

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON L. MOORE,

Defendant-Appellant.

UNPUBLISHED

August 31, 2004

No. 242185

Wayne Circuit Court

LC No. 01-007915-01

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I

This case stems from the June 26, 2001, shooting death of Darrell Scott outside a Detroit home that Scott shared with defendant's brother. Defendant had recently been forced to move out of the home by his brother, but had returned in an attempt to again stay there. According to defendant's statement to police, he had an altercation with Scott at the home and left. Defendant later returned with a gun to retrieve his portable radio from the porch of the home. Scott approached defendant on the sidewalk as defendant neared the home and began harassing defendant. Defendant also claimed that he shot Scott because that was the only way he could get Scott off him. Defendant later claimed that the statement to police was incorrect and was coerced.

II

Defendant first asserts that trial counsel was ineffective for failing to file a motion to suppress his custodial statement. On appeal, defendant asserted that he informed his trial counsel that his statement was coerced, that the sentence stating that he retrieved a gun from a friend's home at 48 Louise Street and shot Scott in the side was incorrect, and that he only signed the statement out of fear because the officer slapped him in the face.

This Court granted defendant's motion to remand for a *Ginther*¹ hearing. The trial court conducted a four-day hearing. The trial court denied defendant's motion for a new trial on the basis of ineffective assistance of counsel. The court found defendant was not a credible witness and that his version of the events was not supported by the evidence. Further, defense counsel's failure to seek suppression of defendant's statement was a matter of trial strategy because the statement supported defendant's claim of self-defense. In addition, because defendant's statement provided evidentiary support for the argument that defendant was provoked by the victim, the trial court instructed the jury on the lesser offense of manslaughter. Accordingly, the court concluded that defendant failed to establish that trial counsel's performance was deficient or that defendant was prejudiced by trial counsel's performance.

A

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* This Court reviews a trial court's findings of fact for clear error. *Id.* We review de novo questions of constitutional law. *Id.*

To establish a denial of effective assistance of counsel, a defendant must show that his counsel's performance was deficient, under an objective standard of reasonableness, and that the deficient performance prejudiced defendant so as to deprive him of a fair trial. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). To demonstrate prejudice, a defendant must establish a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Carbin, supra* at 600. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Garza, supra* at 255. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.*

B

We first note that although defendant claims on appeal that he was dissatisfied with counsel's performance during the trial because his counsel refused to file a motion to suppress defendant's statement, this assertion is not supported by the record. Defendant did express dissatisfaction with trial counsel at the pretrial hearing because counsel did not file a motion to suppress the statement. However, by the next hearing, defendant stated on the record that he had an opportunity to speak with counsel and had resolved any issue concerning the motion. Regardless, we conclude that defendant was not denied the effective assistance of counsel.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Trial counsel's testimony at the *Ginther* hearing established that his main strategy was to obtain an acquittal or, alternatively, to convince the jury that defendant was not guilty of first-degree murder, but merely manslaughter, on a theory of self-defense. As the trial court noted in its opinion, trial counsel maintained that defendant did not indicate that his statement was coerced. Counsel testified that defendant did not claim that the statement was incorrect, but only that the statement was obtained through trickery, which was not a basis for suppression. In counsel's view, defendant's custodial statement was essential to his defense because it showed that the shooting was not premeditated and it established his theory of imperfect self-defense by showing that the victim was a bully who was much larger than defendant and threatened him, and thus defendant fired the gun in self-defense.

We concur with the trial court's conclusion that defense counsel's decision not to seek suppression of the statement was a matter of trial strategy. This Court will not attempt to second-guess decisions concerning trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that counsel's strategy was unsuccessful does not constitute ineffective assistance. *Id.*

III

Next, defendant invites this Court to adopt a requirement that custodial statements must be electronically recorded to be admissible as evidence. However, as defendant notes, this Court has rejected this argument. *People v Geno*, 261 Mich App 624, 626-628; 683 NW2d 687 (2004). We are bound to follow this Court's precedent, and we decline defendant's invitation to again consider a legal requirement for recording custodial interrogations. MCR 7.215(J)(1).

IV

In defendant's next claim of error, he asserts that the trial court erred by refusing to give a self-defense instruction concerning "perfect" or "imperfect" self-defense. We disagree. This Court generally reviews de novo claims of instructional error. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). "Jury instructions are to be read as a whole rather than extracted piecemeal to establish error." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). "Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Jury instructions must include the charged offense elements and must not exclude material issues, defenses, and theories if supported by the evidence. *Kurr, supra* at 327; *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

The first requirement of a claim of self-defense or defense of others is that a defendant act in response to an assault. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). A "perfect" self defense instruction is warranted if there is evidence that the killing of another person was justifiable homicide, i.e., if the defendant honestly and reasonably believes his life is

in imminent danger or that there is a threat of serious bodily harm and that it was necessary to exercise deadly force to prevent such harm. *Riddle, supra* at 119, 127; *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). To satisfy the necessity element of self-defense, the actor must normally try to avoid the use of deadly force if he can safely and reasonably do so, for example, by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. *Riddle, supra* at 119.

“Imperfect” self-defense is a qualified defense that can mitigate murder to voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Where the defense is applicable, it serves as a method of negating the malice element of a murder charge. *Id.* The doctrine is usually invoked when the defendant would have had a claim of self-defense had he not been the initial aggressor. *Id.*

After a review of the record, we conclude that the evidence did not support a self-defense instruction. Defendant’s statement, if believed, arguably is evidence that defendant acted in response to an assault by the victim, who was advancing on defendant. However, the evidence did not support a finding that defendant honestly and reasonably believed his life was in imminent danger or that there was a threat of serious bodily harm and that it was necessary to exercise deadly force to prevent such harm. Defendant stated:

Then he swung on me. He hit me with his fist in the face and chest. I tried to keep walking and ignore him, *but he came after me again and tried to grab me*. I pulled out the gun and shot him once in the side. (Emphasis added.)

The victim’s attempt to “grab” defendant does not support a conclusion that defendant honestly and reasonably believed that deadly force was necessary to prevent harm to himself. More importantly, if defendant feared the victim, he had the option of not returning to the area or of fleeing when he saw the victim approaching on the sidewalk. “[T]he touchstone of *any* claim of self-defense, as a justification for homicide, is *necessity*.” *Riddle, supra* at 127 (emphasis in original). Accordingly, the trial court did not err in denying the request for a self-defense instruction. *Canales, supra* at 574.

V

In defendant’s last claim of error, he argues that he is entitled to a new trial because the police violated his due process rights by failing to preserve a key trial exhibit during the pendency of his direct appeal. Again, we disagree. This issue was not raised before the trial court or in defendant’s original brief on appeal. Instead, defendant raises the issue following remand for the *Ginther* hearing. Defendant claims that he was denied his right of due process on remand because a photograph of him following his arrest, and admitted as evidence at trial, could not be located for the *Ginther* hearing.

We find no plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Defendant asserts that the photograph would have objectively disclosed whether he had a mark on his cheek before the police interview, and thus was relevant to his claim that he was slapped by the police to coerce his statement. However, the

record from the *Ginther* hearing indicates that defendant did not plan to introduce the photograph as an exhibit. In any event, the trial court recollected the photograph as described, and there is no indication that the missing photograph affected the outcome of the hearing. *Carines, supra*.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Brian K. Zahra