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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTA VAN BUREN,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 356536
Wayne Circuit Court
LC No. 16-010382-01-FC

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

Servitto, J. (*dissenting*).

I respectfully dissent.

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "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 Thorne*, 322 Mich App 340, 347-348; 912 NW2d 560 (2017) (citation omitted). In order to assert an affirmative defense, such as self-defense, a defendant must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense. *People v Guajardo*, 300 Mich App 26, 34–35; 832 NW2d 409 (2013).

A defendant is also entitled to the effective assistance of counsel. To establish ineffective assistance of counsel, defendant "must establish (1) the performance of [her] counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Thorne*, 322 Mich App at 347. Counsel's failure to request a particular jury instruction can be a matter of trial strategy. *Id*.

Defendant's entire theory at trial was that she acted in self-defense, which may excuse not only the underlying felony, but also a charge of felony-firearm. *People v Goree*, 296 Mich App 293, 294; 819 NW2d 82 (2012). During both opening and closing argument, defense counsel indicated that defendant acted in self-defense, but did not specifically reference self-defense as applicable to defendant's charge of felony-firearm.

The trial court began its instructions by properly providing the jury with the elements of second-degree murder and the lesser charge of voluntary manslaughter. The trial court then immediately provided the jury with M Crim JI 7.15, which addresses the "use of deadly force in self-defense." Notably, that instruction provides that "If a person acts in lawful self-defense, that person's actions are justified and [he/she] is not guilty of [*state crime*]. The trial court thus instructed the jury, "If a person acts in lawful self-defense, that person's actions are justified and she is not guilty of second-degree murder or voluntary manslaughter." The trial court also instructed the jury on the use of deadly force in the defense of others, M Crim JI 7.21 and, consistent with that M Crim JI 7.21, instructed, "If a person acts in lawful defense of another, her actions are justified and she is not guilty of second-degree murder or voluntary manslaughter." M Crim JI 7.21 provides, and the trial court duly instructed, that to claim defense of others, "at the time she acted, the Defendant must not have been engaged in the commission of a crime."

The trial court then instructed the jury on the elements of defendant's charge of felony-firearm, M Crim JI 11.34:

> First, that the Defendant committed either the crime of second-degree murder or voluntary manslaughter, which have been defined for you. It is not necessary, however, that the Defendant be convicted of those crimes.
>
> Second, that at the time the Defendant committed the crime, she knowingly carried or possessed a firearm.

The trial court did not, however, provide the self-defense instruction again. In my opinion, this was error because the trial court *specifically* stated that self-defense was applicable to the charge of second-degree murder (or the lesser offense of voluntary manslaughter). Had the trial court included the charge of felony-firearm when specifically detailing the elements of self-defense, the jury would have been properly instructed. However, where, as here, the self-defense instruction was given immediately following the second-degree murder instruction and was explicitly tied only to that charge, there was no way for the jury to know that the self-defense instruction would also apply to the felony-firearm charge.

Indeed, the charge of felony-firearm carries with it a very specific jury instruction relevant to self-defense. M Crim JI 11.34b states, in relevant part:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be . . . .

The above instruction specifies that self-defense is applicable when there has been no underlying felony committed. As argued by defendant, when the claim of self-defense is raised in conjunction with a felony-firearm charge, there is no strategic reason for defense counsel to forgo the above instruction.

The jury found defendant not guilty of either second-degree murder or voluntary manslaughter. Thus, it clearly determined that defendant did not commit either of those crimes. Had M Crim JI 11.34b been provided, or if the trial court had included the offense of felony-firearm when providing the jury with M Crim JI 7.15, it is likely the jury would also have found

defendant not guilty of felony-firearm. I would thus find that defense counsel's failure to request the specific self-defense jury instruction applicable to the offense charged and its failure to request that the trial court include felony-firearm when providing the jury with M Crim JI 7.15 constitutes ineffective assistance of counsel.

I also take this opportunity to point out the confusion raised by M Crim JI 11.34's instruction that to be guilty of felony-firearm the jury must necessarily find that defendant committed a felony, but "It is not necessary, however, that the Defendant be convicted of those crimes." M Crim JI 11.34 blatantly encourages inconsistent verdicts. And, when self-defense is raised to a charge of felony-firearm the confusion increases. This is particularly so when one considers the Self-Defense Act, MCL 780.971, *et seq*.

Under the Self-Defense Act, at MCL 780.972:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual 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.
>
> (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.
>
> (2) 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.

Thus, while M Crim JI 11.34 requires the jury to necessarily determine that defendant committed a felony in order to convict a defendant of felony-firearm, a defendant raising self-defense to a felony-firearm charge cannot, under MCL 780.972 be engaged in the commission of a crime at the time he or she uses deadly force. I would thus find the language in M Crim JI 11.34 leads to a trial court to misinform the jury of the law.

/s/ Deborah A. Servitto