STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2016
v	No. 326923 Bay Circuit Court
CRUZ DEVON HINDS, Defendant-Appellant.	LC No. 14-010333-FC

Before: SAWYER, P.J., and HOEKSTRA and WILDER, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, carrying a dangerous weapon with unlawful intent, MCL 750.226, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to concurrent terms of life imprisonment without parole for the murder conviction and 5 to 10 years each for the carrying a dangerous weapon and felon-in-possession convictions, to be served consecutive to concurrent prison terms of two years each for the felony-firearm convictions. Defendant appeals as of right. Because the trial court did not err by refusing to instruct the jury that defendant had no duty to retreat and defendant was not denied the effective assistance of counsel, we affirm.

Defendant was convicted of shooting and killing Alfred Watts outside Tubby's Bar in Bay City on May 24, 2014. The evidence showed that defendant chased a fleeing Watts and then shot him five times, including shots to Watts's back and shots fired while Watts was on the ground. Watts also had injuries to his face, consistent with being struck by a fist. In his statements to police, defendant initially denied having a gun or shooting Watts. After being shown a gun recovered by police, defendant admitted killing Watts, but he claimed to have done so in self-defense. According to defendant, at the bar, he encountered Kwame Mathews, a person with whom he had a verbal altercation approximately a month earlier, and Mathews displayed a gun during a confrontation. Defendant contended that shots were fired outside the bar and that, in the ensuing chaos, he mistakenly chased and shot Watts out of fear for his life.

The trial court instructed the jury on self-defense and the related common law principles of retreat. Despite instructions on self-defense, the jury convicted defendant as noted above. Defendant now appeals as of right.

I. SELF-DEFENSE – NO DUTY TO RETREAT

Defendant argues on appeal that the trial court erred when, although instructing the jury on self-defense, it denied his request to instruct the jury that defendant had no duty to retreat in accordance with M Crim JI 7.16(3),[1] which provides:

> (3) Further, a person is not required to retreat if the person:
>
> (a) has not or is not engaged in the commission of a crime at the time the deadly force is used, and
>
> (b) has a legal right to be where the person is at that time, and
>
> (c) has an honest and reasonable belief that the use of deadly force is necessary to prevent imminent [death / great bodily harm / sexual assault] of the person or another.

With regard to this instruction, defendant concedes that he was a felon-in-possession at the time of the killing, but he maintains that the instruction should still have been given because self-defense can be used as a defense to felon-in-possession. Given the availability of this defense to justify his possession of a firearm, defendant argues that it was for the jury to determine whether defendant "engaged in the commission of a crime." In other words, defendant maintains that, if his possession of a firearm is excused on the basis of self-defense, he was not engaged in the "commission of a crime" at the time he used deadly force and thus he was under no duty to retreat.

We review de novo a claim of instructional error, and review for an abuse of discretion a trial court's determination that a specific instruction is applicable to the facts of the case. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). A trial court must instruct the jury on the applicable law, and must fully and fairly present the case to the jury. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "The instructions must include all elements of the charged crimes and any material issues, defenses, and theories if supported by the evidence." *Id.* A reviewing court must read the jury instructions as a whole. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). Even if somewhat imperfect, jury instructions do not create error if they fairly presented the issues and protected the defendant's rights. *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012). Ultimately, "[r]eversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

Relevant to our assessment of the trial court's instructions in this case, self-defense and the related concept of retreat have their origins in the common law. *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002). At common law, a defendant could claim self-defense if he

[1] This paragraph is commonly known as the "stand your ground" instruction.

"honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *Id.* at 127. The question of whether the exercise of force was "necessary" normally involved consideration of whether a defendant could have safely avoided using deadly force, i.e., whether a defendant could have safely retreated. *Id.* at 119, 142. When considering the issue of retreat, there were three important considerations at common law:

> (1) one who is without fault is *never* obligated to retreat from a sudden, violent attack or to retreat when to do so would be unsafe, and in such circumstances, the presence of an avenue of retreat cannot be a factor in determining necessity; (2) our law imposes an affirmative "duty to retreat" only upon one who is at fault in voluntarily participating in mutual nondeadly combat; and (3) the "castle doctrine" permits one who is within his dwelling to exercise deadly force even if an avenue of safe retreat is available, as long as it is otherwise reasonably necessary to exercise deadly force. [*Id.* at 142.]

Self-defense was available at common law as an affirmative defense to a charge of felon-in-possession. *People v Dupree*, 486 Mich 693, 709; 788 NW2d 399 (2010). When an act is committed in self-defense, it is said to constitute "a lawful act," *People v Heflin*, 434 Mich 482, 508-509; 456 NW2d 10 (1990), and, though the actor "admits the crime," the conduct is justified such that the actor "is not guilty of any crime," *Dupree*, 486 Mich at 705, 707-708 & n 11 (citation omitted).

Effective October 1, 2006, the Legislature enacted the Self-Defense Act (SDA), MCL 780.971 *et seq.*, which "codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *Dupree*, 486 Mich at 708. By its express terms, the SDA did "not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006." MCL 780.974. Consequently, following the enactment of the SDA, self-defense remains available as a defense to a charge of felon-in-possession. See *People v Guajardo*, 300 Mich App 26, 40; 832 NW2d 409 (2013).[2]

[2] On appeal, defendant contends that this Court's decision in *Guajardo*, 300 Mich App at 35-40, entitles him to the stand your ground instruction. The issue in *Guajardo* was whether a person's status as a convicted felon precludes the person from asserting self-defense under the SDA to a charge of felon in possession of a firearm. Relying on MCL 780.974, we concluded that, because the SDA did not alter self-defense as provided by the common law, a felon possessing a firearm was not precluded from raising self-defense as an affirmative defense. *Guajardo*, 300 Mich App at 37. However, we did not consider the stand your ground instruction or whether a felon-in-possession could claim self-defense *without a duty to retreat* in the circumstances set forth in MCL 780.972. In short, *Guajardo* is not dispositive.

However, whereas MCL 780.974 reaffirms a person's right to assert self-defense as it existed under the common law, MCL 780.973 of "the SDA modified the common law's duty to retreat that was imposed on individuals who were attacked outside their own home or were not subjected to a 'sudden, fierce, and violent' attack." *Guajardo*, 300 Mich App at 35. See also *People v Conyer*, 281 Mich App 526, 530 & n 2; 762 NW2d 198 (2008). MCL 780.973 provides that "[*e*]*xcept as provided [MCL 780.972]*, this act does not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force" (emphasis added). Therefore, it is necessary to look to MCL 780.972 of the SDA to define the circumstances in which the SDA modified the common law concepts of retreat. In particular, MCL 780.972(1) sets forth the availability of self-defense without a duty to retreat, as follows:

> (1) *An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force* may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.
>
> (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual. [MCL 780.972(1) (emphasis added).]

This provision created "a new substantive right, i.e., the right to stand one's ground and not retreat before using deadly force in certain circumstances in which a duty to retreat would have existed at common law." *Conyer*, 281 Mich App at 530. In other words, the stand your ground protection is not part of the law of self-defense as it existed at common law; rather, it is a new statutory creation that is clearly inapplicable to an individual who has, or was, engaged in the commission of a crime at the time deadly force was used.

Turning to the present case, the trial court instructed the jury on self-defense and the concept of retreat as it existed at common law. However, despite a request from defendant, the trial court declined to read M Crim JI 7.16(3), which would have informed the jury that defendant had no duty to retreat in keeping with MCL 780.972(1). We see nothing erroneous in this refusal given that, among other criteria under MCL 780.972(1), one of the conditions for not having a duty to retreat is that the individual using deadly force "has not or is not engaged in the commission of a crime at the time he or she uses deadly force." MCL 780.972(1). The facts in this case established that defendant brought a gun to the bar, thereby violating MCL 750.224f, and he still had that gun in his possession while he chased and killed Watts. As a felon ineligible to possess a firearm, defendant had engaged in, and was engaged in, the commission of a crime

at the time he used deadly force.[3] It follows that, although defendant could claim self-defense to justify his conduct, he was not entitled to a stand your ground instruction and the common law principles of retreat applied. Therefore, M Crim JI 7.16(3) was inapplicable, and the trial court did not err by refusing to read this instruction.

Moreover, we note briefly that, even if the instruction should have been given, the facts in this case are such that it does not appear more probable than not that the refusal to give the stand your ground instruction was outcome determinative. See *McKinney*, 258 Mich App at 163. Defendant had the gun in his possession before he arrived at the bar and, by his own admission, he ultimately chased a fleeing Watts to shoot him five times, including in the back. While defendant had a confrontation with Mathews and there was evidence that Mathews had a gun, Watts never threatened defendant and, once Watts began to flee, he certainly did not pose a threat to anyone. Cf. *Guajardo*, 300 Mich App at 42. Quite simply, although defendant claimed that he feared for his life, nothing in defendant's version of events supports the conclusion that he "honestly and reasonably" believed that the use of deadly force against a fleeing Watts was necessary to prevent the imminent death of, or imminent great bodily harm to, himself or someone else. MCL 780.972(1)(a); *Guajardo*, 300 Mich App at 40-42 & n 4. Thus, even if instructed that defendant had no duty to retreat, it is not more probable than not that the jury would have accepted defendant's claim of self-defense. Defendant is not entitled to relief on appeal. See *McKinney*, 258 Mich App at 163.

II. DEFENDANT'S STANDARD 4 BRIEF

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that defense counsel was ineffective for failing to investigate the case and failing to call three known witnesses, including Mathews, Gwendolyn

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[3] We are not faced with a situation, such as that in *Dupree*, where the defendant, who happened to be a felon, claimed that he gained possession of a gun when he took it from his attacker during a struggle. See *Dupree*, 486 Mich at 698. Consequently, we need not decide whether possession of a firearm by a felon in such limited circumstances would constitute the "commission of a crime" for purposes of precluding the stand your ground instruction under MCL 780.972(1). Instead, the facts in this case plainly show that defendant had the gun in his possession before the confrontation, at a time when he could have had no possible justification for possessing the weapon. See *People v Triplett*, 499 Mich 52, 57; __ NW2d __ (2016) (noting that self-defense is only available as an affirmative defense to a felon-in-possession charge "when the felon's *temporary possession* of a firearm was the result of an attempt to repel an *imminent* threat"); *Guajardo*, 300 Mich App at 40 n 4; *People v Dupree*, 284 Mich App 89, 106; 771 NW2d 470 (2009) (opinion by KELLY, J.). In such circumstances, defendant had engaged in a violation of MCL 750.224f at the time he used deadly force. In other words, by use of the present perfect tense "has . . . engaged," the Legislature referred to "action that was started in the past and has recently been completed or is continuing up to the present time," see *People v Kolanek*, 491 Mich 382, 407; 817 NW2d 528 (2012), which plainly encompasses defendant's action of bringing the gun to the bar in violation of MCL 750.224f.

Gray, and LaToya Draine. Because defendant did not raise this issue in a motion for an evidentiary hearing or a new trial in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Counsel is presumed to have afforded effective assistance, and defendant bears the heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must show "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (citation and quotation marks omitted). A defendant also bears the burden of establishing the factual predicate of his ineffective assistance claim. *Id.* An attorney's decision whether to call a witness to testify is a matter of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The failure to call or question witnesses constitutes ineffective assistance only when it deprives the defendant of a substantial defense. *Id.* A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant asserts that Mathews would have testified that Watts had the gun, and would have been questioned as to why he intimidated witnesses, that Gray would have testified that she heard Mathews tell another person that he was going to kill someone, and that Draine would have testified that Mathews started an argument with defendant that evening. However, defendant has not submitted any witness statements or affidavits from Mathews, Gray, and Draine to establish what testimony they would have provided. Without an appropriate offer of proof, defendant has not established the factual predicate of his claim and there is no basis for concluding that there is a reasonable probability that the result of the trial would have been different if these witnesses had been called. Cf. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Moreover, counsel's failure to call Mathews, Gray, and Draine did not prevent defendant from presenting the defense of self-defense given that counsel in fact called other witnesses in support of a self-defense claim.[4] On the whole, defendant has not overcome the presumption that trial counsel rendered effective assistance. Defendant's ineffective assistance of counsel argument is without merit. See *Douglas,* 496 Mich at 592.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder

[4] In his brief on appeal, defendant asks that we remand the case for an evidentiary hearing. Because any failure to call these witnesses did not deprive defendant of a substantial defense, further factual development would not aid defendant's position and it is unnecessary for the resolution of this issue. Defendant request for a remand is denied.