STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARDIS TREMAYNE BLACK,

Defendant-Appellant.

UNPUBLISHED
April 29, 2021

No. 352353
Wayne Circuit Court
LC No. 19-005681-01-FC

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of assault with a dangerous weapon (felonious assault), MCL 750.82.[1] The trial court sentenced defendant, as a second-offense habitual offender, MCL 769.10, to one year in jail and two years' probation. We affirm.

I. BACKGROUND

Defendant's conviction arises from an altercation on July 15, 2019, between the complainant, Thompson Freeman III, and defendant in front of defendant's house. Freeman testified that he went to defendant's house sometime after 2:00 a.m. to deliver food to Calvin Austin, who was defendant's cousin and Freeman's friend. Freeman approached defendant's house, went up the porch, and knocked on the front window twice. The first time Freeman knocked on the window, he asked defendant if Austin was inside, to which defendant responded, "[g]et the hell away from my door." The second time Freeman knocked on the window, his knock caused the window to crack and break. There was conflicting testimony regarding whether Freeman's hand entered the room. However, defendant acknowledged leaving the confines of his home and hitting Freeman with a metal pole several times as Freeman was walking away from the house toward his bicycle. As a result, Freeman sustained severe injuries to his legs, necessitating surgery.

[1] The jury found defendant not guilty of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and assault with intent to do great bodily harm less than murder, MCL 750.84.

Defendant then "snatched" the bicycle from between Freeman's legs, took it to his house, and told Freeman that he was not going to get it back until Freeman fixed his window. Detroit Police Department Detective Jon Metiva testified that defendant admitted he used a metal pole to hit Freeman after Freeman broke his window. Defendant was found guilty of felonious assault, MCL 750.82, as a lesser included offense of assault with intent to do great bodily harm less than murder.

II. SELF-DEFENSE

A. FAILURE TO INSTRUCT

On appeal, defendant argues that the trial court committed plain error in failing to instruct the jury on self-defense. We disagree.

1. ISSUE PRESERVATION AND STANDARD OF REVIEW

A party must object or request a given jury instruction to preserve the error for review. MCL 768.29; *People v Head*, 323 Mich App 526, 537; 917 NW2d 752 (2018), citing *People v Sabin* (*On Second Remand*), 242 Mich App 656; 620 NW2d 19 (2000); see also *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003) ("[t]o preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates."). A review of the record establishes that defendant failed to request an instruction on self-defense or object to its absence. Therefore, this issue is not preserved.

The failure to make a timely objection to a jury instruction constitutes forfeiture, and relief is only warranted if the error was plain and it affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error rule, this Court reverses "only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002). Specifically, in order to show plain error warranting relief, defendant must show that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). "The third requirement requires a showing of prejudice, meaning that the error must have affected the outcome of the lower court proceedings." *Id*.

2. ANALYSIS

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against [him]." *People v Thorne*, 322 Mich App 340, 347; 912 NW2d 560 (2017), quoting *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002) (quotation marks and citation omitted). "The jury instructions must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them." *People v Armstrong*, 305 Mich App 230, 240; 851 NW2d 856 (2014) (quotation marks and citation omitted). Because the issue is unpreserved, defendant must show that an error occurred, the error was plain, and the plain error affected his substantial rights. *McLaughlin*, 258 Mich App at 645.

The Self-Defense Act, MCL 780.971 *et seq*., "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; 832 NW2d 409 (2013) (citation and quotation

marks omitted). MCL 780.972(2), which applies to the use of nondeadly force in self-defense, provides:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

In a self-defense context, this Court has held that reasonableness "depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor." *People v Orlewicz*, 293 Mich App 96, 102; 809 NW2d 194 (2011). A person who uses excessive force or acts as the initial aggressor does not act in justifiable self-defense. *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). An aggressor may still claim self-defense if he or she "withdraws from any further encounter with the victim and communicates such withdrawal to the victim." *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993), abrogated on other grounds by *People v Reese*, 491 Mich 127; 815 NW2d 85 (2012). Once a defendant claims that he or she acted in self-defense, the prosecution bears the burden of disproving the defense beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009).

Defendant argues that he acted in justifiable self-defense because Freeman went to his house sometime after 2:00 a.m., knocked twice on defendant's bedroom window while defendant was asleep, and caused the window to shatter, all while Freeman yelled and taunted defendant and his female companion. The uncontroverted evidence is that after the window broke, Freeman was walking away from the defendant's window toward his bicycle when defendant exited the home to approach him. Thus, regardless of the odious nature of Freeman's conduct at the window, there was no evidence to support the theory that Freeman posed an imminent physical threat, for which the use of nondeadly force was necessary, when the defendant struck Freeman with the pole. Defendant exited the safety of his house and pursued an empty-handed Freeman, who was walking away and toward his bike. Defendant's repeated striking of Freeman with a metal pole rendered any self-defense claim futile due to its excessive nature. Therefore, the trial court did not err in failing to sua sponte instruct the jury on self-defense.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that defense counsel's failure to request a jury instruction on self-defense deprived defendant of the effective assistance of counsel. We disagree.

1. ISSUE PRESERVATION AND STANDARD OF REVIEW

"In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). "Failure to

move for a new trial or for a *Ginther*[2] hearing ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim." *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 Foster*, 319 Mich App 365, 390; 901 NW2d 127 (2017) (quotation marks and citation omitted). Defendant did not move in the trial court for a new trial or an evidentiary hearing.

Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). Appellate courts review the trial court's factual findings for clear error. *Id.* A trial court's finding is clearly erroneous when, although there is evidence to support it, this Court, on the whole record, is left with a definite and firm conviction that a mistake was made. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008). When the trial court did not hold an evidentiary hearing, there are no factual findings to which the reviewing court must defer. *People v Gioglio* (*On Remand*), 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated in part on other grounds, *Gioglio v Michigan*, 568 US 1217; 133 S Ct 1502; 185 L Ed 2d 557 (2013). In such cases, the reviewing court will determine whether the defendant received ineffective assistance on the record alone. *Id.*; see also *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003) (stating that, where there has been no hearing below, the appellate court's review is limited to mistakes that are apparent on the record). Moreover, this Court reviews de novo whether a particular act or omission fell below an objective standard of reasonableness under prevailing professional norms and prejudiced the defendant. *Gioglio*, 296 Mich App at 19-20.

2. ANALYSIS

To establish ineffective assistance of counsel, a defendant must show: (1) the trial counsel's performance was objectively deficient, and (2) the deficiencies prejudiced the defendant. *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). Prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (quotation marks and citations omitted).

Under the objective reasonableness prong of the *Strickland* test, "[t]here is a presumption that counsel was effective, and a defendant must overcome the strong presumption that counsel's challenged actions were sound trial strategy." *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015); see also *Strickland*, 466 US at 689 ("[A] court must indulge in a strong presumption that counsel's conduct falls within the range of reasonable assistance."). This standard requires a reviewing court "to affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.' " *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012), quoting *Cullen v Pinholster*, 563 US 170, 196; 131 S Ct 1388; 179 L Ed 2d 557 (2011). In order to be justified in using nondeadly force, a defendant must honestly and reasonably believe that it was necessary to use that force to protect himself or herself from the imminent unlawful use of force by another individual. MCL 780.972(2). The amount of force used must be proportionate

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

to the danger. *Dupree*, 486 Mich 693 at 707. "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005) (quotation marks and citation omitted).

The facts of the instant case did not justify defense counsel requesting a jury instruction on self-defense. This Court has noted that "[c]ounsel is not required to advocate a meritless position." *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). Because there were insufficient facts to justify requesting a jury instruction for self-defense, defendant cannot demonstrate the first *Strickland* requirement that defense counsel's performance was deficient. *Strickland*, 466 US at 694. Accordingly, defendant's claim of ineffective assistance of counsel fails.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra