STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONICA MARTIN,

Defendant-Appellant.

UNPUBLISHED
October 21, 2021

No. 353691
Wayne Circuit Court
LC No. 19-004669-01-FH

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial convictions for assault with a dangerous weapon (felonious assault), MCL 750.82, domestic violence, MCL 750.81(2), and assault with intent to do great bodily harm, MCL 750.84. Defendant was sentenced to three years' probation, with the first eight months in jail, for all three convictions. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This case arises out of an altercation between defendant and her then-husband on June 4, 2019, at 19544 Dresden in Detroit, Michigan. The victim and defendant were former spouses who apparently had a rather turbulent relationship. During the bench trial in this matter, the victim testified that, on the night in question, at roughly midnight, he was sitting in his vehicle, which was parked in the driveway of the house at 19544 Dresden, when defendant appeared unannounced. Defendant drove up to the house, exited her vehicle, and approached the victim. At that point, the victim rolled down his window and opened the front door on the driver's side. The victim indicated that defendant was using profanity at him, acting irate, and demanding that he go back home with her so they could have sex. The victim called the police to have defendant removed from the premises. According to the victim, defendant then entered the victim's vehicle and sat in the front passenger seat. The victim called the police again the moment defendant forced her way into the front passenger seat. As he waited for the police to arrive, and in an effort to avoid trouble, the victim drove his vehicle out of the driveway and parked it in front of a vacant lot across the street from the house. Meanwhile, defendant climbed into the back seat directly

behind the driver's seat, reached around the victim, and held a knife to his neck and throat. The victim then attempted to grab defendant by the wrist and removed her grip from around his neck, but he soon started feeling pressure from the knife on his neck, followed by a burning sensation. The victim felt a shooting pain in his back when he attempted to remove defendant's grip from around his neck, which was when he realized that he had been stabbed in the back five times. Detroit Police Department Officer Dana McGregor testified that he spoke with the victim and observed that he was bleeding from his left forearm. Officer McGregor could not locate a box cutter in the vicinity of the incident, and he did not see any injuries to defendant.

On the first day of trial, the prosecution moved to prohibit defendant from referencing the prior bad acts of the victim, who allegedly had a long history of violence that resulted in the issuance of more than one personal protection order against him and felony charges of child abuse. The trial court permitted defendant to ask questions about the relationship between her and the victim, but it prohibited the introduction of any evidence of abuse by either party.

Following the closing of proofs, the trial court made its findings, which were, in relevant part:

> At the time of the incident, the [victim] was in a white Suburban vehicle, according to the testimony. . . . And . . . he was in the driveway having a drink and listening to the radio.
>
> [D]efendant approached in a vehicle, a 2009 black Lincoln MKX. According to the testimony, [d]efendant approached [the victim] yelling and demanding that he come home. Previous to this, [the victim] was watching their children so [defendant] could celebrate her birthday that night.
>
> She approached the vehicle. According to the testimony she took keys—the keys out of the ignition and demanded that [the victim] come back to their house—to her house and to have sex with her.
>
> He called the police, when she first arrived, and told them that his wife was there and that she was drunk.
>
> [The victim's] testimony was that the defendant climbed over him into the passenger seat, shut the driver's side door and she was able to make her way behind him, climb to the back seat.
>
> She reached around. She put a knife on his throat saying that he was hers. She began to stab him, [the victim] said about five times, including in his spine. He said he could feel pain. He felt a burning sensation.
>
> [The victim] called the police and told them that he had been stabbed. When the police arrived, which was about 25 to 30 minutes later, [the victim] was at the door of his mother's house and came down to speak with the police. [D]efendant was outside standing on the sidewalk.

She claimed that [the victim] . . . stabbed himself with a box cutter and that she was hit with a club. That [the victim] hit [defendant] in the face.

* * *

[D]efendant said that [the victim] . . . was stabbed outside the vehicle. [But] [t]here was blood actually inside of the vehicle.

[T]here seems to be a lot of corroboration with [the victim's] testimony and the evidence in this case. Blood was in the car, [the victim] had injuries, [the victim] called 911, [the victim] needed medical attention.

* * *

Now, [defendant's] testimony does not seem as reasonable, I will say, because the officer saw no injuries. There . . . are no injuries the Court could see in the booking photo with regards to . . . a busted lip and a forced eye . . . closed.

There's no explanation for all of the blood that was in the vehicle. And [defendant] doesn't really keep her story straight with regards to the use of . . . the box cutters.

* * *

I didn't find [defendant's] testimony to be wholly credible. It certainly contradicts the physical evidence found in the car.

* * *

I don't see how the evidence leads to any other conclusion, other . . . than that [defendant] went over to that location, went inside the car and began stabbing.

Defendant was sentenced as stated above. This appeal ensued.

II. ANALYSIS

On appeal, defendant first argues that the evidence the prosecution presented at trial was insufficient to sustain her convictions for assault with intent to do great bodily harm, felonious assault, and domestic violence, and to disprove self-defense beyond a reasonable doubt.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Henry*, 315 Mich App 130, 135; 889 NW2d 1 (2016). When reviewing a sufficiency challenge, "we review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015). When assessing a challenge to the sufficiency of the evidence, the trier of fact, not the appellate court, determines

what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the trier of fact's role as the sole judge of the facts when reviewing the evidence. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010).

Due process requires the prosecution to prove the elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992). Here, defendant was convicted of assault with intent to do great bodily harm, felonious assault, and domestic violence. Accordingly, the prosecution was required to prove beyond a reasonable doubt the elements of each of these crimes. To prove assault with intent to do great bodily harm less than murder, the prosecution must establish "an attempt or threat with force or violence to do corporal harm to another" and "an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). "Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent." *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010). "Intent to cause serious harm can be inferred from the defendant's actions, including the use of a dangerous weapon or the making of threats." *People v Stevens*, 306 Mich App 620, 629; 858 NW2d 98 (2014). An assault is "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery," and a battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005) (quotation marks and citation omitted). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). In addition, domestic violence is a specific intent crime that is proved by establishing that the defendant and victim are associated by marriage as set forth in the domestic assault statute, and that the defendant either intended to batter the victim or that the defendant's unlawful act placed the victim in reasonable apprehension of being battered. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996).

An individual not engaged in criminal activity may use deadly force against another individual anywhere she has a legal right to be with no duty to retreat if he or she "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual." MCL 780.972(1)(a). Moreover, if an individual is not committing or has not committed a crime "at the time he or she uses force other than deadly force," he or she "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." MCL 780.972(2).

Self-defense is an affirmative defense that justifies otherwise punishable criminal conduct. *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). Once the defendant asserts self-defense, he or she must satisfy the initial burden of producing some evidence to establish the necessary elements of a prima facie case of self-defense. *Id*. at 710. Once a defendant introduces evidence of self-defense, the burden shifts to the prosecution to exclude beyond a reasonable doubt the possibility that the defendant acted in self-defense. *Id*.

Defendant asserts that the prosecution failed to disprove defendant's claim of self-defense. In support of her self-defense claim, defendant testified that before she stabbed the victim with her key, he was speaking to defendant in an aggressive tone and then he struck her in the face with a club, grabbed her by the hair, and dragged her back to his mother's house. Defendant believed that the victim was going to seriously injure or kill her. In response, defendant stabbed the victim with her key in self-defense.

The trial court resolved the credibility questions against defendant. There was sufficient evidence presented for the trial court to find beyond a reasonable doubt that defendant attempted with force or violence to do harm to the victim. Defendant admitted that she struck the victim with her car key, and the victim testified that defendant held a knife to his throat. The victim further testified that defendant stabbed him approximately five times. The victim said he felt a shooting pain in his back. Moreover, Officer McGregor indicated that he saw the victim bleeding from his left forearm. While a key is not a dangerous weapon per se, our Supreme Court has recognized that "articles which are manufactured and generally used for peaceful and proper purposes, would fall within the category of dangerous weapons if used for or carried for the purpose of assault or defense." *People v Vaines*, 310 Mich 500, 505; 17 NW2d 729 (1945); See *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938) ("The character of a dangerous weapon attaches by adoption when the instrumentality is applied to use against another in furtherance of an assault."). In this case, defendant used her key as a dangerous weapon when she stabbed the victim with it.

There was also sufficient evidence that defendant did not act in self-defense when she stabbed the victim. Contrary to defendant's testimony, the victim testified that defendant was using profanity at him, acting irate, and demanding that he go back home with her. The victim further testified that as he waited for the police to arrive, and in an effort to avoid trouble, the victim drove his vehicle out of the driveway and parked it in front of a vacant lot across the street from the house, which was when defendant climbed into the back seat directly behind the driver's seat, reached around the victim, and held a knife to his neck and throat.

The trial court heard both accounts of what occurred and ultimately found that defendant's version of events lacked credibility. It is axiomatic that this "Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Moreover, Officer McGregor testified that he did not see any injuries on defendant, and he could not locate the club with which the victim allegedly hit defendant. Officer McGregor also stated that the blood he saw at the scene of the incident was inside the victim's vehicle, thereby corroborating the victim's version that defendant stabbed him while she was in his vehicle. Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented at trial to prove defendant's convictions for assault with intent to do great bodily harm, felonious assault, and domestic violence and disprove defendant's theory of self-defense.

Defendant next argues that her convictions for assault with intent to do great bodily harm less than murder and felonious assault violate constitutional prohibitions against double jeopardy.

In order to preserve a double jeopardy issue, the defendant must raise it at trial. *People v Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000). A double jeopardy challenge raised for the first time on appeal is not preserved for appellate review. *People v McGee*, 280 Mich App

680, 682; 761 NW2d 743 (2008). Defendant did not raise the double jeopardy issue at trial, and thus has failed to properly preserve this issue.

Generally, a double jeopardy challenge presents a question of constitutional law subject to de novo review by the appellate courts. *People v Ream*, 481 Mich 223, 226; 750 NW2d 536 (2008). Because a double jeopardy issue presents a significant constitutional question, it will be considered on appeal regardless of whether it was raised before the trial court. *McGee*, 280 Mich App at 682. However, this Court reviews "an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings. Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*. (footnotes omitted.)

As this Court has recognized, our Supreme Court has determined that multiple convictions for assault with intent to do great bodily harm less than murder and felonious assault do not violate the constitutional double jeopardy protections because the two crimes have different elements. *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011), citing *People v Strawther*, 480 Mich 900 (2007). This Court is bound to follow decisions of our Supreme Court. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).[1] Although defendant's convictions of assault with intent to commit great bodily harm less than murder and felonious assault resulted from the same incident, her convictions do not violate the prohibition against double jeopardy. Accordingly, there was no plain error affecting defendant's substantial rights.

Defendant also argues that she was denied her right to the effective assistance of counsel when trial counsel failed to investigate, petition to use, and present similar prior bad acts of the victim, which could have provided context to defendant's claim of self-defense.

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 a *Ginther*[2] hearing, *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012), or a motion to remand in this Court, *People v Abcumby-*

[1] We recognize defendant's need to preserve this issue for appellate review. Our Supreme Court heard oral argument on the application for leave to appeal the June 1, 2017 judgment of the this Court's decision in *People v Price*, unpublished per curiam opinion of the Court of Appeals, issued June 1, 2017 (Docket No. 330710), in which this Court concluded that the defendant did not demonstrate error in the trial court's finding him guilty of both felonious assault and assault with intent to do great bodily harm less than murder, and that such convictions did not violate the defendant's double jeopardy protections. On order of the Michigan Supreme Court, the application was again considered, MCR 7.305(H)(1), and it appears that it is now held in abeyance pending the Michigan Supreme Court's decision on appeal from *People v Davis*, unpublished pe per curiam opinion of the Court of Appeals, issued November 12, 2019 (Docket No. 332081). However, because our Supreme Court has not yet decided *Davis*, we are bound to follow existing precedent of our Supreme Court.

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

Blair, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8. Failure to do so ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim. *Heft*, 299 Mich App at 80. "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). Here, defendant did not preserve his claim that his counsel was ineffective. Therefore, this issue is not preserved for appellate review.

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), amended 481 Mich 1201 (2008). However, when the trial court does 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 493 Mich 864 (2012). 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.

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. 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." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018), 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).

On appeal, defendant argues that she was denied the effective assistance of counsel when trial counsel failed to investigate and file a timely motion to introduce evidence concerning the victim's prior bad acts to support the defense theory that defendant stabbed the victim with her key in self-defense.

The decision whether evidence is admissible is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Pursuant to MRE 404(b)(1), which governs the admission of prior bad acts:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

As recognized by this Court, *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), set forth the following test for determining whether to admit prior bad acts evidence at trial:

> Prior bad acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered. [*People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001), citing *VanderVliet*, 444 Mich at 55.]

MRE 404(b) applies to the admissibility of evidence regarding the past acts of any person, including the victim or a witness. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995); *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). Where a criminal defendant seeks to admit evidence of the bad acts of another person, the defendant "remains bound by the requirement that the evidence is not offered to prove conformity with character." *Catanzarite*, 211 Mich App at 579.

In the present case, the defense theory was that defendant stabbed the victim with her key in self-defense because the victim struck her with a club, grabbed her by the hair, dragged her on the ground, and she was aware of the victim's aggressive tendencies from prior incidents. However, defendant presented no evidence to corroborate her testimony that the victim possessed a club at the time of the stabbing. Further, defendant presented no evidence to corroborate her testimony that the victim approached, threatened, or attacked defendant in any way. Finally, while defendant testified that she had sustained injuries from the blow of the victim's strike with the club, and that the victim sustained his injuries from stabbing himself with the box cutter, defendant presented no evidence to corroborate this testimony and the responding officer was unable to verify defendant's assertions.

Moreover, although defendant argues that counsel was ineffective for failing to timely file the required motion, the trial court permitted defendant to ask questions about the relationship between her and the victim, and it merely prohibited the introduction of any evidence of abuse by either party because it observed that the proposed evidence was only marginally relevant, and that

the probative value was substantially outweighed by the danger of unfair prejudice. Even if trial counsel filed the required motion, the trial court made clear it would not have admitted the evidence under MRE 404(a) and (b). When ruling on the prosecutor's request to introduce prior bad acts of the victim the trial court stated:

> Any issues with regards to motive to fabricate or indications of credibility, that will be allowed. Specific instances of violence on the part of the defendant previous to this, I don't think would be relevant. Obviously, anything that happened on that day would certainly be relevant.
>
> I will allow some relief with regards to questions about the relationship in general between the defendant and the [victim]. I think the court, as the trier of fact, should know something about the relationship. Or any, you know, accusations one way or the other. But I am not going to go over every incident or claim incident of abuse by either side. There hasn't been a 404(b) motion.
>
> And so I guess my point is that . . . I'll hear the questions I can rule on that. But there won't be any questioning with regards to abuse of the children, unless there's a claim on that specific day that the defendant saw something.

Hence the trial court had already issued a ruling as to what prior bad acts evidence would be allowed. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *Riley*, 468 Mich at 142. Our review of the record leads us to further conclude that even if the evidence had been admitted, such evidence would not have affected the trial court's findings. Accordingly, defendant's claim of ineffective assistance of counsel has not been established and defendant is not entitled to relief on this issue.

Affirmed.

/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien