

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWIN FORD, III,

Defendant-Appellant.

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UNPUBLISHED

November 20, 2007

No. 272940

Genesee Circuit Court

LC No. 05-017355-FC

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of premeditated first-degree murder, MCL 750.316. The trial court sentenced defendant to life in prison without parole. We affirm.

Defendant was convicted of murdering Ronny Morris in Kamela Randolph's apartment in Flint. Randolph permitted defendant and Morris to sleep in her living room on the night of the murder. Defendant and Morris, who both lived in Detroit, often stayed with Randolph when they visited Flint. Defendant explained to the police that he and Morris had fought over who would sleep on the couch, Morris pulled a gun on defendant, and defendant left the apartment. Because he did not want to be disrespected or humiliated, defendant picked up a board from the entryway and returned to the apartment, where he struck Morris repeatedly with the board. At trial, the trial court instructed the jury on self-defense pursuant to CJI2d 7.15 and CJI2d 7.16.

On appeal, defendant argues that his trial counsel was ineffective for failing to request the self-defense instruction that there is no duty to retreat from one's own dwelling, CJI2d 7.17. We disagree. Because defendant failed to file a motion for new trial or request a *Ginther*<sup>1</sup> hearing, our review of his ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a defendant 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). We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

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

To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578. In the instant case, defendant must establish that there is a reasonable probability that, if defense counsel had requested CJI2d 7.17, he would have been acquitted.

Self-defense normally requires that the defendant try to avoid the use of deadly force if he can safely and reasonably do so, for example by using nondeadly force or retreating. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). However, there is no duty to retreat when the defendant is in his own home, *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), even when both persons have a right to be in the home, *People v Mroue*, 111 Mich App 759, 765; 315 NW2d 192 (1981). The defendant's home is determined by where he resides; it does not require ownership and can include a place of temporary residence. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). In *Davis*, this Court held that the defendant did not reside in the home where the assault occurred, even though "he had previously resided there, continued to have a key to the residence, used it as a mailing address, and occasionally slept there on a couch." *Id.* at 55.

CJI2d 7.17 is inapplicable to the facts of this case. The instruction that a defendant has no duty to retreat in his own home is only appropriate where the defendant is assaulted in his own home *and* where the degree of force used by the defendant is necessary for the defense of his person. *People v Fisher*, 166 Mich App 699, 710-711; 420 NW2d 858 (1988), *rev'd* on other grounds after second remand, 442 Mich 560 (1993). The evidence presented at trial did not establish that defendant resided in Randolph's apartment. Defendant lived in Detroit, and according to Randolph, he only stayed at her apartment "on and off" when he visited Flint. During his visits, defendant used Randolph's shower, ate in her kitchen, and slept in her living room. Defendant had slept on Randolph's living room couch for only three days before the murder, and he returned to Detroit immediately after the murder. These circumstances are far less compelling than those presented in *Davis*, *supra* at 55, where this Court determined that the defendant was not entitled to the same instruction. Moreover, the force used by defendant was unnecessary for the defense of his person. *Fisher*, *supra* at 710-711. Defendant repeatedly struck Morris in the head with a board, producing several fatal injuries and massive bleeding. Defendant admitted to the police that he continued to strike Morris even after Morris dropped his gun and raised his arms in defense.

Furthermore, the self-defense instructions given by the trial court adequately protected defendant's rights. The trial court gave a general self-defense instruction, pursuant to CJI2d 7.15, and it instructed the jury, pursuant to CJI2d 7.16, that defendant had no duty to retreat from a sudden, fierce and violent attack, or from an attack with a deadly weapon. Even if no "duty to retreat" instructions were given, the trial court's general self-defense instructions required the jury to determine whether defendant acted honestly and reasonably in protecting himself.

Defense counsel did not render ineffective assistance of counsel. Counsel's failure to request an instruction inapplicable to the facts at issue does not constitute ineffective assistance.

*People v Truong*, 218 Mich App 325, 341; 553 NW2d 692 (1996). In light of the self-defense instructions given to the jury, defendant cannot establish that defense counsel's failure to request the "no duty to retreat" instruction affected the outcome of the case. *Rodgers, supra* at 714. Reversal is not warranted.

Affirmed.

/s/ Michael J. Talbot  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly