STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLENN ALLEN ZANTELLO,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 354738
Van Buren Circuit Court
LC No. 2019-021968-FH

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

A jury convicted defendant, Glenn Allen Zantello, of entry without permission (illegal entry), MCL 750.115(1), and domestic assault, MCL 750.81(2). The trial court sentenced defendant to serve 90 days' imprisonment for illegal entry, and a concurrent term of 93 days' imprisonment for domestic assault. Defendant appeals as of right. We affirm in part and reverse in part.

I. FACTS

Defendant's convictions arise from an incident on March 7, 2019, at the home of Dawn Knapp. Defendant and Knapp had been in a dating relationship from about June 2018 until late February 2019. On March 7, Knapp arrived home from work and began changing her clothes because she had lunch plans with a friend. During this time, defendant showed up at Knapp's front door.

At trial, Knapp testified that defendant banged on the locked front door, yelled, and tried to enter her home. Knapp described defendant as "irate, very angry," and testified that he demanded she let him in the home or, otherwise, he would break in. Knapp refused, and attempted to get defendant to leave. Because defendant persisted, Knapp went to her bedroom and shut the door so she would not have to hear defendant yelling. However, according to Knapp, defendant entered her home, and "bursted through" her bedroom door with a screwdriver in his right hand.

Knapp described how defendant repeatedly grabbed her and threw her on the bed. Knapp tried to escape through her bedroom window, but defendant shut her hand in the window, threw

her on the bed, and punched and slapped her with both hands. Also, Knapp described how she yelled during the incident, but defendant put his hand over her mouth and nose to quiet her down. When Knapp asked defendant for water, she attempted to escape again through the bedroom window as he went to the kitchen. After grabbing her car keys, Knapp made it halfway out the window when defendant pulled her back inside. Knapp dropped her car keys outside.

After defendant pulled Knapp back inside, he pinned her down and hit her. Knapp then avoided the "biggest hit ever" and fell onto the floor. Defendant went to Knapp's bed and punched himself while screaming. According to Knapp, the altercation ended after Brandy Pennington, Knapp's neighbor, knocked on her back door. Knapp testified that defendant would not allow her to open the door, so she went back to her bedroom and hung her head out of the bedroom window. Knapp asked Pennington to stay with her until defendant left. Pennington waited with Knapp until defendant's truck was gone.

Pennington testified that she heard defendant pounding on Knapp's door and "yelling uh bitch you better let me in or I'm gonna fucking break this door down." Pennington witnessed defendant go to his truck and grab a red screwdriver. In addition, Pennington heard screams and bangs coming from Knapp's home, describing it as "pretty awful." After speaking with her husband, Tyler, about whether to call the police, Pennington went to her back porch to smoke a cigarette, and witnessed Knapp halfway out of her bedroom window and pulled back in. Upon witnessing this, Pennington went to Knapp's back door and banged on it. Defendant opened the door and Pennington told him that he should leave. Defendant proceeded to slam the door in Pennington's face.

Pennington then began walking back to her porch when she saw Knapp at her window. Knapp asked Pennington to grab her car keys that were on the ground outside of Knapp's bedroom window. Pennington found the keys in the grass, and gave them to Knapp. At this point, Knapp begged Pennington not to call the police. Pennington did not call the police, but did observe that Knapp had a black eye. Tyler also witnessed finger marks and bruises on Knapp's neck.

About two weeks after the incident between defendant and Knapp, Officer Matthew Driscoll, formerly of the Lawton Police Department, was contacted by Heather Barr of the Van Buren County Domestic Violence Coalition. Barr contacted Officer Driscoll to inform him that Knapp needed to report an incident. Office Driscoll first spoke with Knapp by telephone on March 20, and then met her in person later that same day. Officer Driscoll observed some bruising on Knapp's face, and was shown pictures of her injuries. In addition, Officer Driscoll went to Knapp's home, and determined that there were no signs of forced entry and testified that there would have been no evidentiary value in taking pictures of Knapp's front door.

Jeffrey Mack, chief of police for the Village of Lawton, interviewed Tyler and Knapp. Chief Mack observed Knapp's home and did not see any damage to Knapp's front door. Sergeant Joshua Griffith of the Van Buren County Sheriff's Department, a jail supervisor, testified about a phone call defendant made to Dena Agusteli while in custody.[1] During this phone call, defendant

[1] The trial court instructed the jury to only consider as evidence defendant's statements made during the phone call with Agusteli, and not to consider Agusteli's statements.

described the March 7, 2019 altercation with Knapp as a physical "tussle," with Knapp and defendant pushing each other. In addition, defendant stated that he used a key to enter Knapp's home.

Defendant was charged with one count of home invasion in the first degree,[2] one count of assault by strangulation or suffocation,[3] and one count of domestic assault. A jury found defendant not guilty of home invasion in the first degree but guilty of the lesser included offense of illegal entry, not guilty of assault by strangulation or suffocation, and guilty of domestic assault. Defendant now appeals his convictions to this Court.

II. ANALYSIS

On appeal, defendant argues that he was denied the right to a jury. Defendant also raises the issue of ineffective assistance of counsel, and contends that cumulative errors by his trial attorney prejudiced him.

A. VERDICT FORM

Defendant argues that he was deprived of his right to a jury because the verdict form used by the jury did not include the option of a general not guilty verdict for the offense of home invasion. We agree.

Because defendant did not object to the verdict form at trial, this issue is unpreserved. Our Court reviews unpreserved arguments for plain error affecting substantial rights. *People v Seals*, 285 Mich App 1, 4; 776 NW2d 314 (2009). A criminal defendant must show that error occurred, "the error was plain, i.e., clear or obvious," and that the plain error affected his or her substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

"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 trial judge must instruct the jury as to the applicable law, "and fully and fairly present the case to the jury in an understandable manner." *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The verdict form is one component of the jury instructions. See *People v Wade*, 283 Mich App 462, 464-468; 771 NW2d 447 (2009). "[A] criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty." *Id.* at 467.

[2] MCL 750.110a(2).

[3] MCL 750.84.

For instance, in *Wade*, this Court concluded that a verdict form is defective when it does not give the jury the option of returning a general verdict of not guilty. *Id*. at 468. The verdict form in *Wade* provided, in pertinent part:

> POSSIBLE VERDICTS
>
> YOU MAY RETURN ONLY ONE VERDICT FOR EACH COUNT.
>
> COUNT 1 – HOMICIDE – MURDER FIRST DEGREE
>
> – PREMEDITATED (EDWARD BROWDER, JR)
>
> ___ NOT GUILTY
>
> ___ GUILTY
>
> OR
>
> ___ GUILTY OF THE LESSER OFFENSE OF – HOMICIDE – MURDER SECOND DEGREE (EDWARD BROWDER, JR.)
>
> OR
>
> ___ GUILTY OF THE LESSER OFFENSE OF – INVOLUNTARY MANSLAUGHTER – FIREARM INTENTIONALLY AIMED (EDWARD BROWDER, JR.) [*Id*. at 465.]

Our Court concluded that such a verdict form is defective despite efforts by the trial court to clarify with instructions to the jury. *Id*. at 468. However, this Court noted that the verdict form in *Wade* would not have been defective had it included a not guilty box for each lesser included offense. *Id*.

In this case, the verdict form for count one was similarly structured as follows:

> POSSIBLE VERDICTS
>
> You may return only one verdict on each charge. Mark one verdict for each count.
>
> Count 1
>
> __ Not Guilty of Home Invasion in the First Degree
>
> __ Guilty of Home Invasion in the First Degree
>
> Guilty of the Lesser Offense of:
>
> __ Entering Without Owner's Permission

The jury was also instructed, in relevant part:

> You may find the defendant guilty of all or any one or any combination of these crimes or not guilty. As to count one you may also consider the less serious crime of Entering Without the Owner's Permission. I've prepared a verdict form listing the possible verdicts and you'll see on this form, which will go with you to the jury room, count one you'll have the option of not guilty of Home Invasion First Degree, or guilty of Home Invasion First Degree, or guilty of the lesser offense of Entering Without Permission.

Like *Wade*, there is no general not guilty verdict box listed under count one.

Furthermore, taking the words literally as they appear on the verdict form, there was no option for the jury to acquit defendant of the lesser included offense, entering without owner's permission, of which he was convicted. The only not guilty option under count one was limited to home invasion. Although the trial court stated that a general not guilty verdict was an option during its verbal instructions, the trial court then immediately proceeded to enumerate the same three options listed on the verdict form, specifically stating that the jury could find defendant guilty of the lesser offense of unlawful entry, but not stating they could find defendant not guilty of that offense. We agree with defendant that the trial court plainly erred because it did not provide the jury with an option of a general not guilty verdict on the verdict form, or the option to find defendant not guilty of the lesser included offense of entering without owner's permission. Therefore, defendant is entitled to a new trial on the lesser included offense of entering without owner's permission.[4]

B. INEFFECTIVE ASSISTANCE OF COUNSEL[5]

Defendant contends that his trial attorney was ineffective for not objecting to the trial court's failure to define "force and violence" when used in relation to the crime of battery. Defendant also contends that his trial attorney was ineffective for not requesting a self-defense instruction. We disagree with each contention.

The United States and Michigan Constitutions guarantee that in all criminal prosecutions the accused shall enjoy the right to effective assistance of counsel. *People v Kammeraad*, 307 Mich App 98, 122; 858 NW2d 490 (2014). Arguments based on ineffective assistance of counsel present a mixed question of fact and constitutional law. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Id*. When the defendant does not "move

[4] Double jeopardy precludes defendant from being retried on the charge of home invasion in the first degree because he was acquitted by the jury.

[5] Defendant argues that his trial attorney was ineffective for not objecting to the verdict form. However, having determined that the verdict form was defective, and that defendant is entitled to a new trial on the lesser included offense of entering without owner's permission, his claim of ineffective assistance of counsel based on his trial attorney's failure to object to the verdict form is moot.

in the trial court for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

To establish that trial counsel was ineffective, "a defendant must show that (1) the lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for the lawyer's deficient performance, the result of the proceedings would have been different." *People v Anderson*, 322 Mich App 622, 628; 912 NW2d 607 (2018). " '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). We presume effective assistance of counsel; a criminal defendant bears a heavy burden of proving otherwise. *People v Schrauben*, 314 Mich App 181, 190; 886 NW2d 173 (2016).

Regarding trial strategy, "[d]efense counsel must be afforded 'broad discretion' " because of the necessity to take calculated risks to win a case. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Id*. (Quotation marks and citation omitted). However, "a court cannot insulate the review of counsel's performance by calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Our Supreme Court has recognized that "[t]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997) (quotation marks and citation omitted).

Here, defendant did not ask for an evidentiary hearing or new trial based on ineffective assistance of counsel. Because of this, our review is limited to mistakes apparent from the record. Defendant first claims that his trial attorney was ineffective for failing to object to the omission of M Crim JI 17.14, which defines "force and violence" as "any use of physical force against another person so as to harm or embarrass [him / her]." However, as defendant admits, his trial attorney did request such an instruction prior to trial when he submitted proposed jury instructions. Moreover, defendant's arguments presented to this Court are based on facts rather than law. Defendant does not cite any case with comparable facts or provide a legal analysis worthy of appellate review. Instead, defendant balances the evidence, a duty assigned to the jury in which this Court will not interfere absent extraordinary circumstances. *See People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008) (explaining that one of this Court's greatest hurdles is overruling the finder of fact and awarding a new trial).

Moreover, defendant merely speculates that objecting to the trial court's final jury instructions would have altered the jury's verdict in his favor. Defendant suggests that if the jury had access to M Crim JI 17.14, it would have concluded that his physical contact with Knapp was lawful, because it would have understood that not all unwanted physical contact is unlawful or constitutes battery. However, defendant has not demonstrated how his trial attorney's performance fell below an objective standard. Further, defendant has not shown that had the jury been given such an instruction, it would have found him not guilty.

Defendant also claims that his trial attorney was ineffective for not requesting a self-defense instruction. However, despite defendant's assertions regarding the facts, the trial court record would not have supported a self-defense instruction. Defendant's trial attorney's closing arguments presented a theory that Knapp exaggerated and fabricated defendant's assault of her, and that the prosecution failed to meet its burden. Although defendant generally cites *Riddle*, 467 Mich at 120, he offers no legal authority in support that demonstrates meritorious arguments based on similar facts and circumstances. Nevertheless, had defendant argued self-defense, it would have potentially undercut the argument that little or no force had occurred. The calculation by defendant's trial attorney to not request a self-defense instruction is an example of the deference that this Court leaves to defense counsel during trial. *Payne*, 285 Mich App at 190. Thus, defendant's trial attorney was not ineffective for not seeking a self-defense instruction.

Lastly, defendant argues that the cumulative effect of his trial attorney's failure to request jury instructions for the definition of "force and violence" and self-defense requires reversal. We disagree. Because defendant did not preserve this issue, we review this issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763. A cumulative error argument is reviewed by examining the actual errors identified on appeal to determine whether the errors cumulatively deprived defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). A new trial is warranted when the cumulative effect of the errors undermines confidence in the reliability of the verdict. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). The nature of the cumulative error doctrine is that it permits the prejudicial effect of multiple errors to be considered in the aggregate in order to determine whether a defendant's right to a fair trial was undermined. *LeBlanc*, 465 Mich at 591 n 12. In this case, defendant has not shown any instance of ineffective assistance by his trial attorney based on the failure to request certain jury instructions. Accordingly, there is no cumulative prejudicial effect to consider.

III. CONCLUSION

We affirm defendant's conviction of domestic assault, but reverse his conviction for illegal entry, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola