

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JOE KNIGHTEN,

Defendant-Appellant.

UNPUBLISHED

December 23, 2008

No. 281341

Genesee Circuit Court

LC No. 07-019758-FC

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

PER CURIAM.

Defendant appeals by right his jury conviction of assault with intent to murder, MCL 750.83. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction stems from the stabbing of Shelton Warner, the former husband of defendant's girlfriend. According to Warner, he was making a purchase in a convenience store when defendant and Warner's former wife arrived. Defendant put his hands in his pockets and approached him aggressively. Warner stated that he raised his hands and told defendant that "this is not what you want to do", and the two stood there. Warner's former wife interposed herself between the two men and told defendant, "That's not what we came in here for." Defendant gestured to Warner, who then told defendant that the two could go outside. Defendant walked toward the door, and Warner followed. Warner asserted that defendant then turned and attacked him. Defendant struck Warner in the stomach and the two began to grapple. Defendant struck Warner a number of times in the body. Warner did not realize defendant was armed until someone shouted that defendant had a knife. Defendant, who had an ice pick, stabbed Warner seven times. Store employees subdued defendant, who then left the store.

Defendant claimed he acted in self-defense. He testified that Warner looked threateningly at him when he entered the store, and Warner said that they should go outside. Defendant stated that he turned to leave, but that Warner grabbed him and the two started fighting. Defendant acknowledged that he stabbed Warner with an ice pick. Defendant maintained that he found the ice pick in the store parking lot. He thought it was a letter opener, and put it into his pocket before entering the store. Defendant admitted that he did not see Warner display a weapon.

On appeal, defendant argues that the trial court erred in instructing the jury on defendant's claim of self-defense. However, trial counsel waived this issue by responding affirmatively to the trial court's question, "At the side bar, other than the correction on the date, counsel indicated there were no other corrections or additions to be made to the instructions as given. Am I correct . . .?" See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant also argues that trial counsel provided ineffective assistance by failing to object to the erroneous instruction. In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, our review is "limited to mistakes apparent on the record." *Id.* "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (quotations and citations omitted).]

The trial court provided the standard jury instructions found in the versions of CJI2d 7.15 and CJI2d 7.16 applicable to acts occurring on or after October 1, 2006. However, the trial court omitted the following portion of CJI2d 7.16, which reflects the language of MCL 780.972:

- (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 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.

Defendant argues that trial counsel provided ineffective assistance when he failed to request that the trial court provide this portion of the defense instruction because he was present in a place where he had a right to be and was not acting illegally.

Reviewing the instructions as a whole, we find that the self-defense instructions given by the trial court adequately protected defendant's rights. The trial court gave a general self-defense instruction, pursuant to CJI2d 7.15, and it instructed the jury, pursuant to CJI2d 7.16, that defendant had no duty to retreat from a sudden, fierce and violent attack, or from an attack with a deadly weapon. These instructions were sufficient to outline defendant's defense under the circumstances here where, if the jury believed defendant's version of events, defendant could not retreat and was subject to a sudden violent attack from Warner. In addition, the trial court's general self-defense instructions required the jury to determine whether defendant acted honestly and reasonably in protecting himself. In light of the self-defense instructions given to the jury, defendant cannot establish that defense counsel's failure to request the additional "no duty to retreat" instruction affected the outcome of the case. Defendant thus cannot show that counsel rendered ineffective assistance. Reversal is not warranted.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder