STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYL MICHAEL EDWARDS,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 353788
Wayne Circuit Court
LC No. 19-006708-01-FC

Before: GLEICHER, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of assault with intent to murder (AWIM), MCL 750.83, first-degree home invasion, MCL 750.110a(2), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced, as a second-offense habitual offender, MCL 769.10, to serve concurrent terms of imprisonment of 300 to 500 months for each AWIM conviction, and 7 to 25 years for the home-invasion conviction, to be served consecutively to concurrent sentences of 2 years' imprisonment for each felony-firearm conviction. We affirm.

I. FACTUAL BACKGROUND

In the early morning hours of July 9, 2019, defendant entered the home of his former wife, Mercedes Harris, and her boyfriend, Christopher Boone. Also present were Harris's children, MW, KH, and KE. Defendant was the father of KE, who was then approximately four years old. Defendant did not testify at trial, but a recording of his police interview was played for the jury. In his interview, defendant initially denied any involvement in the shooting and claimed he had not seen Harris for a month, but eventually he admitted that he went to Harris's house on the morning of the shooting. Defendant claimed he went there to pick up KE, knocked on the door, and was admitted by Harris. Harris could not remember anything about that night due to the injuries she sustained, but she maintained that she and defendant were not on speaking terms and she did not invite him. Boone testified that he had not given defendant permission to come into the home, and he and Harris never invited defendant to the house. Boone opined that it would have been "crazy" to permit defendant to enter the house at four o'clock in the morning.

Boone testified that he was awakened by Harris, who told Boone that defendant "was in here." Boone and Harris slept in their living room. Boone saw defendant hit Harris with a black gun that Boone did not recognize. Boone and Harris kept a gun of their own in the home, a .38 revolver they kept under the couch. Boone testified that defendant grabbed his arm, twisted it and broke it, and then shot Boone twice. MW, who was eleven or twelve years old at the time, testified that he was awakened by KE, who was crying. On the basis of what KE told him, he woke up KH, and they "went to go grab a knife to go help our mama." MW and KH both armed themselves with knives from the kitchen. MW testified that when he got to the living room, he saw defendant pinning Harris and Boone down on the couch. Harris tried to get up but was unable to do so, whereupon MW told defendant to get off her or MW would stab him. Defendant hit Harris with his fist, and Boone "dropped the gun through the cushions and tried to grab it, but [defendant] grabbed it first." Defendant shot Boone three times, twice in the head and once in the chest. Harris tried to flee, whereupon defendant seemingly "forgot about [MW] and he ran to the back after [Harris]." MW ran out of the house, attracted the attention of a motorist, and asked the motorist to call the police.

In contrast, defendant contended that Harris had been unclothed when she admitted him, but she then got dressed at Boone's direction. Defendant told Harris that he wanted to pick up KE, and a three-way argument ensued. During that argument, Boone pulled a gun out of his pocket, defendant lay on top of Boone to prevent Boone from using the gun, and the gun went off several times during the ensuing struggle. After one of the gunshots, Harris ran into the kitchen, and after another of them, Boone stopped moving. Defendant contended that he then ran to the back of the house and left through a back window. Defendant also took and hid the gun, but he later directed the police to the gun's hiding place. Defendant generally claimed that he shot the victims in self-defense.

When the police arrived, they found Boone shot in both the face and the torso, but awake and lucid. They discovered KH unconscious in the kitchen entryway with a gunshot wound to his head and a bullet hole through his ear and hand.[1] They discovered Harris slumped on the floor with a gunshot wound to the top of her head. They also discovered KW "just standing along the wall inside the kitchen and she was just staring at her mother." The black gun was still on the couch, and it was eventually determined to be a facsimile firearm. A hatchet was also found.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his AWIM convictions, on the ground that the prosecution failed to establish that he acted with an actual intent to kill. Defendant also contends that the prosecution failed to present sufficient evidence to disprove his claim of self-defense beyond a reasonable doubt. We disagree with both contentions.

[1] Defendant was initially charged with AWIM as to KH and assault with intent to commit great bodily harm less than murder as to KE, but both charges regarding the children were dismissed at the prosecutor's request.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

This Court reviews a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). The evidence is reviewed "in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Id*. "This standard is deferential, and the reviewing court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The jury may not speculate. *People v Bailey*, 451 Mich 657, 673-675, 681-682; 549 NW2d 325 (1996). However, "a jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

"The elements of the crime of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Warren*, 200 Mich App 586, 588; 504 NW2d 907 (1993). "Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent." *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010). "Intent to kill may be inferred from all the facts in evidence, including use of a deadly weapon, taking aim at a victim, injury to the victim, evidence of flight and attempts to hide evidence." *People v Everett*, 318 Mich App 511, 531 n 10; 899 NW2d 94 (2017) (quotation marks and citation omitted). A person who not engaged in the commission of a crime may use deadly force against another person anywhere he or she has the legal right to be, if he or she "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." MCL 780.972(1)(a). "Once a defendant satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of disproving the affirmative defense of self-defense beyond a reasonable doubt." *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010).

B. ANALYSIS

Importantly, the jury was not obligated to believe defendant's version of events. As noted, the jury was permitted to reject defendant's version of events entirely, so long as its verdict was based on evidence actually introduced rather than speculation. Viewed in a light most favorable to the prosecution, the testimony in this case was sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that defendant intended to kill Harris and Boone. According to the testimony, defendant entered the home uninvited in the early hours of the day while everyone was asleep, despite not being on speaking terms with Harris, and apparently to the great distress of KE despite defendant's claim that he was there to pick her up. An altercation ensued, during which defendant pinned Harris and Boone down onto the couch. At some point, Harris's gun was retrieved from where it was stored near the couch. Boone initially had control of the gun but dropped it, and defendant took control of it, then took hold of Boone and shot him twice in the head and once in the chest. Defendant then followed Harris into the kitchen, where she was later found with a gunshot wound to her head. As noted, KH was also found to have been shot in the entryway to the kitchen.

The fact that defendant affirmatively chased after Harris and shot her in the head, rather than fleeing after he shot Boone, more than amply shows both an intent to kill Harris and a total absence of any plausible self-defense regarding Harris. The fact that defendant shot Boone three times, including twice in the head at close range, strongly supports an intent to kill. Defendant was the initial aggressor by breaking into the home at a time everyone would be expected to be asleep, seemingly armed with both a facsimile firearm and the element of surprise, and he was able to pin down both Boone and Harris. As such, he had no entitlement to self-defense, even if the victims produced a real gun first, unless there was no reasonable way for him to escape. See *People v Reese*, 491 Mich 127, 158; 815 NW2d 85 (2012). However, defendant clearly had the upper hand in the fight, and once he gained control of the gun, he could have thrown it across the room instead of using it. Even if it was somehow strictly necessary to fire the gun, shooting Boone three times shows excessive force. The fact that he then chased and shot Harris[2] shows that he was not at all fearful, and fleeing was not his intent until after satisfying a desire to kill those present in the house.

For these reasons, we reject defendant's challenges to the sufficiency of the evidence to support his AWIM convictions.

III. JURY INSTRUCTIONS

Defendant argues that the trial court erred because it did not instruct the jury on a lesser-included alternative to the AWIM charges, and did not expressly instruct the jury that self-defense was a defense to the felony-firearm charges.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

Defendant waived any appellate challenges to the jury instructions by affirmatively approving them at trial. When defense counsel goes beyond failing to object to a jury instruction and affirmatively approves it, he or she waives any error. *People v Hershey*, 303 Mich App 330, 349; 844 NW2d 127 (2013). Waiver is "the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (quotation marks and citations omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.* (quotation marks and citations omitted). Nevertheless, even if this issue was merely unpreserved, it would be reviewed for plain error affecting substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), order mod 450 Mich 1212 (1995). "[T]he trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *Id.* Jury instructions

[2] And, seemingly, KH.

are reviewed in their entirety to determine if there is error requiring reversal, and, "[e]ven if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997) (quotation omitted).

B. ANALYSIS

Defendant first argues that he was entitled to a jury instruction on assault with intent to commit great bodily harm (AWIGBH), which is a necessarily included lesser offense of AWIM. See *Everett*, 318 Mich App at 529. "These offenses are distinguishable from each other by the intent required of the actor at the time of the assault. That is, AWIM requires an actual intent to kill that is not a part of AWIGBH." *Id*. (quotation marks and citation omitted). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). However, trial courts are not generally required to instruct the jury sua sponte on necessarily included lesser offenses. *People v Johnson*, 409 Mich 552, 562; 297 NW2d 115 (1980). There was no request to do so here. Accordingly, the trial court was not required to sua sponte provide an instruction on AWIGBH. In any event, for the reasons discussed, the evidence did not plausibly suggest that defendant had any lesser intent than murder, and an AWIGBH instruction would not have made sense in light of his theory of the case that *he* was the victim and had acted in self-defense.

Defendant also argues that he was denied his right to present a defense when the trial court failed to instruct the jury specifically that his self-defense claim applied to the felony-firearm charges. We conclude that the court adequately instructed the jury on self-defense as it applied to AWIM, and thus on the elements of felony-firearm. The trial court explained that, to prove the felony-firearm charges, the prosecution was first required to prove that defendant committed the predicate AWIM offenses. The court also instructed that, to prove the AWIM charges, the prosecution was required to establish that defendant did not act in self-defense. The jury obviously rejected defendant's self-defense claim. Had the jury concluded that the prosecution failed to disprove that defendant acted in self-defense, it could not have found defendant guilty of the felony-firearm charges without straying from the trial court's instruction that, to find defendant guilty of felony-firearm, it must first find that defendant committed AWIM. Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). The instructions as given fairly presented the issues to be tried and sufficiently protected defendant's rights.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Relatedly, defendant argues that he was denied the effective assistance of counsel when defense counsel failed to request the instructions of which defendant now makes issue. We disagree.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

Because there has been no evidentiary hearing to develop defendant's claim of ineffective assistance, appellate review is limited to mistakes apparent on the existing record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). However, our Supreme Court has explained that we must consider materials submitted by a defendant for the limited purpose of determining whether to remand for an evidentiary hearing. *People v Moore*, 493 Mich 933, 933; 82 NW2d 580 (2013). Even if this Court denies an earlier motion to remand for an evidentiary hearing, this Court retains the authority to revisit that denial after plenary review. See *People v Smith*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 346044, decided February 18, 2021), slip op at p 10.

"[I]neffective assistance requires a defendant to show (1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). To establish deficient performance of counsel, "a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). To establish prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Randolph*, 502 Mich at 9 (quotation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation omitted).

B. ANALYSIS

We conclude that defense counsel was not ineffective for declining to request the additional jury instructions. Regarding AWIGBH, defense counsel's decisions about what defenses to bring forth at trial were matters of trial strategy. "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *Unger*, 278 Mich App at 242. "[T]his Court has specifically recognized that an all-or-nothing defense is a legitimate trial strategy. . . . When the defense's trial strategy is to obtain an outright acquittal, an instruction or argument on a lesser offense may reduce the defendant's chance of acquittal." *People v Allen*, 331 Mich App 587, 610; 953 NW2d 460 (2020), vacated in part on other grounds ___ Mich ___; 953 NW2d 197 (2021). In this case, defendant cannot show that defense counsel's performance was deficient for failing to request instructions on the lesser offense, because it was a reasonable for counsel to focus solely on defendant's self-defense claim in hopes of winning outright acquittal—a strategy that would have been undermined by an instruction on AWIGBH. Defendant cannot show that he suffered any prejudice as a result.

Regarding the felony-firearm instruction, as explained above, the trial court instructed the jury that, in order to find defendant guilty of the felony-firearm charges, it must first find that defendant was guilty of the underlying AWIM charges. It instructed further that, in order to find defendant guilty of AWIM, the jury must find that the prosecution proved that defendant had not acted in self-defense. Therefore, the jury was in fact instructed that it could not find defendant guilty of the felony-firearm offenses if it concluded that defendant acted in self-defense. Any request for additional and repetitive such instructions would have been of no further benefit.

Accordingly, defendant cannot show that his trial counsel was ineffective, or that he was prejudiced, for want of self-defense instructions more specifically tied to felony-firearm.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause