

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMMETT MCCAIN,

Defendant-Appellant.

UNPUBLISHED

May 25, 2004

No. 243336

Wayne Circuit Court

LC No. 01-012992

Before: Owens, P.J. and Kelly and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial¹ conviction of voluntary manslaughter, MCL 750.321.² The trial court sentenced him as a third habitual offender, MCL 769.11, to 110 months to thirty years' imprisonment. After filing his claim of appeal, defendant filed a motion to remand for a *Ginther*³ hearing. This Court granted defendant's motion and retained jurisdiction. The trial court denied defendant's motion for a new trial on the basis of ineffective assistance of counsel. We affirm.

Although we review for abuse of discretion the trial court's denial of a defendant's motion for a new trial, we review de novo an underlying claim of ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). To merit a new trial because of ineffective assistance of counsel, the defendant has the heavy burden of demonstrating that defense counsel's performance was so deficient that he was not functioning as constitutionally guaranteed "counsel" and that defense counsel's performance prejudiced the defendant to the extent that it is reasonably probable that the outcome of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

¹ The judgment of sentence incorrectly states that defendant was tried by a jury.

² Defendant was charged with second-degree murder, MCL 750.317.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant argues that trial counsel was ineffective because he inadequately presented a case of self-defense that would have led to an acquittal.⁴ Defendant's argument is premised on the incorrect assumption that a defendant has the burden of proving self-defense. "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). "Self-defense requires both an honest and reasonable belief that the defendant's life was in imminent danger or that there was a threat of serious bodily harm." *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995).

Defendant contends that defense counsel should have advised defendant to testify. A defendant's right to testify is a constitutional right guaranteed under due process principles. *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985). If the defendant expresses a wish to testify he must be permitted to do so. *Id.* at 685. Yet, if the defendant "acquiesces in his attorney's decision that he not testify," his right to testify will be deemed waived. *Id.* Here, defendant stated on the record that defense counsel advised him of his right to testify. He stated that he understood that it was his decision whether to testify. The trial court then asked him: "And you elect to do what?" Defendant replied: "Not to testify." Based on this record, defendant clearly waived his right to testify.

But even if defendant had not waived his right to testify, this Court will not second guess counsel's trial tactics. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Decisions on whether to call or question witnesses are presumed to be matters of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense that would have affected the outcome of the trial. *Id.*

Based on our review of the record, we conclude there were compelling strategic reasons for defendant not to testify. First, if defendant had testified he would have been impeached with his prior convictions. Second, despite defendant's testimony, the trial court could have relied on evidence that defendant either willingly went outside to continue the argument or came back in the shelter to grab a knife, to support a finding that defendant could have initially retreated from the confrontation. Third, defendant's flight⁵ from the scene of the crime may also have been raised in the prosecution's cross-examination as proof of consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Fourth, defense counsel also expressed concerns that defendant had a tendency to "talk to[o] much." Defendant has failed to meet his

⁴ Defendant originally presented three bases to this Court in support of his motion to remand: (1) failure to present a witness; (2) failure to conduct criminal background checks of prosecution witnesses; and (3) failure to advise defendant to testify. However, defendant expressly abandoned the first two claims at the *Ginther* hearing. Therefore, we only address defendant's remaining claim that counsel was ineffective because he failed to present defendant as a witness.

⁵ "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Id.* (citation omitted).

burden of demonstrating that defense counsel's performance was so deficient that he was not functioning as constitutionally guaranteed "counsel." *Carbin, supra* at 623.

We further find that defendant was not denied a substantial defense. The record reveals that the testimony of other witnesses supported the self-defense theory. Nonetheless, the trial court rejected defendant's self-defense theory finding no evidence that defendant believed his life was in immediate danger or that he was threatened with serious bodily harm. The fact that the self-defense strategy ultimately failed is insufficient to establish ineffective assistance of counsel. *Kevorkian, supra* at 414-415.

Finally, defense counsel testified that his main strategy was to reduce the second-degree murder charge to manslaughter on a theory of imperfect self-defense. Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). The doctrine is usually invoked when the defendant would have had the defense of self-defense had he not been the initial aggressor. *Id.* In defense counsel's opening statement, he asserted that the prosecution would fail to establish second-degree murder and that the trial court should consider the lesser included offense of manslaughter. This Court will not second-guess a trial tactic of admitting guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

We affirm defendant's conviction and sentence, but we remand to the trial court for correction of the judgment of sentence to reflect that defendant was tried in a bench trial, not a jury trial. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs