

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 23, 2013

v

RICKY SMYTHE,

Defendant-Appellant.

No. 307927
Wayne Circuit Court
LC No. 11-007804-FH

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

PER CURIAM.

A jury convicted defendant of aggravated assault, MCL 750.81a, but acquitted him of an additional charge of third-degree home invasion, MCL 750.110a(4). The trial court sentenced defendant to 18 months' probation. Defendant appeals as of right. We affirm.

Defendant's conviction arises from an altercation between himself and William White. White testified that while he was working in his backyard, defendant approached him and accused him of acting inappropriately toward defendant's girlfriend, who lived in the same residential complex as White. They exchanged words and defendant left. Defendant returned sometime later and again left at White's request. According to White, defendant returned a third time and began hitting White in the face, which led to fighting in which they were "throwing punches back and forth." Defendant testified that he spoke to White only one time, during which White began swearing and then began punching defendant in the face. Defendant explained that he "[g]rabbed him and rassled [White] down to the ground" and held White's arms to keep from getting hit.

Defendant first argues that the trial court erred by failing to instruct the jury on self-defense. Because defendant did not request an instruction on self-defense or object to the instructions as given, this issue is unpreserved. See *People v Gonzalez*, 468 Mich 636, 642; 664 NW2d 159 (2003). Therefore, the issue is reviewed for plain error affecting defendant's substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

The trial court must "instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, mod 450 Mich 1212 (1995). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. Even if the instructions are imperfect, there is no error if they fairly

presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "A criminal defendant has a state and federal constitutional right to present a defense," and "[i]nstructional errors which directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense." *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002). "A defendant asserting an affirmative defense 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 Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998).

In general, self-defense excuses the use of force against another when force is necessary to defend against an attack. *People v Riddle*, 467 Mich 116, 127, 129; 649 NW2d 30 (2002); *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999); CJI2d 7.22. A finding that the defendant acted in self-defense requires a finding that the defendant acted intentionally and that the circumstances justified his actions. *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990). A successful self-defense claim requires a defendant to have had an honest and reasonable belief that he was in danger and used only that amount of force necessary to defend himself. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993), abrogated in part on other grounds by *People v Reese*, 491 Mich 127; 815 NW2d 85 (2012); see also MCL 780.972(2). "[A]n act committed in self-defense but with excessive force . . . does not meet the elements of lawful self-defense." *Heflin*, 434 Mich at 509. The defendant has the initial burden of producing evidence of self-defense. *Reese*, 491 Mich at 155. "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant failed to produce evidence to establish that he acted in self-defense. Defendant testified that White punched him in the face, in response to which defendant grabbed White, wrestled him to the ground, and held White's arms to stop White from hitting him again. Defendant did not believe that he struck White and later explained, "It wasn't like punching or anything" on his part. Defendant did not admit to intentionally striking White in response to White's attack and did not claim that White's injuries resulted from being wrestled to the ground. Where a defendant denies committing the crime or contends that the victim was injured accidentally, he is not entitled to an instruction on self-defense. *People v Droste*, 160 Mich 66, 80; 125 NW 87 (1910); *People v Trammell*, 70 Mich App 351, 355; 247 NW2d 311 (1976). Further, defendant's statement to a detective does not support a finding that defendant acted in self-defense. Defendant testified that White punched him once in the face. Defendant told the detective that he defended himself by intentionally punching White after White attacked him. Defendant explained that he punched White several times, causing White to fall to the ground. When White got up, defendant punched him several more times. This evidence, if believed, shows that defendant responded with excessive force.

Because the evidence showed either that defendant did not intentionally strike White in response to White's attack or that defendant responded to White's attack with excessive force, defendant was not entitled to an instruction on self-defense. Defendant's related claim of ineffective assistance of counsel based on his attorney's failure to request an instruction on self-defense must likewise fail. "Trial counsel's failure to request an instruction inapplicable to the

facts at bar does not constitute ineffective assistance of counsel.” *People v Truong (After Remand)*, 218 Mich App 325, 341; 553 NW2d 692 (1996).

Defendant next argues that trial counsel was ineffective for failing to call a witness to testify regarding White’s state of inebriation. The trial court considered this claim after conducting an evidentiary hearing and concluded that defendant was not prejudiced by defense counsel’s failure to call the witness. Whether a defendant has been denied effective assistance of counsel is a mixed question of law and fact. The trial court’s factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that a defendant’s right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel’s representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 314; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense.” *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Witness credibility is a material issue in every case. *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000). “A witness’ perception of persons and events, the clarity and accuracy of the witness’ memory, and the lucidity of the witness’ description of persons and events are critical in evaluating the credibility of testimony.” *People v Poole*, 444 Mich 151, 160; 506 NW2d 505 (1993), overruled in part on other grounds by *People v Taylor*, 482 Mich 368, 370; 759 NW2d 361 (2008). Evidence of any fact influencing a witness’ testimony is relevant to his motivation and truthfulness and is thus admissible. *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). In particular, a witness’ use of drugs or alcohol on the day of the offense is relevant to his ability to perceive and recall the events that transpired and thus is relevant to his credibility. *People v Hill*, 282 Mich App 538, 541; 766 NW2d 17 (2009), vacated in part on other grounds 485 Mich 912 (2009).

White testified at trial that he had consumed some beer on the day of the altercation but was not drunk. Defendant, however, testified that White “was so drunk he couldn’t stand up.” Defendant contends that defense counsel was ineffective for failing to call the investigating police officer, Mitchell Heaney, who would have testified that White “appeared highly

intoxicated” at the time Heaney spoke to him. At the evidentiary hearing, defense counsel was not asked, and did not offer an explanation, for failing to call Heaney. However, he did testify that he had read Heaney’s report, which indicated that White was interviewed “several hours” after the incident. The fact that Heaney found White to be highly intoxicated at approximately 8:00 p.m. was not substantially probative of White’s condition around noon when the altercation with defendant took place. Therefore, it was not objectively unreasonable for counsel not to call Heaney to testify regarding White’s state of inebriation.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan