

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 21, 2012

v

HARVEY MALONE, JR.,

Defendant-Appellant.

No. 300433
Wayne Circuit Court
LC No. 08-002525-FC

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

After a jury trial, defendant Harvey Malone, Jr., was convicted of one count of carrying a concealed weapon (“CCW”), MCL 750.227, and one count of felony-firearm, MCL 750.227b. Defendant was acquitted of the most serious charge against him: assault with intent to commit murder, MCL 750.83. After the trial court granted defendant a new trial on the felony-firearm count, the prosecutor appealed by right, and we reversed and remanded to the trial court for sentencing. Defendant now appeals by right, and we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant’s convictions arise from a January 27, 2008, confrontation between defendant and Edward Coleman. Defendant testified at trial that Coleman had robbed his house 11 years earlier. Defendant’s truck had been set on fire on January 5, 2008, and defendant suspected that Coleman was responsible. Five days after the fire, defendant purchased a firearm on the street because he feared for his life and wanted a gun quickly. Defendant admitted that he did not purchase the gun legally and that he never obtained a permit to carry a concealed weapon. He purchased a new truck on January 25, 2008. On the night of the confrontation, defendant saw Coleman ride by on his bicycle and engage in suspicious activity near the truck. Defendant grabbed his gun, went to check on his truck, and discovered that the tires had been slashed. Defendant followed Coleman down the street to a party store.

Defendant testified that he approached Coleman to ask him why he had cut the truck tires and that Coleman started to swear at him, saying “you dead. You dead.” Defendant testified that Coleman put his hand in his pocket when he was getting off his bike, so defendant fired a shot at Coleman. The bullet hit Coleman, but he did not fall down. Defendant thought that Coleman might be wearing a bullet-proof vest. Defendant testified that he fired a second shot because Coleman was pulling something out of his pocket that he thought might be a knife or a gun;

Coleman pulled out a cellular telephone. After defendant fired the second shot, Coleman went into the store. Defendant did not believe that he had hit Coleman because of the way Coleman acted.¹

According to defendant, Coleman punched some numbers on his telephone and said, “Harvey done shot me. Come over. We going to kill him.” At that time, Coleman was just outside the store, and he repeated what he had said as he went into the store. Defendant tried to go into the store to call the police, but Coleman was holding the door. Defendant then fired a third shot through the door at Coleman because Coleman continued to call for someone to help kill defendant and he was afraid. Defendant left the store to go to his neighbor’s house to tell her to lock his house, but he became confused and went to the wrong house. He stated that he was still scared that whoever Coleman had called would arrive and come after him before the police responded. The police ultimately responded and arrested defendant. Although defendant denied having concealed the gun, the arresting officer testified that defendant had the pistol in his pocket when he was arrested.

As stated above, a jury found defendant guilty of carrying a concealed weapon and felony-firearm but acquitted him of assault with intent to commit murder. Defendant moved for a new trial on the felony-firearm charge. The trial court granted the motion, concluding that the jury erroneously believed that it was required to convict defendant of felony-firearm despite finding him not guilty of the predicate assault with intent to commit murder charge. The prosecution appealed, and this Court reversed the trial court’s decision. We concluded that the trial court improperly considered the jurors’ posttrial comments, which “involved matters inherent to the verdict,” and that “the judge’s decision to grant the new trial based solely on those comments was outside the range of reasonable and principled outcomes.” *People v Malone*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2009 (Docket No. 289151), slip op at 3.² On remand, the trial court sentenced defendant to 30 days’ probation for the CCW conviction and to two years’ imprisonment for the felony-firearm conviction.³

II. DURESS

Defendant argues that trial counsel was ineffective for not presenting a duress defense at trial. Because defendant did not raise this ineffective assistance of counsel issue in the trial court, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

¹ As defendant testified, a video of the incident was played for the jury.

² Defendant has not raised the issue of inconsistencies in the verdicts, but we note that our Supreme Court has specifically held that such inconsistencies do not invalidate felony-firearm convictions. *People v Lewis*, 415 Mich 443, 453; 330 NW2d 16 (1982) (“Although the Legislature no doubt contemplated that a person convicted of felony-firearm would also have been convicted of an underlying felony, it made commission or the attempt to commit a felony and not conviction of a felony an element of felony-firearm.”).

³ The trial court granted defendant’s motion for an appeal bond pending this appeal.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "[D]efendant must overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). "Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *Id.* A substantial defense is one that might have made a difference in the trial's outcome. *Id.*; see also *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy," and ineffective assistance of counsel will not be found merely because a strategy backfires. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987) (quotations and citation omitted).

In this case, defense counsel presented a theory of self-defense, and the trial court instructed the jury on that defense. Defendant now argues that his possession of the gun was justified by duress because he heard Coleman calling someone to help him kill defendant, so he feared that others would be coming after him.

In *People v Chapo*, 283 Mich App 360, 371-372; 770 NW2d 68 (2009), this Court explained the theory of duress as follows:

A duress defense requires some evidence from which the jury could find the following elements:

"A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

"B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

"C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

"D) The defendant committed the act to avoid the threatened harm." [*People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997), quoting *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

Further, the threatening conduct or compulsive act must be present, imminent, and impending. *Lemons, supra* at 247. It must arise without the negligence or fault of the person claiming the defense. *Id.* The defense reflects a

social policy that it is better for a person to chose [sic] to commit a crime than to face a greater evil threatened by another person. *Id.* at 246.

In this case, the evidence did not support a defense of duress. While defendant claimed that he shot Coleman at the store because he heard Coleman tell someone on his telephone to come over and kill defendant, it was defendant who created the situation by first going after Coleman, shooting him, and continuing to pursue him while Coleman attempted to keep defendant out of the store. Because it was defendant's conduct that caused Coleman to use his telephone to request assistance, defendant is not entitled to claim duress as a result of any threat arising from that conduct. See *Chapo*, 283 Mich App at 371-372. Furthermore, there was no evidence that defendant was in reasonable fear of an imminent threat of death or serious injury when he shot Coleman at the store or when the police discovered him shortly after with the gun concealed in his pants pocket. See *id.* Although defendant testified that he heard Coleman request that someone come and kill defendant because defendant had shot Coleman, there was no evidence that anyone responded to Coleman's call or that anyone Coleman may have called presented an imminent risk of immediate harm. See *id.*

Therefore, we conclude that trial counsel was not ineffective for failing to present a duress defense.

III. CHARACTER EVIDENCE

Next, defendant argues that the trial court erred by limiting the evidence of Coleman's character that he could present at trial. In particular, defendant argues that he should have been permitted to introduce evidence of Coleman's prior convictions for breaking and entering, home invasion, and delivery of a controlled substance, which defendant contends was relevant to his claim of self-defense. We review the trial court's evidentiary decisions for an abuse of discretion but review de novo whether a rule precludes admission of evidence as a matter of law. *People v Roper*, 286 Mich App 77, 90-91; 777 NW2d 483 (2009).

Although defendant argues that evidence of Coleman's character was relevant to his self-defense claim, because "the rules of evidence strictly limit both the circumstances under which character evidence may be admitted and the types of character evidence that may be admitted[.]" defendant was required to show that any proffered character evidence was admissible under a specific rule of evidence. *Id.* at 91. Defendant's reliance on MRE 404(a)(2) is misplaced because that rule expressly applies only when self-defense is an issue to a charge of homicide. Defendant was not charged with a homicide crime.⁴

⁴ We note that the trial court nevertheless permitted defendant to present evidence of Coleman's character for violence and aggression in reliance on *People v Harris*, 458 Mich 310; 583 NW2d 680 (1998), and consistent with MRE 405. At the time *Harris* was decided, MRE 404(a)(2) was not limited to a charge of homicide. That limitation was added when the rule was amended in 2001. Under the rule as amended, the trial court should not have allowed any evidence of the

Defendant also summarily asserts that the evidence of Coleman's prior crimes was admissible under MRE 404(b), which prohibits evidence of other crimes to prove the character of a person in order to show action in conformity therewith but permits such evidence for other noncharacter purposes. Defendant, however, does not explain how evidence of Coleman's property and drug crimes was relevant to a noncharacter purpose at trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims" *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).

Accordingly, defendant has not shown that the trial court erred by excluding evidence of Coleman's prior criminal conduct.

IV. JURY INSTRUCTIONS

Finally, defendant argues that the trial court erred by failing to instruct the jury that a felony-firearm conviction could not be based on the commission of CCW as an underlying felony. See generally MCL 750.227b(1); *People v Bonham*, 182 Mich App 130, 137-138; 451 NW2d 530 (1989) ("[A] CCW conviction may not be the underlying felony for a felony-firearm conviction"). We disagree. We review this unpreserved claim of instructional error for plain error affecting defendant's substantial rights. *People v Martin*, 271 Mich App 280, 353; 721 NW2d 815 (2006).

In this case, the trial court first instructed the jury on assault with intent to commit murder, the lesser included offense of assault with intent to do great bodily harm less than murder, and CCW. It then instructed the jury on felony-firearm as follows:

Now the third charge is the crime of possessing a firearm at the time of the commission or attempted commission of a felony also known as felony firearm.

To prove the charge of felony firearm, which is also very straightforward, the prosecutor has to prove the following beyond a reasonable doubt.

First, that the defendant committed or attempted to commit the crime of assault with intent to murder or assault with intent to do great bodily harm, which I already defined for you. It is not necessary, however, that the defendant be convicted of that crime.

Second, that at the time the defendant committed or attempted to commit that crime, he knowingly carried or possessed a firearm. I will tell you that as a matter of law a pistol is considered a firearm.

Thus, the trial court specifically instructed the jury that a felony-firearm conviction required proof beyond a reasonable doubt that defendant "committed or attempted to commit the crime of assault with intent to murder or assault with intent to do great bodily harm." The trial court instructed the jury orally and also provided the jury with a written copy of its instructions.

victim's character for aggression. However, any error in allowing such evidence benefited defendant and, therefore, does not entitle defendant to relief.

Nothing in the court's instructions conveyed that a felony-firearm conviction could be based on defendant's commission of the crime of CCW. "[J]urors are presumed to follow their instructions." *People v Meshell*, 265 Mich App 616, 637; 696 NW2d 754 (2005) (quotations and citation omitted). Accordingly, there was no plain error.

Defendant also argues that defense counsel was ineffective for not requesting an instruction specifically informing the jury that the mere commission of CCW could not support a felony-firearm conviction. Because the trial court's instructions clearly conveyed that only the commission of a specified assault offense could support a felony-firearm conviction and nothing in the instructions conveyed that a felony-firearm conviction could be based on the commission of the crime of CCW, defense counsel's failure to object or request an additional clarifying instruction was not objectively unreasonable.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering