

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 15, 2014

v

TANIS JEAN SZELEST,

Defendant-Appellant.

No. 313929
Kent Circuit Court
LC No. 12-001586-FH

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with a dangerous weapon (felonious assault), MCL 750.82(1), and the trial court sentenced defendant to 90 days' home confinement and two years' probation. Defendant appeals as of right. We affirm.

Austin Smith and Jeremy Woodworth, employees of a repossession company, were assigned to repossess a truck owned by defendant's husband, Edward. They believed that Edward might be living at defendant's residence, and on January 19, 2012, they went to defendant's home. Khristopher Kropp, the son of defendant and Edward, met the men outside of defendant's residence and asked them to leave. Smith gave Kropp a business card, which Kropp gave to defendant, who was inside the home. Kropp then went to the home of a neighbor, Pauline Diamond. Smith and Woodworth went to the office for the mobile home park to inquire about the residents of defendant's home. Smith and Woodworth then returned to defendant's home.

Defendant testified that she was talking to Diamond on the telephone when she saw Smith and Woodworth again approach her home. The men walked toward steps that led to a landing that was connected to an enclosed porch attached to the home. Defendant indicated that she retrieved her pistol because the presence of the men made her anxious and scared. As Smith and Woodworth approached the home, Kropp came out of Diamond's home, accompanied by Diamond's two sons and two other young men. Smith and Woodworth were standing on the steps and landing leading to defendant's enclosed porch when the group of men gathered at the bottom of the steps. Testimony regarding the subsequent events varied. Smith testified that defendant pointed a gun directly at his head, yelled obscenities at him and Woodworth, and advised them to leave her property. Defendant testified that Smith entered her enclosed porch so she waved her gun and yelled at the men. Defendant did not dispute that she brandished her pistol, yelled obscenities at the men, and advised them to leave her property.

Defendant first argues that the prosecution failed to present sufficient evidence to sustain her convictions. Defendant does not address how the record evidence was insufficient to establish the elements of the crimes for which she was convicted. Rather, she contends that the prosecution failed to present sufficient evidence to refute her claim of self-defense.

“[O]nce the defendant injects the issue of self-defense and satisfies the initial burden of producing some evidence from which a [fact finder] could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of proof to exclude the possibility that the killing was done in self-defense.” *People v Dupree*, 486 Mich 693, 709–710; 788 NW2d 399 (2010) (internal quotations omitted). The Self-Defense Act, MCL 780.971 *et seq.*, “codified the circumstances in which a person may use self-defense.” *People v Guajardo*, 300 Mich App 26, 35; 832 NW2d 409 (2013) (citation omitted). There is no dispute in this case that defendant did not use deadly force. Accordingly, the relevant subsection is MCL 780.972(2), which provides:

(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.

MCL 780.951 allows for a rebuttable presumption that an individual using force has an honest and reasonable belief that imminent death, sexual assault, or great bodily harm will occur only when that force is used against another individual in the context of breaking and entering a dwelling, or to prevent another individual from unlawfully attempting to remove someone from a dwelling or vehicle against that person’s will. MCL 780.951(1)(a).

To rebut this presumption in the context of this case, the prosecutor had to show that Smith and Woodworth were not in the process of breaking and entering defendant’s dwelling. No evidence was presented that Woodworth entered defendant’s enclosed porch or dwelling. With regard to Smith, defendant was the only witness who testified that Smith attempted to enter the enclosed porch. However, defendant also testified that the door leading from the landing to the inside of the porch was locked, and no evidence was presented that the lock was broken by Smith. Moreover, Smith testified that he did not open the door to, or try to get into, either defendant’s porch or dwelling. Woodworth testified that he could not recall if Smith opened the door to the porch, but he was certain that neither he nor Smith entered the porch. Another witness testified that Smith and Woodworth were standing on the steps leading up to the porch and that neither man entered the porch. Although Kropp’s testimony was inconsistent, he did testify that when he approached defendant’s home Smith and Woodworth were standing on the steps and landing leading to the porch, and he did not see either man enter the porch. The prosecution provided evidence that Smith and Woodworth did not break and enter defendant’s dwelling. It was up to the jury to determine which testimony to believe and this Court will “not interfere with the jury’s assessment of the weight and credibility of witnesses or the evidence.” *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

There was sufficient evidence from which a reasonable fact finder could find that defendant did not act in self-defense. Defendant's evidence that she acted in self defense came through her own testimony. Defendant claimed that she "tried to scare" Smith and Woodworth by brandishing a weapon because Smith lunged at her. There is no dispute that, at this time, a group of young men, including defendant's son, had surrounded Smith and Woodworth to confront the men on behalf of defendant. The jury's verdict demonstrates that they did not find defendant's testimony credible. The jury was free to believe or disbelieve, in whole or in part, the testimony presented at trial. *People v Ortiz*, 249 Mich App 297, 302; 642 NW2d 417 (2002).

Finally, with respect to self defense, we note that defendant's rights and duties with regard to self-defense were the same under both the SDA and the common law. *Dupree*, 486 Mich at 407. Therefore, regardless of whether defendant's actions are analyzed under the SDA or the common law, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a reasonable jury to find that defendant did not act in self defense. MCL 780.972(2); *People v Goree*, 296 Mich App 293, 304; 819 NW2d 82 (2012).

Defendant also argues that she is entitled to a new trial because an affidavit executed by Diamond presented newly discovered evidence material to trial, and the fact that this evidence was not presented at trial denied her the right to a fair trial. Defendant's unpreserved claim of error regarding newly discovered evidence is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To justify a new trial on the basis of newly discovered evidence, the moving party must show that:

- (1) the evidence itself, not merely its materiality, was newly discovered;
- (2) the newly discovered evidence was not cumulative;
- (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and
- (4) the new evidence makes a different result probable on retrial. [*People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).]

The defendant bears the burden of establishing each requirement. *Id.* at 279.

In the present case, trial counsel identified Diamond on defendant's witness list and subpoenaed Diamond as a witness for trial. Clearly, both defendant and defense counsel were aware of Diamond as a potential witness and were aware of the substance of her potential testimony before trial; evidence is not newly discovered if the defendant or defense counsel was aware of it at the time of trial. *Rao*, 491 Mich at 281-282. In addition, Diamond's proposed testimony would have been cumulative of other testimony. Finally, defendant cannot establish that Diamond's testimony makes a different result probable on retrial. Defendant has failed to establish that Diamond's proposed testimony was newly discovered evidence which would entitle her to a new trial or which denied her the right to a fair trial. *Rao*, 491 Mich at 279.

Finally, defendant argues that her trial counsel was ineffective for failing to investigate Diamond's testimony before trial and for failing to call Diamond as a witness at trial, and that she was deprived of her right to a fair trial on this basis. This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for new trial. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). In addition, "whether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law," and "[t]his Court

reviews findings of fact [if any] for clear error and questions of law de novo.” *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Pursuant to the constitutions of the United States and Michigan, a criminal defendant has “the fundamental right to effective assistance of counsel.” *Heft*, 299 Mich App at 80, citing US Const, Am VI; Const 1963, art 1, § 20. “Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise.” *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation omitted). To demonstrate ineffective assistance of trial counsel, a defendant has the burden of proving that “(1) defense counsel’s performance was so deficient that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that defense counsel’s deficient performance prejudiced the defendant.” *Heft*, 299 Mich App at 80-81. To establish that she was prejudiced, a defendant must show that “but for defense counsel’s errors, the result of the proceeding would have been different.” *Id.* at 81.

At the hearing on defendant’s motion for a new trial, trial counsel testified that an investigator from her law firm spoke with Diamond before trial, and counsel also spoke with Diamond several times before trial. Trial counsel confirmed that Diamond’s statements to her and her investigator were consistent with the testimony of defendant, Kropp, and another witness at trial. Defendant’s trial counsel identified Diamond as a witness and subpoenaed Diamond for trial. However, trial counsel testified that she did not call Diamond as a witness at trial because she did not believe that Diamond would present as a credible witness and that some of Diamond’s statements could have undermined the theory of self-defense. In sum, she believed that Diamond’s testimony could potentially be more harmful than helpful to defendant’s case.

The trial court found that trial counsel’s decision not to call Diamond as a witness was a matter of trial strategy, that this conduct did not fall below an objective standard of reasonableness, and that defendant could not establish that, but for this decision, the outcome of her trial would have been different. We agree. Decisions regarding what evidence to present, including whether to call witnesses, are presumed to be matters of trial strategy, and a trial counsel’s strategy does not constitute ineffective assistance of counsel simply because it did not work. *Heft*, 299 Mich App at 84. Inconsistencies in Diamond’s statements could have undermined defendant’s claim of self-defense, and it was a reasonable strategic decision not to call Diamond. Moreover, even if defendant could convince us that defense counsel’s decision not to call Diamond as a witness was unreasonable, her proposed testimony was largely cumulative of testimony presented by defendant, Kropp, and another witness, and defendant cannot establish that, but for the decision not to call Diamond, the result of her trial would have been different. Defendant cannot establish that the trial court abused its discretion when it denied her motion for a new trial on the basis of ineffective assistance of counsel, or that she was denied a fair trial on this basis.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Douglas B. Shapiro