STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0349

State of Minnesota,
Respondent,

vs.

Cara Ann Gedatus,
Appellant.

Filed December 23, 2013
Affirmed
Stauber, Judge

Washington County District Court
File No. 82CR114159

Lori A. Swanson, Attorney General, St. Paul, Minnesota; and

Sarah Beth Sicheneder, Lakeland City Attorney, Johnson & Turner, P.A., Forest Lake, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant challenges her conviction of domestic assault stemming from an altercation with her 14-year-old stepdaughter. Because the district court did not err when it declined to instruct the jury on self-defense and because the postconviction court did not err when it refused to find that appellant received ineffective assistance of counsel at trial, we affirm.

FACTS

In October 2011, appellant Cara Ann Gedatus was cited for domestic violence, in violation of Minn. Stat. § 609.2242, subd. 1(2) (2010), at her home in Lakeland, Minnesota, after an altercation with her minor stepdaughter F.G. Deputy Nicholas Sullivan, a responding officer, took statements from F.G., appellant, and two of appellant's minor children: J.G. and B.G. F.G. stated that there had been an altercation, during which appellant had punched her in the face. Appellant stated that she had punched F.G., but only in self-defense after F.G. punched first. Both J.G. and B.G. stated that they had seen both F.G. and appellant "punching each other."

At appellant's jury trial in January 2012, neither party disputed that there had been an altercation, but two theories of the case emerged. The state offered the testimony of F.G. and Deputy Sullivan to support the theory that appellant had struck F.G.'s face during the altercation. F.G. testified that she and appellant had fought and that appellant had struck her. Deputy Sullivan testified that J.G. and B.G. had both admitted to seeing appellant punch F.G., and that appellant had admitted to striking F.G. in self-defense.

Appellant's sole theory of the case was that she "did not in any way, shape, or manner assault [F.G.]." To support this theory, appellant testified that she had never admitted to striking F.G., that police statements taken on the day of the altercation were inaccurate, and that the testimony of Deputy Sullivan and F.G. was false. Appellant also called J.G. and B.G., who testified that their police statements were inaccurate because they had never admitted to seeing appellant punch F.G.

Appellant's counsel requested that the district court instruct the jury on the law of self-defense. Although appellant's counsel admitted that he did not notice self-defense as required by Minnesota discovery rules, he argued that it had been implicated by the police reports and Deputy Sullivan's testimony, and thus constituted a "part of the landscape of this case from the very beginning." And although appellant's counsel admitted that appellant's sole theory of the case was that she never struck F.G., he argued that the jury should have the law on self-defense in case it viewed the facts differently.

The district court declined to instruct on self-defense on two grounds: lack of required notice and lack of evidentiary support.[1] Specifically, because the district court's review of witness testimony did not reveal "any testimony that . . . properly supported a self-defense claim," the instruction was improper because it did "not conform to the evidence that the jury heard." During deliberations, the jury asked the district court to

[1] Appellant has argued that the district court rested its decision not to instruct on self-defense solely on lack of evidentiary support. The trial transcript clearly indicates that the district court initially declined the instruction both for lack of notice and lack of evidentiary support. The district court later clarified that the evidentiary issue was of "greater concern," but still stated that the lack of notice "certainly was an issue." There is nothing in the record to indicate that the district court abandoned lack of notice as one of the reasons for declining to instruct of self-defense.

delineate the "the difference between intent and self-defense." After the district court responded that the jury was "not to consider self-defense," appellant was found guilty of domestic assault.

Appellant pursued postconviction relief on the theory that she had received ineffective assistance of counsel at trial. In December 2012, appellant's request post-conviction relief was denied. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court erred by failing to instruct the jury on self-defense. The district court declined to instruct because (1) because it found that there was insufficient evidence to support self-defense and (2) because appellant failed to notice her intent to assert self-defense as required under Minn. R. Crim. P. 9.02, subd. 1(5)(a).

A. Insufficient evidence

District courts have "considerable latitude" to select language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). We review the refusal to give a requested jury instruction for abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). On review, appellant must demonstrate that she was entitled to a jury instruction on self-defense and that the failure to instruct was not harmless. *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997).

If "the evidence does not support the proposed [jury] instruction and no abuse of discretion is shown," a district court's refusal to instruct is not error. *State v. Lopez*, 587 N.W.2d 26, 28 (Minn. 1998) (quotation omitted). "[A] party is entitled to an instruction on his theory of the case if there is evidence to support it." *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977). But a party is not entitled to a jury instruction on self-defense simply because facts suggest that it could be a plausible theory of the case. *See State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000) (holding that the existence of facts in the record that "suggest[ed] that [defendant] could have argued self-defense to the jury" did not entitle a defendant to a sua sponte jury instruction on self-defense).

In Minnesota, self-defense requires that a non-aggressor party has an actual, honest, and reasonable belief of imminent danger and no reasonable possibility of retreat. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). As a defendant, it was appellant's burden to present evidence supporting each of these elements. *Id.*

Although the trial record contains some evidence from which a jury might infer that appellant struck F.G. in self-defense, namely Deputy Sullivan's testimony, appellant did not introduce that evidence. To the contrary, she based her defense on asserting that she did not strike F.G., and consequently, that Deputy Sullivan's testimony was false. Appellant did not raise self-defense in her opening statement or during the examination of witnesses. When appellant took the stand, she testified that she did not hit F.G. and that any police reports to the contrary were inaccurate. A party that fails to raise an affirmative defense in opening statements, declines to develop that defense during the questioning of witnesses, testifies to a theory of the case inconsistent with that defense,

and later raises the defense as an "afterthought" is not entitled to a jury instruction on that defense. *State v. Pacholl*, 361 N.W.2d 463, 465 (Minn. App. 1985).

Appellant failed to meet her burden to introduce sufficient evidence supporting a self-defense instruction. The district court did not abuse its discretion.

B. Lack of notice

Minn. R. Crim. P. 9.02, subd. 1(5)(a), mandates that a party intending to raise self-defense must "inform the prosecutor in writing" before the omnibus hearing. Appellant admits that she failed to notify the state of her intent to raise self-defense in the required time. We review the imposition of sanctions for violations of discovery rules, such as Minn. R. Crim. P. 9.02, subd. 1(5)(a), for abuse of discretion. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979).

The district court effectively sanctioned appellant for failing to notice self-defense by barring her from raising it. A district court may sanction a party that fails to comply with Rule 9.02 by "enter[ing] any order it deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. The determination of appropriate sanctions for a discovery-rule violation is "particularly suited to the judgment and discretion" of the district court. *Lindsey*, 284 N.W.2d at 373. To make this determination, the district court should take into consideration the reason why the disclosure was not made and the extent of the prejudice to the opposing party, among other factors. *Id.*

Appellant failed to notice self-defense because she did not intend to pursue it as an alternate theory of the case. Instead, she made the strategic choice to testify consistently that she never struck F.G. The state, with no notice that self-defense was at issue,

impeached appellant's testimony by introducing evidence that she had previously admitted to striking F.G. in self-defense. Allowing appellant to receive both the benefit of testifying consistently and the benefit of a self-defense instruction on these facts would prejudice the state.

It would have further prejudiced the state for the district court to have treated appellant's self-defense claim as established because once self-defense is properly raised, "the state has the burden of disproving one or more of [its] elements beyond a reasonable doubt." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). Allowing appellant's self-defense claim would have placed the burden on the state to disprove a theory that was never properly raised, noticed, or developed in evidence. By declining to instruct on self-defense for lack of notice, the district court did not abuse its discretion.

II.

Appellant argues that the postconviction court erred when it refused to find that her trial attorney's failure to notice self-defense was ineffective assistance of counsel. Because claims of ineffective assistance of counsel involve mixed questions of law and fact, we review them de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Appellant must show (1) that her trial counsel's performance "fell below an objective standard of reasonableness" and (2) that a "reasonable probability" exists that the outcome would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064-2068 (1984); *Williams v. State*, 764 N.W.2d 21, 29 (Minn. 2009).

A. Trial counsel's performance

The post-conviction court found that trial counsel's "failure to provide notice of self-defense is a protected trial strategy," and that appellant had therefore "failed to prove that [counsel's] representation fell below an objective standard of reasonableness."

Representation meets the objective standard of reasonableness when the attorney displays "the customary skills and diligence" of a reasonably competent attorney under the circumstances. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009) (quotation omitted). "A strong presumption exists in favor of finding that counsel's representation was reasonable, and particular deference is given to matters of trial strategy." *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009). "What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics," which we will not review for ineffective assistance of counsel. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Appellant argues that her trial counsel's failure to notice self-defense constitutes deficient performance because it precluded her from presenting self-defense at trial. But the decision not to notice self-defense was embedded in a long-term strategy, manifest at trial, and centered on appellant's claim that she did not strike F.G. at all. While it may have been a viable strategy for appellant to argue self-defense, the decision to avoid arguing in the alternative had a valid strategic purpose: it allowed appellant to testify consistently instead of undermining her own credibility with alternative arguments. We do not review matters of trial strategy for competence. *Id.* The district court did not err.

B. Effect on outcome at trial

The postconviction court concluded that, even if trial counsel's failure to notice self-defense rendered his performance deficient, appellant has not established that the outcome at trial would have been different because the district court would have still declined to instruct on self-defense for want of sufficient evidence.

Appellant must establish that a "reasonable probability exists that the outcome would have been different but for counsel's errors." *Williams*, 764 N.W.2d at 29. Because the district court rested its failure to instruct on self-defense on two grounds, one of which did not implicate trial counsel's failure to notice, appellant has not established that the outcome would have been different but for counsel's failure to notice. The district court did not err.

Affirmed.