

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 17, 2013

v

DAVID MICHAEL JEDD,

Defendant-Appellant.

No. 311867
Oakland Circuit Court
LC No. 2012-240043-FH

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and two counts of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant to one to four years' imprisonment for the felonious assault conviction, two years' imprisonment for the felony-firearm conviction, and one to two years' imprisonment for each assault, resisting, or obstructing a police officer conviction, with all sentences concurrent, but consecutive to the felony-firearm sentence. Defendant appeals as of right. We affirm.

I. FACTS

Don Polick was driving home when his car slid off an icy road and into a ditch. Polick decided to walk to his home to obtain assistance from his uncle. Polick and his uncle returned in an attempt to tow Polick's car. Polick's uncle proceeded to drive away from the car in an attempt to obtain a better angle to tow the car, during which time a pickup truck arrived. Defendant was driving the pickup truck with his wife as a passenger. Defendant exited the vehicle and offered to help, but, according to Polick, did so in a rude and expletive-filled manner. Polick, wanting to avoid an altercation, declined. Defendant took offense and indicated his intent to fight Polick. Polick informed defendant that he was prepared to defend himself and that he was an amateur cage fighter. Defendant responded by returning to his truck and grabbing a gun, which he, using a laser scope, pointed directly at Polick's forehead. Defendant then lowered the gun, returned to his vehicle, and left. Polick, having noted defendant's license plate number, called the police. When two police officers arrived at defendant's residence, defendant attempted to draw his gun and was tackled to the ground.

At trial, defendant claimed that his actions in relation to Polick were acts of self-defense. Defendant testified that Polick was a large cage fighter, initiated the aggressive and violent behavior, threatened to kill defendant, approached him in a cage fighter's stance, and was set to attack before defendant retrieved his gun. The trial court instructed the jury on self-defense, but, as previously indicated, the jury convicted defendant.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied effective assistance of counsel. We disagree. Defendant's claim is unpreserved because he failed to move for a new trial or seek an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). See *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *Id.* Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 495 Mich 575, 579; 640 NW2d 246 (2012); *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Effective assistance of counsel is presumed. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland*, 466 US at 688. The defendant must overcome a strong presumption that assistance of his counsel was sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Trial counsel's decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Further, the failure to present evidence will constitute ineffective assistance of counsel only if such failure deprives defendant a substantial defense. *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013).. A substantial defenses is one that may have made a difference at trial. *People v Hyland*, 212 Mich App 701; 710; 538 NW2d 465 (1995). Second, the defendant must show that trial counsel's deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 691 Mich at 669, citing *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland*, 466 US at 694.

Defendant first argues that defense counsel's assistance was ineffective for failing to educate the jury regarding the Self-Defense Act, MCL 780.972, or to adequately tailor his defense to that statute. We disagree. 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:

(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.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

(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.

Although the record indicates that defense counsel never specifically mentioned the Self-Defense Act, defense counsel adequately tailored the defense to the requirements of the statute. During cross-examination of Polick, defense counsel asked pertinent questions related to self-defense, including questions about Polick's size, whether Polick liked to fight, whether he threatened to kill defendant and his wife, and if Polick approached defendant in a threatening manner. During direct examination of defendant, defense counsel elicited testimony that Polick was the initial aggressor, threatened to kill defendant, began removing his jacket as if he was preparing for a fight, approached defendant in a cage fighter's stance, that defendant feared for his life, and that defendant retrieved his gun only to stop Polick from advancing. Thus, defense counsel produced sufficient evidence of self-defense under MCL 780.972, regardless of whether he specifically mentioned the Self-Defense Act by name. Moreover, the trial court instructed the jury on self-defense at defense counsel's request. Because defense counsel provided evidence to support defendant's claim of self-defense, and the jury was properly informed of the requirements of the defense by the trial court, defense counsel did not deny defendant a substantial defense. See *Dunigan*, 299 Mich App at 589.

Defendant also argues that defense counsel's assistance was ineffective for failing to provide the jury with adequate information about Polick's history as a cage fighter and what cage fighting actually entails. We disagree. Defendant cannot overcome the presumption that defense counsel's decision to avoid questioning Polick on his cage fighting history was sound trial strategy. See *Rockey*, 237 Mich App at 76. During the prosecution's direct examination of Polick, Polick testified that, as a cage fighter, he was a sportsman who only fought in the ring under the proper circumstances. On the other hand, he denied that he searched for fights outside of the ring. When defense counsel attempted to elicit testimony from Polick on cross-examination, Polick testified that he only fought inside of a cage under the prescribed circumstances as part of his profession. Given that defense counsel was attempting to portray Polick as an aggressive cage fighter to support defendant's self-defense claim, defendant cannot overcome the strong presumption that it was sound trial strategy to avoid continued testimony from Polick regarding the passivity and sportsmanship of cage fighters. See *Armstrong*, 490 Mich at 290; *Rockey*, 237 Mich App at 76.

Moreover, defendant has failed to demonstrate that he was denied a substantial defense because the jury was provided with information regarding Polick's history as a cage fighter. See *Dunigan*, 299 Mich App at 589. In addition to the prosecution's description of cage fighting in its opening statement, defense counsel elicited testimony from defendant that he had seen cage fighting. Specifically, defendant testified that he thought it was a violent sport, and that during the altercation, Polick was approaching defendant in the aggressive style befitting a cage fighter. Defense counsel even elicited testimony from defendant that, considering his understanding of cage fighting, he believed Polick's hands to be akin to a deadly weapon. Therefore defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness. See *Vaughn*, 491 Mich at 669.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto