

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 14, 2013

v

LUKE ANTHONY REDMOND,
Defendant-Appellant.

No. 305318
Wayne Circuit Court
LC No. 08-015560-FC

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendant appeals as on leave granted¹ an order and opinion denying defendant's motion for relief from judgment. On March 10, 2009, defendant was convicted by jury trial of felonious assault, MCL 750.82, assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two to four years' imprisonment for the felonious assault conviction, 3 to 10 years' imprisonment for the assault with intent to commit great bodily harm less than murder conviction, and two years' imprisonment for the felony-firearm conviction. On February 28, 2011, defendant filed a motion for relief from judgment, which is the basis of this appeal. We affirm.

Defendant first argues that he was denied the effective assistance of counsel at trial because his trial counsel failed to advise him that waiving his right to testify at trial could result in the denial of a jury instruction on self-defense or the defense of others. We disagree.

A trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion while its findings of facts supporting its decision are reviewed for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law." *Id.* at 628-629 (citation omitted).

¹ See *People v Redmond*, 492 Mich 863; 819 NW2d 880 (2012).

“Subchapter 6.500 of the Michigan Court Rules establishes the procedures for pursuing postappeal relief from a criminal conviction.” *People v Watroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992). “The subchapter is the exclusive means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process.” *Id.* Generally, a trial court’s decision on a motion for relief from judgment is reviewed for an abuse of discretion. *Swain*, 288 Mich App at 628. However, MCR 6.508(D)(3) places limitations on a trial court’s ability to grant relief from judgment. *People v Reed*, 198 Mich App 639, 645; 499 NW2d 441 (1993). Under MCR 6.508(D), a trial court may not grant a motion for relief from judgment if the motion:

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

b) actual prejudice from the alleged irregularities that support the claim for relief. . . .

* * *

The court may waive the “good cause” requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime. [MCR 6.508(D).]

Under the court rule, relief from judgment may not be granted unless the defendant demonstrates good cause for failure to raise the grounds for relief on appeal or in a prior motion and demonstrates actual prejudice from the alleged irregularity. *Watroba*, 193 Mich App at 126. Good cause warranting relief from judgment can be established by showing ineffective assistance of counsel. *Swain*, 288 Mich App at 631. Actual prejudice exists when, in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal. *Id.* at 624. “A defendant has the burden to establish entitlement to relief” from judgment. *Id.* at 630.

To establish ineffective assistance of counsel, a defendant must meet two requirements. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). “First, the defendant must show that counsel’s performance fell below an objective standard of reasonableness.” *Id.* at 290. “In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy.” *Id.* “Second, the defendant must show that, but for counsel’s deficient performance, a different result would have been reasonably probable.” *Id.*

We hold that defendant was not denied the effective assistance of counsel. Defendant claims that his trial counsel failed to advise him that waiving his right to testify at trial could result in the denial of a jury instruction on self-defense or the defense of others. Defendant's claim raises issues relating to two rights that belong to a criminal defendant: the right to testify at trial and the right to have a properly instructed jury. A defendant's right to testify in his own defense arises from the federal constitution. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *Id.* Additionally, a criminal defendant is entitled to have a properly instructed jury. *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010). "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *People v Martin*, 271 Mich App 280, 345; 721 NW2d 815 (2006). "However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *Id.*

In this case, defendant cannot show that his trial counsel's performance fell below an objective standard of reasonableness because defendant cannot overcome the strong presumption that his trial counsel's assistance constituted sound trial strategy. *Armstrong*, 490 Mich at 289. Defendant's trial counsel advised defendant not to testify, presumably so defendant would not be subject to cross-examination. This decision constituted trial strategy, and "this Court will not second-guess defense counsel's judgment on matters of trial strategy." *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). Moreover, while defendant claims that his failure to testify resulted in the trial court's refusal to give a self-defense or defense of others jury instruction, defendant has presented no authority to show that he needed to testify in order to receive a jury instruction on self-defense or defense of others. In order to have the jury instructed on self-defense or defense of others, there must be some evidence to support that theory. *Martin*, 271 Mich App at 345. There is no requirement that defendant testify himself in order for the jury to be instructed on self-defense or defense of others, so his trial counsel was not objectively unreasonable when he failed to advise him of that fact. See *id.* Therefore, defendant cannot show that his trial counsel was ineffective because his trial counsel failed to advise him that waiving his right to testify at trial could result in the denial of a jury instruction on self-defense or the defense of others.

Defendant next argues that the trial court erred when it refused to instruct the jury on self-defense or defense of others. We disagree that the trial court erred when it did not give a jury instruction on defense of others, but agree that the trial court erred when it failed to give a jury instruction on self-defense. Despite the trial court's error, however, reversal is not justified because the error was not outcome determinative.

A criminal defendant is entitled to have a properly instructed jury. *Dupree*, 486 Mich at 712. "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *Martin*, 271 Mich App at 345. "However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *Id.* "The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v*

Riddle, 467 Mich 116, 124-125; 649 NW2d 30 (2002). Therefore, in order to show error, defendant must show that he presented evidence to justify a jury instruction on self-defense and defense of others, and that the error was outcome determinative.

First, we analyze whether defendant was entitled to a jury instruction on self-defense and defense of others. The Michigan Self-Defense Act provides:

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 . . . [t]he 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. [MCL 780.972(1)(a).]

At trial, there was evidence presented that defendant was acting in self-defense. Kenneth Emerson, the officer in charge of the case, testified that in defendant's statement to police, defendant said that the victim, Jemere Miller, began shooting at him and defendant fired back because he was scared for his life. Additionally, witnesses Kenya Jones and Donald Burton testified that they saw Miller with a gun. Because there was evidence presented on whether defendant honestly and reasonably believed that the use of deadly force was necessary to prevent the imminent death of or imminent great bodily harm to himself, the trial court erred in refusing to instruct the jury on self-defense. However, there was not sufficient evidence presented at trial to justify a defense of others jury instruction. While Jones and Burton testified that the victim was pointing a gun at Jones's house, there was no evidence that suggested that defendant shot Miller in order to protect Jones or Burton or that Jones and Burton feared for their lives. Moreover, defendant did not request a defense of others jury instruction at trial. The failure of a court to instruct on any point of law is not ground for setting aside the verdict of the jury unless the instruction was requested by the defendant. *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999), overruled on other grounds *People v Thompson*, 477 Mich 146 (2007). Therefore, the trial court did not err in failing to instruct the jury on defense of others.

As discussed, the trial court erred in refusing to instruct the jury on self-defense. However, in order to show that a new trial is necessary, defendant must also show that there was a miscarriage of justice—that it was more probable than not that the error was outcome determinative. *Martin*, 271 Mich App at 345; *Riddle*, 467 Mich at 124. In this case, the instructional error was not outcome determinative. While there was evidence that supported defendant's claim of self-defense, as discussed previously, there was also evidence that contradicted defendant's claim. There was evidence presented that defendant left Jones's house and got his gun without any show of aggression or anger from Miller. Miller testified that defendant came back to Jones's house and shot at him, injuring Miller's infant daughter. Defendant admitted to shooting at Miller in his statement to Emerson. Cobb also testified that she did not see Miller with a gun and that Jones told her defendant was the shooter. Additionally, the police did not find a gun on Miller after the incident, but located defendant's gun hidden in a closet at his home. Based on these facts, we cannot conclude that it is more probable than not that the error in this case was outcome determinative.

Even assuming defendant could show that the instructional error was outcome determinative, relief from judgment could not be granted unless the defendant also demonstrated actual prejudice and good cause for failure to raise the grounds for relief on appeal or in a prior motion. *Watroba*, 193 Mich App at 126. Actual prejudice exists when, in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal. *Swain*, 288 Mich App at 624. As discussed above, there was evidence presented at trial that discredited defendant's self-defense claim, and if the case were remanded for a new trial, defendant would not have a reasonably likely chance of acquittal. In addition, defendant did not demonstrate good cause for failing to raise this issue on appeal or in a prior motion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad