S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2018
v	No. 337234 Berrien Circuit Court
ROY MICHAEL THOMPSON, Defendant-Appellant.	LC No. 2015-005579-FC

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317; felon in possession of a firearm (felon-in-possession), MCL 750.224f; carrying a concealed weapon, MCL 750.227; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 420 to 720 months' imprisonment for second-degree murder, 57 to 120 months' imprisonment for felon-in-possession, and 57 to 120 months' imprisonment for carrying a concealed weapon. These sentences are concurrent to each other and consecutive to a 2-year sentence for felony-firearm. For the reasons explained in this opinion, we affirm.

I. FACTS

Defendant's convictions arise out of the shooting death of David Krieger on December 11, 2015. David and his brother, Stephen Krieger, both worked at their family's business, Michiana Supply, Inc., an industrial hose and rubber supply company located on Milton Street in Benton Harbor. Defendant lived in a nearby residential neighborhood. Each day, on his way to a nearby shopping plaza where he sold DVDs, defendant would walk by a house belonging to Tammicia Johnson and he would then cut across a grassy area next to Michiana's parking lot.

At approximately 9:00 a.m. on the day in question, defendant walked his usual route. David was outside, in Michiana's fenced-in backyard, and David yelled at defendant, ordering him to stop kicking Johnson's dog. David then went inside Michiana and out the front door to confront defendant. David again yelled at defendant about the dog, telling defendant to stay off Michiana's property because "[w]e don't allow dog abusers on our property." Stephen, who witnessed the confrontation, testified that David put both his hands out and said "[d]on't come on our property." Stephen testified that after David put his hands out, defendant immediately "stepped back"; defendant then reached into his right pocket, pulled out a gun, raised it, and

"fired a bullet right into [David's] chest." Samuel Shade, a Michiana employee, and Joseph Williams, who was driving by on Milton, saw David push defendant and then saw defendant shoot David. David died at the scene. After defendant shot David, Stephen and defendant exchanged gunfire, but none of the shots hit anyone. Defendant then fled the scene.

Shade called 911, and used racial slurs when reporting the incident, telling the dispatcher that a "n----- shot my friend" and that if he returned to the area, "we'll hang him up." When paramedics and police arrived, paramedics cut off David's shirt, revealing that David, who had a concealed carry permit, had a gun under his clothing, "snug" in a hip holster.

Shortly after the shooting, police identified defendant as a suspect. Police located defendant hiding underneath a sofa in the basement of a home. Police later found a semi-automatic handgun in a plastic bag behind a sewer pipe in the basement.

After his arrest, defendant gave a statement to police and this recorded interview was played for the jury at trial. In the interview, defendant stated that he kicked the dog. Defendant indicated that there were five men at Michiana and that they yelled at him about the dog, threatening him and using racial slurs. Defendant stated a man came and pushed him. Defendant claimed that he then heard gunshots. But, defendant made conflicting statements as to whether David had a gun. Defendant stated that "the guy had a gun," then stated, "I don't know" if "he had a gun," but "somebody had a gun." By his own admission, defendant then shot David. Defendant proceeded to state that "he pushed me and reached" "either to swing" or to "grab something." Defendant stated that he did not know what the man had on him to hit him with, but he stated that it "looked like he had something on him," either "a gun or a knife or something." Defendant stated that he saw a "bulge like on the side" of the man's body. After defendant stated that it looked like the man had a weapon, one of the detectives asked him, whether on "the first confrontation, you did not see a gun?" Defendant responded, "no, I heard one," and he claimed that the guy's "buddy" came out with a gun "before" defendant killed David. But, defendant then conceded that no one appeared with a gun until after he killed David. When asked about his gun, defendant told police that he threw the gun away.

Defendant testified in his own defense at trial. Defendant acknowledged that he encountered Johnson's dog. According to defendant, the dog was outside of the yard, so defendant "shooed" him to get him back into his yard. Defendant denied kicking the dog. Defendant stated that, after he got the dog back in the yard, David started yelling at him from the fenced-in area near Michiana. According to defendant, David stated, "[y]ou f------ n-----, why did you kick that f------ dog like that?" Stephen then came outside and also yelled at defendant about the dog. As defendant continued walking, David and Shade came out the front door, and David confronted defendant using racial slurs and stating, "don't put your foot on my f------ property no further or I'm gonna beat your ass." Defendant testified that he tried to ask David, "[I]s this your property?" David then pushed him in the chest with both hands. Defendant testified that David's "gun was made visible to me" and that David reached "both hands" for the gun. According to defendant, he thought that David "was gonna kill" him. Defendant admitted that he killed David. He testified that he shot David because he was "scared" and "in fear of [his] life." Defendant admitted that he told police that he heard gunshots before he shot David, and he acknowledged that this was not true. He also conceded that he lied to police when he told

them that he threw his gun away. In addition to testifying in his own defense, defendant called numerous character witnesses all of whom testified that defendant had a peaceful character.

The trial court instructed the jury on first-degree murder, MCL 750.316, second-degree murder, and the assault and weapons counts. The trial court provided a self-defense instruction. Defendant was convicted and sentenced as set forth above.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to exclude the possibility of self-defense beyond a reasonable doubt.

We review de novo a challenge to the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). "All conflicts in the evidence must be resolved in favor of the prosecution." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Id.*

In Michigan, the Legislature enacted the Self-Defense Act (SDA), MCL 780.971 *et seq*., which "codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *People v Guajardo*, 300 Mich App 26, 35-36; 832 NW2d 409 (2013) (quotation marks and citation omitted). Like the common law, the SDA requires that a person have an honest and reasonable belief that there is an imminent "danger of death, great bodily harm, or a sexual assault in order to justify the use of deadly force." *Id*. See also MCL 780.972. "In general, a defendant does not act in justifiable self-defense when he or she uses excessive force[.]" *Guajardo*, 300 Mich App at 35.

> [O]nce the defendant injects the issue of self-defense and 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 proof to exclude the possibility that the killing was done in self-defense . . . beyond a reasonable doubt. [*People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010) (quotation marks and footnotes omitted).]

In this case, defendant introduced "some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-dense exist[ed]." *Id*. Defendant testified that David and other individuals at Michiana confronted him and directed racial insults and threats at him. Defendant testified that David then physically pushed him. According to defendant, he saw that David had a gun and he saw David reaching both hands for a gun. Defendant testified that he shot David because he thought David was going to kill him, explaining, "I was gonna die. If I don't shoot, I was gonna die."

However, the prosecution introduced evidence that would allow a rational jury to exclude the possibility of self-defense beyond a reasonable doubt. *Id.* At trial, three eyewitnesses testified that they witnessed the shooting. None of the witnesses saw David possess a gun or reach for his gun. To the contrary, their testimony indicates that David did nothing more than put his hands out or, at most, push defendant. For instance, Stephen testified that David put his hands out to prevent defendant from entering the property. According to Stephen, David put his hands to his sides when defendant pulled a gun. Shade and Williams testified that David pushed defendant. However, Shade did not see David reach for a gun. Rather, Shade stated that, after David pushed defendant, defendant immediately pulled a gun and shot David. Likewise, Williams testified that David shoved defendant, took a step backward, and then put his hands to his sides. Defendant then shot David. Further, while David did have a gun on his person, it was found "snug" in its holster underneath his clothing and a police officer testified that the gun was not visible until David's shirt was cut away. Although defendant testified that he saw David's gun and saw David reach for his gun, the credibility of the witnesses was for the jury. *Kanaan*, 278 Mich App 594, 619. The jury could have found Stephen's, Shade's, and Williams's testimonies more credible and found that David did not reach to retrieve a deadly weapon.[1] In these circumstances, a rationale jury could have concluded beyond a reasonable doubt that defendant did not have an honest and reasonable belief that shooting David in the chest was necessary to prevent imminent death or great bodily harm. Thus, the prosecution introduced sufficient evidence to allow a rational jury to conclude beyond a reasonable doubt that defendant did not act in self-defense.

III. SCORING OF OV 3

Next, defendant contends that he is entitled to resentencing because the trial court erred in assigning 25 points for offense variable (OV) 3. Notably, defendant concedes that, under *People v Houston*, 473 Mich 399, 405-407 & n 16; 702 NW2d 530 (2005), 25 points were properly assigned. However, defendant contends that *Houston* was wrongly decided, and he urges us to follow Justice CAVANAGH's dissenting opinion in *Houston*. This argument obviously lacks merit because we are bound to follow the majority decision in *Houston*. See *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000) ("An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of the Michigan

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[1] Indeed, the jury had sound reasons to disbelieve defendant's version of events given the inconsistencies in defendant's statements. For example, at trial, defendant testified that David's shirt came up and he saw David's gun. However, during the police interrogation, defendant equivocated on whether David had a gun. In his interview, he also stated that David's "buddy" had a gun and that he heard shots before he killed David; but, he later conceded that no one fired before he killed David. In addition, during the police interrogation, defendant admitted that he kicked the dog; but, at trial, he denied doing so. On this record, a rational jury could have concluded that defendant was not credible. See *Kanaan*, 278 Mich App at 618. Further, the jury could have concluded that defendant evinced a consciousness of guilt when he fled the scene, hid inside a basement under a couch, hid the gun that he used, and lied to police about what he did with the gun. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Supreme Court is binding on lower courts.”). Under *Houston*, the trial court did not err in scoring OV 3, and thus defendant is not entitled to resentencing.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, in a Standard 4 brief, defendant argues that he was denied the effective assistance of counsel.[2] When, as in this case, no evidentiary hearing was held, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, a defendant must show that (1) counsel rendered assistance that “fell below the objective standard of reasonableness,” and (2) “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000) (quotation marks and citation omitted). “Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

A. CROSS-EXAMINATION OF WITNESSES

Defendant argues that counsel rendered ineffective assistance by failing to effectively cross-examine Stephen and Shade. With respect to Stephen, defendant argues that, as set forth in a police report,[3] Stephen informed police that he and David saw an African American male kick a small white dog. In contrast, at the preliminary examination and at trial, Stephen testified that he did not see a dog and that he did not see defendant kick a dog. Similarly, with respect to the number of shots that Stephen fired, Stephen told authorities that he fired one shot at defendant. However, at trial, Stephen testified that he fired two shots.

Defendant now argues that defense counsel should have impeached Stephen on these inconsistencies. However, “[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant has failed to show that defense counsel’s strategy regarding the cross-examination of Stephen fell below an objective standard of reasonableness. During cross-examination, defense counsel thoroughly questioned Stephen about the shooting and about a variety of topics relating to his credibility and bias. For example, defense counsel questioned Stephen about the inconsistency between his trial testimony and the

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[2] In his Standard 4 brief, defendant asserts that he is entitled to a remand to the trial court to develop an evidentiary record. However, in a separate motion, defendant previously moved this Court for a remand for an evidentiary hearing, and we denied that request. *People v Thompson*, unpublished order of the Court of Appeals, entered October 12, 2017 (Docket No. 337234). That denial is now the law of the case. *People v White*, 307 Mich App 425, 429; 862 NW2d 1 (2014).

[3] On appeal, defendant mentions a “police report,” but it appears that he is actually referring to the “Complaint and Warrant,” which is included in the lower court record.

testimony at the preliminary examination regarding whether he heard the words spoken between defendant and David. Defense counsel also questioned Stephen about whether he pulled or rolled David's body after the shooting, and about whether David turned and ran toward the building after being shot. Defense counsel impeached Stephen about whether he used a racial slur, questioned him about his memory, and questioned Stephen about whether he was friends with a responding officer. In doing so, defense counsel challenged Stephen's credibility in the manner that he deemed most appropriate, and we will not second-guess counsel's choice regarding the most effective line of questioning. See *id.* Counsel's cross-examination of Stephen did not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302.

With respect to Shade, defendant contends that, in a police report, Shade stated that David pushed defendant, but at trial, Shade testified that David only put his hands out to stop defendant. In addition, defendant contends that Shade testified that he did not make racial slurs; however, the 911 call indicated that Shade did use racial slurs. Defendant contends that defense counsel failed to impeach Shade with these inconsistencies. Defendant does not attach a police report that purports to show Shade's inconsistencies, and these statements do not appear in the Complaint and Warrant. In any event, defendant's argument lacks merit because the record shows that defense counsel did cross-examine Shade about these issues. Specifically, during cross-examination, Shade admitted that David pushed defendant before defendant shot David. Moreover, while Shade testified that he does not generally use racial slurs, he admitted on direct and during cross-examination, that on the day of the shooting, he used the "n-word" and told the 911 operator "we'll hang him up" if defendant returned to the scene. Given that defense counsel explored these issues, defendant has failed to establish the factual predicate of his claim, *Carbin*, 463 Mich at 600, and defendant has failed to show that counsel's performance fell below an objective standard of reasonableness, *Toma*, 462 Mich at 302.

B. WARRANTY DEED

Next, defendant argues that defense counsel rendered deficient performance when he failed to introduce the warranty deed to the Michiana property. Defendant argues that David was partially on neighboring property at the time of the shooting, and defendant contends that the deed could have "layed [sic] a solid foundation for counsel's argument of the importance of where the alleged crime took place." Pertinent to defendant's argument, when trying to explain the relevance of the Warranty Deed at trial, defense counsel asserted that David's presence on neighboring property—as opposed to Michiana property—would be relevant to assessing the level of aggressiveness that David exhibited. In other words, defense counsel maintained that the farther afield David travelled to confront defendant, the more aggressive his conduct.

Related to this issue, at trial, defense counsel asked numerous questions of multiple witnesses about the boundary line of Michiana's property in an attempt to show that, at the time of the confrontation, David crossed over Michiana's property line and crossed onto the neighboring property owned by Fire Findings. In attempting to advance this theory, defense counsel questioned Stephen about a warranty deed that purportedly depicted a sewer easement between Michiana's property and Fire Findings' property. After several questions about the warranty deed, the trial court excused the jury and precluded defense counsel from using the warranty deed because counsel failed to disclose the document to the prosecution before trial.

Even assuming that defense counsel should have disclosed the deed to the prosecution, defendant's ineffective assistance claim lacks merit because defendant cannot show that there is a reasonable probability that, but for counsel's failure to disclose the warranty deed, the result of the proceeding would have been different. *Toma*, 462 Mich at 302-303. First of all, defense counsel was able to present his theory about the property line even without the warranty deed. That is, defense counsel asked numerous questions about the property line and David's location. Additionally, according to the trial court, without a survey, the legal description contained in the document could not be easily converted to an understanding of the property lines; thus, the document did not appear to have a high probative value. Moreover, even if defense counsel introduced the document, and assuming the jury could decipher the easement and property lines, this would not have shown that David knew that he crossed over the property line at the time he confronted defendant. Absent evidence that *David* knew the property boundaries, there is no factual basis for defendant's contention that a higher level of aggressiveness should be attributed to David because he crossed a property line. Finally, we are not persuaded by defendant's argument that the property line was highly relevant. It was uncontested at trial that David approached defendant and berated him about his treatment of Johnson's dog. Irrespective of whether David crossed over the property line, the central issue in this case was whether defendant had a reasonable fear of imminent death or great bodily harm when he shot David. MCL 780.972(1)(a). Defendant has failed to show that he was denied the effective assistance of counsel based on counsel's failure to introduce the warranty deed.

C. JURY INSTRUCTIONS

Finally, defendant argues that defense counsel was ineffective for failing to object to the second-degree murder instruction and for failing to request an instruction on manslaughter.

The trial court instructed the jury on first-degree premeditated murder and instructed the jury on second-degree murder. With respect to second-degree murder, the elements are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Roper*, 286 Mich App at 84 (quotation marks and citation omitted). See also M Crim JI 16.5. Defendant is correct that the trial court failed to instruct the jury on the "without justification or excuse" element, and defense counsel offered no objection to this omission. Further, this instruction was applicable in this case because defendant made a prima facie showing of self-defense, which would constitute a justification or excuse for the killing. Thus, defense counsel could have succeeded on a request for this instruction.

Nevertheless, even assuming counsel performed unreasonably by failing to object to the omission of this portion of the second-degree murder instruction, defendant is not entitled to relief because defendant cannot show that, but for counsel's deficient performance, the result of the proceeding would have been different. *Toma*, 462 Mich at 302-303. The trial court provided a thorough instruction on self-defense, which was the only justification for the shooting that defendant advanced at trial. Specifically, the trial court instructed the jury that "[i]f a person acts in lawful self-defense, that person's actions are justified and he is not guilty of murder . . . ." The trial court also instructed the jury that "[t]he defendant does not have to prove that he acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt . . . that the defendant did not act in self-defense." These instructions made plain that defendant was not guilty of murder if he acted in self-defense and that the prosecutor bore the burden of proving

that defendant did not act in self-defense. Even if the instructions on second-degree murder were somewhat imperfect, the instructions, when considered as a whole, fairly presented the issues to be tried and these instructions were sufficient to protect defendant's rights. See *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004). In these circumstances, defendant has not shown that counsel's failure to object to the omission of the "without justification or excuse" language affected the outcome of the proceedings. *Toma*, 462 Mich at 302-303.

Additionally, defendant argues that defense counsel should have requested a manslaughter instruction. However, declining to request a particular jury instruction can constitute effective trial strategy. *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013). "The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). And, consistent with this strategy, counsel may choose not to request instructions on lesser offenses because an instruction on a lesser offense may reduce the chance of acquittal. *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986). In this case, defense counsel could have made a reasonable strategic decision to pursue an "all or nothing" strategy. See *Nickson*, 120 Mich App at 687. In other words, counsel may have reasonably decided to forgo requesting a manslaughter instruction with the hopes of obtaining an outright acquittal based on a self-defense theory. The fact that this strategy was not entirely successful does not establish that defense counsel provided ineffective assistance. See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Indeed, counsel's decision to pursue an all or nothing defense strikes us as particularly sound because an instruction on either voluntary or involuntary manslaughter would not have been wholly consistent with the self-defense theory advanced at trial and defense counsel could have reasonably concluded that a claim of manslaughter would not have been persuasive, but would have instead weakened defendant's claim of self-defense. For instance, voluntary manslaughter requires a defendant to kill in the heat of passion caused by adequate provocation. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). But, in this case, defendant did not contend that he acted "out of passion rather than reason." See *id.* Instead, he testified that he shot the victim because he was afraid for his life. Likewise, an instruction on involuntary manslaughter would not have been consistent with defendant's theory of the case. An involuntary manslaughter instruction is warranted "only if a rational view of the evidence would have supported a finding that the . . . death[] [was] caused by an act of gross negligence or an intent to injure, and not malice[.]" *People v Gillis*, 474 Mich 105, 138; 712 NW2d 419 (2006) (quotation marks and citation omitted). In this case, the evidence showed that defendant intentionally shot David in the chest. There was no evidence that the death was caused by an act of gross negligence or intent to injure. Instead, defendant admitted intentionally killing David but claimed that the killing was justified—i.e., that it was done in self-defense. Therefore, an involuntary manslaughter instruction was not warranted. *Id*. Ultimately, defense counsel's strategic decision to pursue a claim of self-defense—as an all or nothing strategy—does not demonstrate deficient performance. *Nickson*, 120 Mich App at 687. See also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant has not shown that he was denied the effective assistance of counsel.

Affirmed.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Brock A. Swartzle