STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2008
v	No. 276151 Baraga Circuit Court
TREVOR LEE THOMPSON, Defendant-Appellant.	LC No. 06-000944-FH

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of two counts of assaulting a prison employee, MCL 750.197c. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 1-1/2 to 8 years for each conviction, to be served consecutively to the prison sentence he was serving when he committed the assaults. We affirm.

Defendant was convicted of assaulting two corrections officers on August 15, 2005, in the dining area of the facility where he was incarcerated. The assaults were preceded by defendant's involvement in an altercation with two food service leaders in the kitchen. One of the food service leaders was blocked by defendant as she tried to go behind a buffet-style serving line. Defendant then threw a pair of gloves in the face of another food service worker who exclaimed that he had been assaulted. As the corrections officers walked to intervene, defendant punched one of the officers in the face. The other corrections officer came to the aid of the first officer and was knocked to the floor by defendant. Defendant was subsequently restrained by other employees.

On appeal, defendant argues that the trial court erred in denying his request for a jury instruction on self-defense. Defendant argues that the trial court, in denying the request, failed to consider the testimony of two defense witnesses. We disagree.

"Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007); see also *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). An abuse of discretion occurs if a trial court's decision "results in an outcome falling outside of the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). If a defendant requests an instruction on a defense that has evidentiary support, the trial court must give the instruction.

People v Hawthorne, 474 Mich 174, 182; 713 NW2d 724 (2006); *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Conversely, an instruction that lacks evidentiary support should not be given. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). The failure to give an applicable instruction on self-defense is evaluated under standards for preserved nonconstitutional error. *Riddle, supra* at 124-125; *Hawthorne, supra* at 182. Reversal is not warranted unless the omission undermined the reliability of the verdict. *Id.* at 184-185. Stated differently, where the issue was preserved, it must affirmatively appear more probable than not that the error was outcome determinative. *Riddle, supra* at 124-125.

Here, defendant was charged with violating MCL 750.197c(1), which prohibits "[a] person lawfully imprisoned in a . . . place of confinement . . . through the use of violence . . . [from] assault[ing] an employee of the place of confinement or other custodian knowing the person to be an employee . . . ." "An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in a reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Violence in an assault is characterized by the wrongful application of force against another so as to harm or embarrass the person. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996); *People v Boyd*, 102 Mich App 112, 116-117; 300 NW2d 760 (1980), lv den 412 Mich 927 (1982).

A claim of self-defense requires that the defendant act in response to an assault. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). Justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that circumstances justified the action. *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990) (opinion by Riley, C.J.). The defense is generally not available if the defendant was the aggressor or used excessive force. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993).

Pursuant to MCL 800.41, the two corrections officers were entitled to use all suitable means to defend themselves, enforce discipline, and secure a prisoner, where the prisoner assaults or batters another or resists or disobeys a lawful command.[1] Each of the four prosecution witnesses testified that defendant was the aggressor in his encounter with the corrections officers. Although there were some differences in their testimony regarding the encounter, each witness testified that the affray was initiated when defendant punched the first corrections officer.

[1] At the time of the offense, on August 15, 2005, MCL 800.41(1) provided:

> If a prisoner or prisoners assault or batter any officer or guard of a correctional facility, or assault or batter another prisoner or any other person, or damage, or attempt to damage any part of a correctional facility, or attempt to escape, or resist or disobey any reasonable command, the officers or guards of the correctional facility shall use all suitable means to defend themselves, to enforce the observance of discipline, to secure the persons of offenders, and to prevent any such attempt to escape.

Defendant contends that the testimony of the two inmates, who were called as defense witnesses, provided evidentiary support for a claim of self-defense, and we disagree. A defendant need not take the stand and testify to require an instruction on self-defense, so long as there is other evidence to support it. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978). Contrary to defendant's argument, the inmates did not testify that defendant engaged in any assaultive conduct that could have formed the basis of a self-defense claim. Antonio Gordon testified that he did not see anyone throw a punch, but only observed the corrections officers manhandling defendant after the word "assault" was yelled, and that he also observed defendant resisting the manhandling by "defending himself you know.". Tracy Hagler testified that one of the corrections officers grabbed defendant after the food service employee yelled "assault," that the second corrections officer bumped into the first officer, and that defendant ran out of the way and did not hit anyone.

Because the two defense witnesses failed to testify that the defendant engaged in any assaultive conduct while "defending himself," the trial court did not err by denying defendant's request for an instruction on self-defense. Cf. *People v Droste*, 160 Mich 66, 80; 125 NW 87 (1910) (self-defense instruction was unnecessary where the defendant denied committing the fatal blow underlying the charged crime).

Moreover, even if the trial court erred by failing to instruct the jury on self defense, such error was not outcome determinative. Under MCL 800.41, the corrections officers had authority to secure and discipline defendant on the basis of his conduct toward the food service employees. The evidence was more than sufficient to allow the jury to conclude that defendant had no justification to "defend" himself from the corrections officers who were performing their duties under law.

Defendant next argues that the trial court erred by denying his request to instruct the jury that no adverse inference could be drawn from his decision not to testify at trial. Generally, a trial court is required to grant a defendant's request for an instruction regarding his right not to testify, if the request is made before the jury retires to consider the verdict. *People v Moore*, 39 Mich App 329, 333-336; 197 NW2d 533 (1972); see also *People v Rogers*, 411 Mich 202, 208; 305 NW2d 857 (1981) (a request for an instruction before a jury is released to begin deliberations is timely), and *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003) (to preserve an instructional error for review, a defendant must object before the jury deliberates).

Although the failure to object does not preclude our review for plain error affecting a defendant's substantial rights, *Gonzalez, supra* at 225, there is no requirement that a trial court give the cautionary instruction in the absence of a request. A defendant might prefer that nothing be said about his failure to testify. *People v Abernathy*, 29 Mich App 558, 561; 185 NW2d 634 (1971). Indeed, a trial court must honor an express request by a defendant that no such cautionary instruction be given at a trial where there is only one defendant. *People v Hampton*, 394 Mich 437; 231 NW2d 654 (1975).

In the present case, because defendant failed to request that the jury be instructed that no adverse inference could be drawn from his decision not to testify until after the jury began deliberating, the defendant's request was untimely. "After jury deliberations begin, the court may give additional instructions that are appropriate." MCR 6.414(H). The use of the word

"may" indicates discretionary action. *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). The trial court's decision not to interrupt the jury's deliberations[2] to give the jury an instruction that was only required if defendant made a timely request, does not fall outside the range of principled outcomes. *Barnett*, *supra* at 158. Defendant's reliance on *Moore*, *supra* at 335, is misplaced, because the question in that case concerned the timeliness of a request before jury deliberations began, not a request made after the jury deliberations had already commenced. Under the circumstances here, the trial court did not abuse its discretion.

Because defendant did not move for a *Ginther*[3] hearing or new trial based on ineffective assistance of counsel,[4] our review of defendant's alternative claim, that defense counsel was ineffective for failing to timely request the instruction, is limited to mistakes apparent from the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). We find no such mistake.

Effective assistance of defense counsel is strongly presumed. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prevail on a such a claim, the defendant must show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment, *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993), or under the Michigan Constitution, *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994). In other words, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a heavy burden on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "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." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant has the burden of showing a reasonable probability that the result of the trial would have been different had it not been for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Carbin*, *supra* at 600, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

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[2] Indeed, the jury deliberated only 40 minutes before returning its verdict.

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

[4] Although defendant moved for a new trial, his motion was based on a claim that the jury verdict was against the great weight of the evidence and the trial court's failure to grant his request for the cautionary instruction that no adverse inference could be drawn from his decision not to testify. (S Tr, pp 12-15; Appendix A.) Defendant did not alternatively argue that he was denied the effective assistance of counsel.

In this case, defendant's failure to show the requisite prejudice is dispositive of his ineffective assistance of counsel claim. The mere fact that a defendant offers testimony to rebut the prosecutor's case, does not establish the requisite prejudice. See *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000). An effective rebuttal is only accomplished if the jury believes the testimony. *Id.* We must consider the totality of the circumstances at trial when evaluating whether the requisite prejudice was established:

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. [*Strickland, supra* at 695-696.]

Here, there was overwhelming eyewitness testimony that defendant assaulted two corrections officers after Mingfeld stated that there was an assault. And while defense counsel attacked the credibility of the prosecution witnesses, and elicited inconsistencies regarding details of the conflict, and offered testimony of defendant's fellow inmates to rebut the prosecutor's theory, the trial court provided a number of instructions to assist the jury in assessing the credibility of the witnesses that were not related to defendant's decision not to testify. The jury was instructed that it could consider the witnesses' abilities to see or hear clearly, their demeanor when testifying, and any bias or prejudice of a witness. Further, the instructions required that the jury "only consider the evidence that has been properly admitted in this case." Evidence was defined as including "only the sworn testimony of witnesses, the exhibits admitted into evidence," and a stipulation that defendant was lawfully imprisoned at the time of the charged assaults. The jury was cautioned that many things are not evidence and that it must be careful not to consider them, including "the fact that the Defendant is charged with crimes and is on trial."

Considering the totality of the circumstances, we are not persuaded that there is a reasonable probability that the outcome of trial would have been different had defense counsel timely requested a cautionary instruction that no adverse inference could be drawn from defendant's decision not to testify. This alleged error does not undermine confidence in the jury's verdict. Therefore, reversal on this basis is not warranted.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder