STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ARIELLE ASHLEY GARDNER, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

ARIELLE ASHLEY GARDNER,

Respondent-Appellant.

UNPUBLISHED
January 13, 2011

No. 295083
Wayne Circuit Court
Family Division
LC No. 09-489677-DL

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Respondent appeals as of right the dispositional order placing her on juvenile probation following her plea of admission to domestic violence, MCL 750.81(2), and incorrigibility, MCL 712A.2(a)(3). We affirm.

Respondent was charged with domestic violence and felonious assault, MCL 750.82, as well as incorrigibility, following an altercation with her stepmother. Pursuant to a plea agreement, she entered a plea of admission to the domestic violence and incorrigibility charges in exchange for the dismissal of the felonious assault charge. The court released respondent to her father and placed her on juvenile probation with services. Seven months later, the court terminated respondent's probation because she had become a temporary court ward following the initiation of child protective proceedings. Respondent now contends that she is entitled to relief due to ineffective assistance of counsel.

Because respondent did not raise an ineffective assistance of counsel claim in the trial court, our review is limited to errors apparent from the existing record.[1] *People v Rodriguez*, 251

[1] The child protective services petition appended to respondent's appeal brief was not presented in the trial court. Appeals are heard on the original record, MCR 7.210(A), and a party may not

Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a claim of ineffective assistance of counsel, respondent must show that "(1) h[er] trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and [respondent] must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

"The ultimate decision to plead guilty is the defendant's, and a lawyer must abide by that decision." *People v Effinger*, 212 Mich App 67, 71; 536 NW2d 809 (1995). When considering a claim of ineffective assistance of counsel in the context of a guilty plea, the court must determine whether the defendant tendered a voluntary and understanding plea. *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993). "The question is not whether a court would, in retrospect, consider counsel's advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 89-90. "Defense counsel must explain to the defendant the range and consequences of available choices in sufficient detail to enable the defendant to make an intelligent and informed choice" between accepting a plea and going to trial. *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994). A guilty plea may be rendered involuntary due to ineffective assistance of counsel where defense counsel fails to explain the nature of the charges or discuss possible defenses thereto. *Id*.

Respondent argues that trial counsel was ineffective for failing to consider whether she had a possible defense to the assault charges based on self-defense. "A defendant is entitled to have his counsel investigate, prepare and assert all substantial defenses." *People v Hubbard*, 156 Mich App 712, 714; 402 NW2d 79 (1986). When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that she made a good-faith effort to avail herself of the right to present that defense and that the defense was substantial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

"A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions." *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990). When a defendant uses deadly force, the test for determining whether she acted in lawful self-defense has three parts: (1) the defendant honestly and reasonably believed that she was in danger; (2) the danger which she feared was serious bodily harm or death; and (3) the action taken by the defendant appeared at the time to be immediately necessary, i.e., the defendant is only entitled to use the amount of force necessary to defend herself. CJI2d 7.15; *Heflin*, 434 Mich at 502; *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). To be justified in the use of nondeadly force, a defendant must have honestly and reasonably believed that it was necessary to use the force to protect herself from

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expand the record on appeal, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Therefore, we shall not consider the petition on appeal. *People v Seals*, 285 Mich App 1, 20-21; 776 NW2d 314 (2009).

harm. CJI2d 7.22. The amount of force used must be proportionate to the danger. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Where the defendant is the initial aggressor, self-defense is not available unless the defendant first withdrew from the encounter and communicated that withdrawal to the victim. *Id.* at 323. "[A]n act committed in self-defense but with excessive force or in which defendant was the initial aggressor does not meet the elements of lawful self-defense." *Heflin*, 434 Mich at 509.

The record here indicates that respondent objected to her stepmother searching her book bag. This led to an altercation in which respondent threatened her stepmother with a knife. The record does not disclose whether respondent was the initial aggressor and, if so, whether she attempted to withdraw from the fight. Further, there is nothing in the record to show that the amount of force used by respondent was proportionate to the circumstances. The record does not indicate whether the fight was verbal or physical, or whether respondent's stepmother threatened her with or used any force against her. Finally, there is nothing in the record to suggest that respondent advised counsel of any facts that suggested that she had acted in self-defense. From the record presented, there is no basis for concluding that defense counsel was aware of facts indicating that respondent had a valid claim of self-defense such that counsel could be deemed ineffective for failing to investigate it.

Respondent also argues that counsel was ineffective for failing to consider whether her father or stepmother were being investigated by Child Protective Services (CPS) and to seek an adjournment to determine whether the Department of Human Services would file a petition for wardship under MCL 712A.2(b). There is nothing in the record to suggest that a CPS investigation was in progress while this case was pending and, if so, whether counsel was aware of it. Even assuming that a CPS investigation was in progress and that counsel was not aware of that fact, that does not provide a basis for concluding that counsel was constitutionally ineffective with respect to her representation of respondent in this case. Respondent does not contend that counsel should have pursued child protective proceedings on her behalf, that the court could not have obtained jurisdiction over her pursuant to MCL 712A.2(a) simply because it also could have obtained jurisdiction over her pursuant to MCL 712A.2(b), or that her behavior was somehow excused because she was in need of protection by the court. Further, it is purely a matter of speculation that the charges that brought respondent under the court's jurisdiction pursuant to § 2(a) would have been dismissed had they been pending when the petition seeking jurisdiction under § 2(b) was filed. Therefore, respondent has failed to show that trial counsel was ineffective.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello