explain her reasons for retrieving the gun. Defense counsel's failure to call an additional witness to testify regarding these circumstances did not deprive defendant of a substantial defense. *Daniel, supra.*

Defendant also claims that her counsel was ineffective in failing to call an expert to testify regarding defendant's psychological reaction to Jerry Rehe's conduct. Again, we conclude that defendant was not prejudiced by the failure to present this type of expert testimony because defendant testified to the circumstances surrounding the shooting. Defendant described the events and the victim's conduct, as well as her own state of mind and reactions, which the jury observed and evaluated. Given that testimony, counsel's failure to call plaintiff's proposed expert to also testify on the issue did not deprive defendant a substantial defense. *Daniel, supra*.

Last, defendant claims that her counsel was ineffective in failing to present evidence that Jerry Rehe previously assaulted a storeowner during a business dispute and had a prior felony conviction for breaking and entering. Defendant asserts that this evidence was admissible under MRE 404(b) to show Rehe's intent and defendant's lack of mistake in perceiving Rehe as aggressive and threatening. At trial, defendant did not claim that Rehe attacked her or used any amount of force against her. To the contrary, defendant testified that Rehe was "edgy," not angry and that he did not threaten her, but that they argued and yelled at each other. Therefore, evidence of Rehe's prior felony conviction and assaultive behavior was not material or in dispute in this case and was inadmissible under MRE 404(b). Under these circumstances, trial counsel's failure to introduce the prior bad acts evidence did not constitute ineffective assistance.

II. Instructional claims

Defendant next argues that the trial court erred in failing to give instructions regarding self-defense and "no duty to retreat" when there was sufficient evidence to support such instructions. This Court reviews jury instructions as a whole to determine if an error requires reversal. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "The instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them." *Id.* Even if the instructions were imperfect, they do not create error if they fairly presented to the jury the issues to be tried and sufficiently protected the defendant's rights. *Id.* at 143-144.

Defendant requested an instruction on self-defense, which the trial court denied on the basis that the evidence did not support the instruction. A defendant may be said to have acted in lawful and justifiable self-defense when: (1) the defendant honestly and reasonably believed that she was in imminent danger of serious bodily harm or death, (2) the action taken by the defendant at the time appeared to be immediately necessary, and (3) the defendant is not the aggressor. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Bright*, 50 Mich App 401, 406; 213 NW2d 279 (1973).

After a thorough review of the record in this case, we conclude that there was not evidence to support a self-defense instruction. Defendant testified that she and Jerry Rehe got into an argument and were both yelling and swearing at each other. Defendant further testified that she got angry, went into her bedroom, and Rehe followed her down the hall. Defendant specified that Rehe was not angry, only "edgy." Defendant claimed that she felt threatened by Rehe's presence, tone, attitude, and acts. However, she acknowledged that Rehe did not threaten her with any sort of physical harm. Under these circumstances, there was no evidence that she was in danger of serious bodily harm or death or that using the gun appeared to be immediately necessary. *Heflin, supra*. Accordingly, the trial court properly denied defendant's request for a

self-defense instruction. *Bartlett, supra* at 143. As such, it follows that a “no duty to retreat” instruction also was improper.

Defendant also argues that the trial court erred when it refused to instruct the jury on the lesser-included misdemeanor of intentionally pointing a firearm without malice, MCL 750.233. When an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge must give the requested instruction unless to do so would result in undue confusion, violation of due process, or some other injustice. *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982).

We conclude that the trial court properly denied defendant’s request for the misdemeanor instruction because the instruction was not supported by a rational view of the evidence. John Rehe and Steven Rehe testified that defendant pointed the gun at them after she shot Jerry Rehe. According to John and Steven, defendant exited her house and pointed the gun at them while using profanity and making threats. Defendant and her brother testified that defendant never pointed the gun at John or Steven. Were the jury to accept John and Steven’s account as truth, it could only conclude that defendant pointed the gun *with* malice. If the jury believed defendant’s account, there would be no support for a finding that defendant pointed the gun at John or Steven. Thus, there was no evidence that defendant pointed the gun at John or Steven Rehe *without* malice.

III. Newly discovered evidence claim

Defendant further argues that newly discovered evidence requires a new trial. A motion for a new trial based on newly discovered must first be brought in the trial court in accordance with MCR 2.611 and 2.612. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Because defendant did not move for a new trial before the lower court,³ this issue was not preserved for this Court’s review and we decline to address the issue. *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989).

IV. Cumulative error claim

Last, defendant argues that the cumulative prejudicial effect of the foregoing errors requires a new trial. Given that defendant’s prior arguments lack merit, there were no prejudicial errors that separately or cumulatively denied him a fair trial. *People v Herndon*, 246 Mich 371, 422-423; 633 NW2d 376 (2001).

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter

³ See, *supra*, n 2.