STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEANDREW MARTIN,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 348584
Jackson Circuit Court
LC No. 18-004820-FC

Before: BOONSTRA, P.J., and BORRELLO and RICK, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84; three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; felon in possession of a firearm, MCL 750.224f; felon in possession of ammunition, MCL 750.224f(6); and carrying a concealed weapon, MCL 750.227.[1] On appeal, defendant argues that he was denied effective assistance of counsel when defense counsel failed to request a jury instruction on self-defense or defense of others. We vacate defendant's convictions and remand for a new trial.

I. BACKGROUND

This case arises from a nonfatal shooting. The shooting occurred in the parking lot of a club and bar in the early morning hours of July 22, 2018. Defendant fired approximately 10 shots into a crowd after a brawl broke out. The aftermath of the shooting left one person shot in the foot with a ricocheted bullet. The entire incident was caught on video and played at various times throughout the trial.

[1] The jury also found defendant guilty of an additional count of felony-firearm and one count of carrying a weapon with unlawful intent, MCL 750.226. However, in postconviction proceedings, the trial court granted directed verdicts of acquittal as to those counts, which is reflected in defendant's amended judgment of sentence.

At trial, defendant did not dispute most of the gun charges but instead only argued that he never tried to shoot anyone and was acting in self-defense. However, defense counsel never requested a jury instruction for self-defense or defense of others. Nonetheless, defense counsel indirectly argued the defense of self-defense in his closing argument on eight different occasions. The jury acquitted defendant of assault with intent to commit murder and the felony-firearm attached to it, but it found defendant guilty of the remainder of the charges.

After the trial, defendant moved for a *Ginther*[2] hearing, which the trial court granted. During the *Ginther* hearing, defense counsel conceded that his failure to request the self-defense jury instructions were not a matter of trial strategy. Rather, defense counsel mistakenly believed that defendant was not entitled to the self-defense jury instructions because defendant was a felon in possession of a firearm. The trial court concluded that the first prong of *Strickland*[3] was met because the jury instructions would have been given if they were requested. But the trial court also found that there would not have been a "substantial likelihood of a different result" if the jury considered the self-defense instructions. Accordingly, the trial court denied defendant's motion for a new trial. This appeal followed.

On appeal, defendant argues that he is entitled to a new trial because defense counsel's failure to request self-defense or defense-of-others jury instructions was objectively unreasonable and he was prejudiced by the error. We agree.

II. STANDARD OF REVIEW

Generally, the determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). We review constitutional questions de novo and factual findings for clear error. *Id*. A factual finding is clearly erroneous if "the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

III. ANALYSIS

To be entitled to a new trial as a result of ineffective assistance of counsel, a defendant must show: (1) deficient assistance, which is that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) prejudice, which is that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Trakhtenberg*, 493 Mich at 51. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018) (cleaned up). In making this determination, courts "must consider the totality of the evidence before the judge or jury." *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Deference should be given to the trial court's superior opportunity to assess the credibility of the witnesses who appeared before it. MCR 2.613(C); *People v White*,

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

331 Mich App 144, 150; 951 NW2d 106 (2020). Additionally, the defendant bears the burden to prove the factual predicate of his claim, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 US at 689.

A. PERFORMANCE PRONG

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). The jury instructions must allow the jury to consider material issues, defenses, or theories if there is evidence to support them. *People v Armstrong*, 305 Mich App 230, 240; 851 NW2d 856 (2014). Accordingly, failing to request a jury instruction can constitute ineffective assistance of counsel. See *People v Thorne*, 322 Mich App 340, 347-348; 912 NW2d 560 (2017).

Under Michigan law, self-defense can be applied by the Self-Defense Act (SDA) or by common law. See MCL 780.971; *People v Dupree*, 486 Mich 693, 708; 788 NW2d 399 (2010). Common-law self-defense requires evidence showing that the defendant: (1) honestly and reasonably believed that she or he was in danger, (2) the danger feared was death or serious bodily harm, (3) the defendant's actions appeared at the time to be immediately necessary, and (4) the defendant was not the initial aggressor. *People v Guajardo*, 300 Mich App 26, 35, 832 NW2d 409 (2013). Common-law self-defense also applies to the defense of others. See *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002). Self-defense and defense of others are affirmative defenses that imply that the defendant's "actions were intentional but that the circumstances justified his [or her] actions." *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). "In a self-defense claim, the accused's conduct is judged according to how the circumstances appeared to him at the time he acted." *People v Adamowicz*, 503 Mich 880, 880 (2018).[4] Because self-defense is subjective to the defendant, a defendant may be justifiably mistaken in his conclusion that self-defense was necessary. See *Riddle*, 467 Mich at 126-127. Our Supreme Court has provided the following guidance when applying self-defense jury instructions:

> [O]nce a defendant 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 disproving the affirmative defense of self-defense beyond a reasonable doubt. The sufficiency of the evidence of a defendant's self-defense theory is for the jury to decide under proper instructions. Those instructions cannot exclude the theory of self-defense if there is evidence to support it. [*People v Rajput*, 505 Mich 7, 11; 949 NW2d 32 (2020) (cleaned up).]

[4] *Adamowicz* is a Michigan Supreme Court order rather than an opinion. However, a Supreme Court order is binding when it constitutes a final disposition of an application and contains a "concise statement of the applicable facts and the reason for the decision." *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1994).

In this case, defendant was entitled to self-defense and defense-of-others jury instructions, and defense counsel's failure to request those jury instructions was objectively unreasonable. The trial court found that defense counsel's decision was objectively unreasonable, and defendant agrees with the trial court's ruling on that part. At the *Ginther* hearing, defense counsel admitted that he wanted to argue self-defense, but that he did not believe that he was legally allowed to do so. Defense counsel testified that it was his belief that the self-defense jury instructions were not available because defendant was a felon in possession of a firearm. Although the SDA limits the duty to retreat if the person who was acting in self-defense was not committing a crime, MCL 780.972, it does not limit application of the common law to determine whether self-defense was allowed or whether there was a duty to retreat, MCL 780.973 and MCL 780.974. Additionally, the "traditional common law affirmative defense of self-defense is generally available to a defendant charged with being a felon in possession if supported by sufficient evidence." *Dupree*, 486 Mich at 712. Further, self-defense is an affirmative defense to felony-firearm charges, *People v Goree*, 296 Mich App 293, 304-305; 819 NW2d 82 (2012), and it has also been extended to a defendant charged with carrying a concealed weapon, see *People v Triplett*, 499 Mich 52, 59; 878 NW2d 811 (2016). Therefore, common-law self-defense was available as an affirmative defense in defendant's case. See *Guajardo*, 300 Mich App at 40.

B. PREJUDICE PRONG

We also conclude that defendant was prejudiced as a result of defense counsel's failure to request the self-defense jury instructions.

In this case, the trial court concluded—and there appears to be no dispute—that defense counsel should have requested the self-defense jury instructions. Nonetheless, the trial court concluded that defendant was not prejudiced by the error.

Defendant relies on *Rajput* to support the argument that he was prejudiced by defense counsel's error. In *Rajput*, the defendant was driving in his car with a friend when someone in a red Malibu shot at them and drove away. *Rajput*, 505 Mich at 9. Later, the defendant and his friend tracked down the Malibu, trapped it, and approached the driver. *Id*. The confrontation turned deadly as the driver of the Malibu reached for a gun, and the defendant's friend shot the driver. *Id*. at 9. The trial court refused to give defendant a self-defense jury instruction, and the defendant was found guilty of second-degree murder. *Id*. at 9-10. This Court affirmed.[5] The Michigan Supreme Court reversed, holding that the defendant was entitled to the self-defense jury instruction. *Id*. at 11-12. The Court reasoned that regardless of the merits of self-defense, whether the defendant and his friend were the initial aggressors or could have fled were issues for the jury to decide "because defendant presented sufficient evidence to satisfy his burden of proof on self-defense." *Id*. at 12. Although *Rajput* was a case in which the jury instructions were denied—not one in which defense counsel failed to request them—the same principles apply.

[5] *People v Rajput*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2018 (Docket No. 339117).

In denying defendant's motion for a new trial, the trial court concluded that defendant was not prejudiced by the error on the basis that defendant had "conceded" to some of the crimes and the circumstances of the case. Specifically, the court considered that defendant conceded to the felon-in-possession and ammunition counts, that "there were many shots fired [and] the defendant was running towards the danger as opposed to any retreat," that defendant "was shooting a gun" and that there was "no deadly weapon" or firearm on the other side of the altercation. We conclude that the trial court erred by denying defendant's motion and engaged in improper fact-finding in making its determination.

The trial court improperly considered the duty to retreat because *there is no* duty to retreat from a sudden, fierce, or violent attack. See *Riddle*, 467 Mich at 119-121. Both the testimony and the video recording of the altercation support that this altercation was sudden, fierce, and violent. The video indicates that it only took six seconds from the brick being thrown to the tequila bottle being smashed over defendant's friend's head and that the first shot was fired only six seconds later. Defendant also testified that the events quickly transpired and that it was a "frightening situation."

The trial court also found that there was no other weapon other than the firearm used by defendant. However, most importantly, it failed to consider how the circumstances appeared to defendant. See *Adamowicz*, 503 Mich at 880. At trial, defendant testified that he believed the other individuals involved in the altercation had weapons. The trial court also improperly concluded that the tequila bottle was not a deadly weapon. A tequila bottle, especially in this case where it was violently used to strike someone in the head, could be considered a deadly weapon. See MCL 750.226; see also *Triplett*, 499 Mich at 56 ("[T]he test to determine if an instrument is an 'other dangerous weapon' is whether the instrumentality was used as a weapon and, when so employed in an assault, was dangerous.") (Cleaned up). Additionally, although defendant may have conceded to some of the charges against him, the common law affirmative defense of self-defense is generally available to a defendant charged with being a felon in possession, *Dupree*, 486 Mich at 712, and felony-firearm, *Goree*, 296 Mich App at 304-305.

Defendant produced sufficient evidence to satisfy his burden of proof for his self-defense and defense-of-others claim and these were issues for the jury to decide. See *Rajput*, 505 Mich at 12. We also note that defendant was acquitted of a higher charge at trial after defense counsel indirectly argued self-defense on eight different occasions. Because evidence of a prima facie case of self-defense was produced, the prosecution would have had the burden to disprove self-defense beyond a reasonable doubt. See *Rajput*, 505 Mich at 11.

Defendant presented evidence of an honest and reasonable belief that he and his group were in danger of death or serious harm when the brawl unfolded in front of him. Defendant testified that it was a frightening situation, that his group was outnumbered, that he thought the other group had weapons, that he saw a bottle get broken over his friend's head, and that both of his friends were on the ground. Although no one else appeared to actually have a firearm, there was evidence that defendant reasonably thought they did, and this Court looks to the circumstances as they appeared to defendant. See *Adamowicz*, 503 Mich at 880. Defendant testified that he knew the other parties had firearms with them and that "they could start shooting." Defendant said that he believed his group was seriously outnumbered and only fired to "protect himself." Defendant also said that he carried a firearm with him for protection and testified that it was "just a frightening

situation." The victim was shot at and then arrested two days later for carrying a concealed weapon and felon-in-possession, which supports defendant's claim that he thought the victim's group may have had a weapon. And a detective testified that he has had to deal with a lot of gun violence in the area, also providing support for defendant's belief that the other side may have been armed. Even though there is not a mass of evidence supporting the reasonableness of defendant's beliefs of the other side carrying weapons, only some evidence is required to establish a self-defense case, *Rajput*, 505 Mich at 11, and defendant was allowed to be justifiably mistaken in his belief, *Riddle*, 467 Mich at 126.

Additionally, defendant's actions arguably were necessary, as the brawl intensified in a matter of seconds. As the trial court recognized,

> Defendant saw those around him throwing rocks, bottles, and fists, with the violence intensifying as the fighting progressed . . . he was reacting to what he honestly and reasonably viewed to be a situation destined to end in serious bodily harm to him and others if he did not intervene.

As indicated, defendant had no duty to retreat if he was met with a sudden, violent, fierce attack, or he reasonably believed the aggressor was about to use a deadly weapon—he could meet force with force. See *Riddle*, 467 Mich at 119-121. In this case, not only did a sudden attack break out in front of defendant, but he also expressed that he thought the other parties were armed, which would suggest that defendant's fear was of death or great bodily harm. Further, a tequila bottle could be used as deadly weapon, especially when broken over someone's head. See MCL 750.226; see also *Triplett*, 499 Mich at 55-56.

Finally, the evidence suggests that defendant was not the initial aggressor. In fact, defendant was seen throughout the night trying to prevent the fight, and he testified that he only pulled out his weapon to "shoo them back." Further, defendant never denied what he did, which is consistent with a self-defense claim. See *Wilson*, 194 Mich App at 602. Defendant also testified, as to his subjective intent, "When I pulled that gun my intention was to protect myself." See *Adamowicz*, 503 Mich at 880. Further, even the trial court found that some evidence was produced for all of the elements of self-defense, and we defer to the trial court's factual findings. See *White*, 331 Mich App 150. Therefore, defendant met all the elements of a prima facie claim of self-defense regarding AWIGBH and the associated charges and, we conclude, has established that, but for defense counsel's failure to request the jury instructions, there was a reasonable probability that the result would have been different.[6] See *Trakhtenberg*, 493 Mich at 51.

In sum, defendant was denied effective assistance of counsel because defense counsel's failure to request the self-defense jury instructions was objectively unreasonable and defendant was prejudiced because there was a substantial likelihood that the result of the proceedings would

[6] Although the evidence of prejudice is arguably less clear with respect to defendant's convictions of felony-firearm, felon in possession, and carrying a concealed weapon, we conclude that it is most prudent under the circumstances to remand for a new trial on all of the outstanding charges.

have been different but for the error. Therefore, the trial court erred when it denied defendant's motion for a new trial.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Stephen L. Borrello
/s/ Michelle M. Rick