# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 15, 2012 |
| v | No. 305628<br>Oakland Circuit Court |
| JORDAN ANTHONY GONZALEZ,<br><br>Defendant-Appellant. | LC No. 2011-235938-FC |

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. The trial court sentenced defendant to life in prison without parole for the first-degree murder conviction and two years for the felony-firearm conviction. We affirm.

## I. DUE PROCESS

Defendant first argues he was denied due process because the jury instructions and the prosecution's closing argument included a statement regarding a duty to retreat. After giving the contested instruction to the jury, the trial judge inquired whether either party objected to the instructions as read. Defense counsel answered, "No Judge. Thank you." Defendant thus waived objection to this instruction. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) ("[E]xpressions of satisfaction with the trial court's instructions constitute a waiver of any instructional error"), citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), habeas corpus rev'd 347 Fed Appx 205 (CA 6, 2009). However, we review the propriety of the jury instructions because counsel's failure to object forms the basis of defendant's claim of ineffective assistance of counsel. We find that the trial court committed no error.

Generally, we review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). However, because defendant failed to object to the instructions as given by the trial court, our review is for plain error affecting substantial rights. See *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305, cert den ___ US ___; 130 S Ct 509; 175 L Ed 2d 349 (2009). An error affects substantial rights if it causes prejudice to defendant by affecting the outcome of the proceedings. *Id.* The defendant bears the burden of establishing prejudice. *Id.* at 220.

Due process requires that the trial court "properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 584-585; 556 NW2d 820 (1996). This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). "The instructions must include all elements of the charged offense[s] and must not exclude material issues, defenses, and theories, if there is evidence to support them." *People v McIntire*, 232 Mich App 71, 115; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999). "Even 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." *Cain*, 238 Mich App at 127 (quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994)).

At issue is the following portion of the trial court's jury instructions in defendant's trial:

> Under the law, a person may only use as much force as he thinks is necessary at the time to protect himself. When you decide whether the amount of fort [sic] used seem [sic] to be necessary, you may consider whether the defendant knew about any of the other ways, protecting himself, but you may also consider how the excitement of the moment affected the choice the defendant made.
>
> A person can use deadly force and self defense -- and self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly or reasonably believed he needed to use deadly force and self-defense.
>
> However, a person is never required to retreat if attacked in his own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack.
>
> Further, a person is not required to retreat if the person has a legal right to be where the person is at the time and has an honest and reasonable belief that the use of deadly force is necessary to prevent imminent death or great bodily harm of the person or another.

Defendant claims that including the initial reference to "retreat" in the jury instructions was improper, because there is never a duty to retreat in one's home. We disagree. To the extent that the trial court included a reference to "retreat" – which merely illustrated the court's previous statement regarding the necessity of force – that reference was nullified by its very next statement that no duty to retreat arises when a person is attacked in his own home.

The trial court's instruction regarding self-defense was virtually identical to CJI2d 7.16. Although the Michigan Criminal Jury Instructions themselves do not have the sanction of our Supreme Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), the Court did approve the very same instruction under similar facts in *People v Richardson*, 490 Mich 115; 803 NW2d 302 (2011). In *Richardson*, the defendant claimed he was denied due process when the trial court instructed the jury that there is a general duty to retreat, and then qualified the general rule with a statement that there is never a duty to retreat when attacked in one's home. *Id*. at 119-120. In rejecting the defendant's argument, our Supreme Court stated:

> An instruction that omitted the general duty to retreat and informed the jury only that defendant had no duty to retreat might have been clearer. However, defense counsel did not ask the court to give such an instruction. And defendant was not prejudiced by this omission because the jury was, in fact, informed that a person attacked in his or her home has no duty to retreat. [*Id*. at 120-121.]

As in *Richardson*, defendant cannot show that he was prejudiced by the initial reference to a duty to retreat because its effect, if any, was nullified by the trial court's subsequent statement that no such duty arises when a person is attacked in his own home.

We find defendant's reliance on *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980), to be misplaced. *Pace* is not binding on this Court. MCR 7.215(J)(1). Moreover, it is distinguishable from the instant case. In *Pace*, the trial court gave instructions on both the use of deadly force in self-defense and the use of non-deadly force in self-defense. *Id.* at 535. This Court reversed defendant's conviction because "nothing in the nondeadly force instructions dispelled the idea that a perception of death or great bodily harm was a condition precedent to claiming self-defense. Where two instructions were given one proper and one improper it is presumed that the jury followed the erroneous one." *Id.* (citations omitted). Here, by contrast, the trial court's instruction made reference to the general duty to retreat and the specific exception that one is not required to retreat in one's own home. *Richardson* explicitly states that such an instruction does not prejudice a defendant because the jury was in fact informed that a defendant has no duty to retreat when in one's own home. 490 Mich at 119-120.

Defendant also relies on *People v Riddle*, 467 Mich 116, 142 n 30; 649 NW2d 30 (2002), in which our Supreme Court stated:

> There might be circumstances in which an instruction permitting the jury to consider a defendant's failure to retreat would be improper; for instance, if the defendant was inside his dwelling when he was attacked . . . . In such a case there would be no basis for an instruction allowing the defendant's failure to retreat to be considered in determining whether he acted in lawful self-defense.

However, in *Riddle*, the defendant was not in his home when attacked. *Richardson*, 490 Mich at 122 n 12. This speculative passage is therefore obiter dictum. *Id.* Obiter dicta are statements that are unnecessary to decide the case at hand and do not constitute binding precedent because they lack the force of adjudication. *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011). Further, to conclude from *Riddle* that the instruction in this case (which expressly stated that no duty to retreat arises in one's home) was a denial of due process is a bridge too far. The passage from *Riddle* is inapposite because the trial court in the instant case did not simply permit the jury to consider defendant's failure to retreat without elaboration. To the contrary, the trial court instructed the jury on the relevant exceptions to the general duty to retreat, including the rule that retreat is never required when inside one's home.

The crux of defendant's argument — that simply referencing "retreat" in cases where a defendant is attacked inside his or her home necessarily confuses the jury and violates due process — is at odds with the governing standard of instructional error claims. See *Cain*, 238 Mich App at 127 ("This Court reviews jury instructions as a whole . . . ."). Read as a whole, the

instructions given in this case fairly presented the governing law; any error in the initial reference to "retreat" did not prejudice defendant in light of the immediately subsequent instruction that defendant had no such duty when in his own home. See *Richardson*, 490 Mich at 120-121.

Defendant argues that *Richardson* is distinguishable because the prosecutor in the instant case, unlike the prosecutor in *Richardson*, made reference to defendant's opportunity to retreat. Defendant claims that the trial court's error was "exacerbated" by the prosecutor's statement in his closing argument that "you'll hear about you can consider whether he had an opportunity to retreat. You can consider that." We conclude that any confusing effect that this statement, combined with the later initial jury instruction reference to retreat, may have had on the jury was cured by the trial court's subsequent instruction that there is no duty to retreat while inside one's home. It did not prejudice defendant. See *Matuszak*, 263 Mich App at 58 ("It is presumed that the jury followed [the] instructions of the trial court when it deliberated defendant's guilt.").

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues he received ineffective assistance of counsel because his attorney failed to object to the jury instruction regarding the duty to retreat. This Court's review of an unpreserved ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Wilson*, 257 Mich App 337, 362-363; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004). "Whether a person 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).

To establish ineffective assistance of counsel, a defendant must show "that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *Matuszak*, 263 Mich App at 57-58. There is a strong presumption that defense counsel rendered effective assistance. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Further, counsel is not required to advocate a meritless position. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant argues that the failure of defense counsel to object to the jury instructions regarding the duty to retreat constituted ineffective assistance of counsel. As noted, however, it was not an error on the part of the trial court to give the instruction in question. It therefore would have been a futile endeavor for defense counsel to object to the jury instructions. See *Ericksen*, 288 Mich App at 201 ("[f]ailing to . . . raise a futile objection does not constitute ineffective assistance of counsel"). Defendant also cannot show that, but for the failure to object, the result of the trial would have been different. *Matuszak*, 263 Mich App at 57-58. The jury listened to the testimony and arguments, was instructed on all the applicable rules of law (including the rule that there is no duty to retreat in one's home), and found defendant guilty of first-degree murder and felony-firearm. Defendant fails to demonstrate that a different outcome would have resulted if the trial court had omitted its initial reference to a general duty to retreat in its jury instructions. *Id.* In sum, defense counsel's failure to object was not "deficient," and, in any event, did not prejudice defendant because defendant has not shown that omission of the reference would have resulted in a different outcome of his trial.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra