STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2012
v	No. 299875 Wayne Circuit Court
DAVID HARSCHON WASHINGTON, Defendant-Appellant.	LC No. 10-001510-FH

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Following a bench trial, the circuit court convicted defendant David Harschon Washington of various assaultive offenses arising from his attempt to eject the female complainant from his father's home. The trial court erroneously concluded that defendant could not establish that he acted in self defense. Specifically, the trial court incorrectly concluded that defendant had a duty to retreat in the face of the complainant's show of force simply because he did not own or reside at his father's home. We affirm defendant's convictions, however, because the record evidence supports the court's conclusion that defendant used unnecessarily excessive force against the complainant and thereby vitiated his claim of self defense.

I. BACKGROUND

The complainant, a 41-year-old woman, was an apparent acquaintance of defendant's 72-year-old father who suffered from dementia. According to defendant and defendant's brother, sister and sister-in-law, the complainant was a drug addict who stole from and used their father. They claimed that the complainant had become violent against them in the past. Defendant testified that on January 19, 2010, the complainant turned to violence when he asked her to leave his father's home. Defendant, a former boxer, admitted to punching the complainant 10 to 20 times and to dragging the complainant by her ear and hair "weave," but claimed to act in self defense as the drug-influenced complainant attacked him with a metal rod and a kitchen knife.

The complainant, on the other hand, claimed that defendant was the initial aggressor. She accused defendant of punching and kicking her, pulling her ear partially off, and hitting her in the head with a metal rod. The complainant alleged that the assault spanned 30 to 40 minutes, during which defendant continually prevented the complainant's attempts to escape. Following the attack, the complainant was hospitalized for two days, received stitches to her head and to

reattach her ear, and was prescribed a neck brace. Defendant admittedly suffered no injuries as a result of the confrontation.

Ruling from the bench, the trial court indicated that it found the complainant less than credible. The court also believed that the complainant likely stole from and used defendant's ill father. However, the court rejected defendant's claim of self-defense, noting that there were opportunities to handle the situation differently. The trial court stated, in pertinent part:

> You know, there, in listening to the testimony, this Court finds that there was opportunity to handle the situation in a way that the injuries that were sustained by the complainant were not as comprehensive, and were not as significant, and as great as they were, that is the Court's finding.
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> Specifically, the defendant testified that he grabbed the complainant by her hair and her ear in order to keep her from obtaining or retrieving a knife from the kitchen. Again, the Court notes that there were other ways to prevent the complainant from obtaining a knife in the kitchen other than pulling her by her ear. That's this Court's finding.
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> When [defendant] took the stand I found it compelling of the [sic] some of the things that he said. I mean, he testified that he was not afraid of the complainant, I remember that, I wrote that down. . . . He also testified that the complainant did not strike fear in him but he would only be fearful if an object was involved.
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> This Court takes note of the fact that for the amount of time that the interaction took place, the assault took place, [the complainant] did not have an object in her hand the whole time. This Court certainly takes note of the fact of how you tried to explain, you know, where the scenarios where you would be fearful, and I took your testimony - - I took [defendant's] testimony to mean that he would be fearful in a situation where, you know, an object of some sort was involved. And we certainly have testimony in this record that there was an object involved, that there was a two to three foot pole involved, at some point there was an attempt to get a knife, you know. But for the amount of time that this assault went on this Court funds that, no, this defendant was not in fear of the complainant.
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> This Court certainly took note of the observations of witnesses that testified for the defense in terms of at least one previous incident where the complainant, I guess to characterize it, seemed to have overreacted in a situation where she was yelling for somebody to go get the bat. I think all that was done to establish that there was some type of erratic or perhaps violent behavior on the

> part of the complainant and the Court took that into consideration in evaluating whether or not there is actually a legitimate claim here for self defense.
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> Looking at the relative strength of the individuals involved, [the complainant] is not a small woman, but, again, this Court finds that there were opportunities - - opportunities during the course of this assault for [defendant] to really walk away or to defuse [sic] the situation in some other kind of way. I don't see that - - I really believe that based upon [defendant's] own testimony and the testimony of [the complainant] that there were other ways for this matter to be resolved. So the idea of not having the duty to retreat in one's home - - this was not [defendant's] home, number one, and number two, again, I don't see that as being applicable here.
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> The Court finds that there was an excessive amount of force that was used in this case relative to the threat of injury that [defendant] was facing. And accordingly, the Court concludes that this is not a case where the evidence will substantiate self defense.

The court then convicted defendant as charged of assault with intent to do great bodily harm less than murder, MCL 750.84, assault with intent to maim, MCL 750.86, felonious assault, MCL 750.82, and aggravated assault, MCL 750.81a. The court later sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 29 months to 15 years each for the assault with intent to do great bodily harm and assault with intent to maim convictions, 29 months to 6 years for the felonious assault conviction, and six months to one year for the aggravated assault conviction.

II. SELF DEFENSE

Defendant challenges the trial court's rejection of his self-defense claim. We review a trial court's factual findings in a bench trial for clear error and conclusions of law de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). When a defendant presents evidence that he acted in self defense, the prosecution "bears the burden of disproving it beyond a reasonable doubt." *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). From the record, it appears that the trial court misapplied the law of self defense in this case, but ultimately reached the correct result.

The Self-Defense Act (SDA), MCL 780.971 *et seq.*, changed the law of self defense with respect to the common-law duty to retreat for offenses committed after October 1, 2006. *People v Conyer*, 281 Mich App 526, 530 n 2; 762 NW2d 198 (2008); *People v Dupree*, 486 Mich 693, 708; 788 NW2d 399 (2010). Under the common law, an individual had a duty to retreat "unless attacked inside one's home, or subjected to a sudden, fierce, and violent attack . . . ." *Conyer*, 281 Mich App at 530 n 2. The SDA limited the duty to retreat and expanded the right to act in self defense. Specifically, MCL 780.972 provides:

> (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:
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> (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.
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> * * *
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> (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. [Emphasis added.]

Neither the parties nor the court specifically referenced the SDA at trial and it is unclear from the record whether the court considered the act or merely relied upon the common law. However, the charged incident occurred after the October 1, 2006 effective date of the SDA, MCL 780.973, and therefore defendant had no duty to retreat if he "honestly and reasonably believe[d]" that the use of force was "necessary" and he was in a location where he had "the legal right to be." MCL 780.972.

First and foremost, we reject the trial court's implication that defendant had a duty to retreat simply because he was not inside his own home. That conclusion is contrary to the plain language of MCL 780.972. There is no record evidence countermanding that defendant had a legal right to be at his father's home. Accordingly, defendant was entitled to use force if he "honestly and reasonably believe[d]" that the use of force was necessary to defend himself. The trial court clearly erred in finding that defendant's position as a nonresident negated his right to stand firm and defend himself.

The trial court considered the record evidence and determined that defendant had the "opportunity to handle the situation in a way" that would have reduced the injuries suffered by the complainant. The court found, for example, that defendant did not need to pull the complainant by the ear to prevent her from grabbing a kitchen knife. Noting that defendant had the opportunity to "walk away" or to diffuse the situation in a less violent manner, the court ruled that defendant utilized "an excessive amount of force," negating the right to claim self defense. The court essentially determined that defendant did not honestly and reasonably believe that the use of deadly or nondeadly force was necessary to defend himself. MCL 780.972.

It is well established that an individual acting in self defense is only entitled to use that level of force necessary to protect him or herself. "'When the steps [an individual] takes are reasonable, he has a complete defense to such crimes against the person as . . . assault and battery and the aggravated forms of assault and battery . . . .'" *Dupree*, 486 Mich at 707, quoting 2

LaFave, Substantive Criminal Law (2d ed), § 10.4(a), pp 143-144. "The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force . . . ." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). "A defendant is not entitled to use any more force than is necessary to defend himself." *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). "[A]n act committed in self-defense but with excessive force . . . does not meet the elements of lawful self-defense." *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990).

Defendant presented evidence that he used the force necessary to repel the complainant's attack. Defendant testified that the complainant tried to stab him with a kitchen knife and hit him with a metal rod. Moreover, defendant contended that the complainant was under the influence of illegal drugs and was acting erratically. The prosecution presented evidence to the contrary. The complainant testified that she was standing and eating peacefully in the kitchen when defendant approached her, knocked her food from her hand and began assaulting her. The complainant denied trying to grab a knife or possessing the metal rod. Rather, the complainant asserted that she continually tried to escape but that defendant's repeated blows kept her hostage.

The trial court viewed the witness testimony first-hand and deemed neither completely credible. Even accepting defendant's version of events, the court found that defendant did not act reasonably and used more force than necessary (excessive force) in defending himself. We may not interfere with the trial court's resolution of the factual issues in such a closely placed credibility contest. See MCR 2.613(C) ("[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."). However, the court's judgment was supported by record evidence of the severity of the complainant's injuries in contrast to defendant's complete lack of injuries. The judgment is also supported by defendant's own admission that he could have used less violent means to diffuse the situation and eject the complainant from his father's home but chose not to do so based on his perceived entitlement to use any and all means possible. As defendant's use of excessive force negates his ability to claim self defense under the SDA, we affirm the trial court's rejection of that defense and subsequent conviction of defendant.

III. ASSISTANCE OF COUNSEL

Defendant challenges trial counsel's failure to specifically raise the issue of self defense under the SDA at trial, seemingly relying on the common law instead. "To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010). Although reliance on the SDA would have removed defendant's duty to retreat from the court's consideration, the statute cannot support the level of

force used by defendant in repelling the complainant's attack. Accordingly, defendant cannot show the prejudice necessary to support a new trial based on the ineffective assistance of counsel.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio