

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH CHRISTOPHER MAZZIO,

Defendant-Appellant.

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UNPUBLISHED

May 27, 2014

No. 314685

Oakland Circuit Court

LC No. 2012-242291-FC

Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant Joseph Christopher Mazzio appeals by right his jury conviction of assault with intent to commit murder. MCL 750.83. The trial court sentenced Mazzio to serve 88 to 360 months in prison for the conviction. Because we conclude there were no errors warranting relief, we affirm.

Mazzio's conviction arises from an altercation at a fireworks display. Mazzio attended the fireworks with his girlfriend, Latonya Kilcher, and several other friends. While Kilcher waited for Mazzio outside a restroom, Edward Otis approached Kilcher and tried to start a conversation. When Mazzio left the restroom, he saw Otis touching Kilcher and confronted him. The two began to fight and eventually Mazzio stabbed Otis with a small knife.

Mazzio argued that he brandished the knife in self-defense after he felt that Otis had a gun in his pocket. He also argued that he did not intend to stab Otis, but Otis suffered his injuries after he charged at Mazzio and forced the knife up into his neck.

The jury rejected Mazzio's version of events and found him guilty as charged.

Mazzio argues that the trial court erred when it refused to provide a jury instruction on the use of nondeadly force in self-defense in addition to the instruction on the use of deadly force in self-defense. This Court reviews de novo whether the trial court properly instructed the jury. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, we review a trial court's determination whether a particular instruction applies to the facts for an abuse of discretion. *Id.*

A defendant has the right to have a properly instructed jury consider the evidence against him. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). When a defendant requests an instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction. *Id.* The defendant, however, bears the burden of establishing that the trial court's failure to give a requested instruction resulted in a miscarriage of justice. *Id.*

In *People v Pace*, 102 Mich App 522, 533-534; 302 NW2d 216 (1980), this Court examined whether the trial court erred when it instructed the jury on the use of deadly force in self-defense where the evidence showed that the defendant drew a knife and held it at his side during a confrontation. The Court determined that an act involves deadly force when the act is "such that the natural, probable, and foreseeable consequence" of the act is death. *Id.* at 534. Because there was no evidence that the defendant in that case "stabbed, lunged, or swung at anybody with the blade", the court concluded that it was error for the trial court to instruct the jury on the use of deadly force in self-defense. *Id.* at 533-534. Because the claim to self-defense "is greatly restricted" when the defense involves deadly force, the court concluded that the error warranted a new trial. *Id.* at 535.

Here, there was evidence that Mazzio used deadly force. But Mazzio also testified that he intended to merely display the knife to scare Otis and that Otis only suffered his injury after he charged Mazzio and forced the knife upward. On the basis of that testimony, Mazzio's lawyer asked the trial court to instruct the jury on the alternate standard applicable for the use of nondeadly force in self-defense. See *Pace*, 102 Mich App at 534 n 7. The trial court rejected the request because—in its view—the facts showed that Mazzio used deadly force.

Assuming that the trial court erred when it refused to instruct the jury on the use of nondeadly force in self-defense, Mazzio has not established that the error would warrant relief. Although Mazzio testified that he merely intended to display the knife to scare Otis, the overwhelming evidence showed that Mazzio deliberately attacked Otis with the knife. Cynthia Cooper-Bunna testified that Mazzio lunged at Otis with the knife and John Brouillard, another witness, stated that he heard Mazzio say he was "going to kill that motherfucker" after Otis had been cut. Otis testified that he did not see the knife, but heard someone yell "he's stabbing you" during the altercation. Additionally, Otis's wounds were consistent with a deadly attack rather than an accidental cut: he was cut multiple times in the throat, with one deep cut just millimeters from his carotid artery. Finally, there was evidence that Mazzio had Kilcher conceal the knife after the altercation. Given the evidence that he deliberately used deadly force and the fact that the jury rejected his claim that he acted in self-defense, Mazzio has not establish that the failure to give this instruction prejudiced his trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).<sup>1</sup>

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<sup>1</sup> To the extent that the trial court's failure to give this instruction could be said to amount to constitutional error, we conclude that it was harmless beyond a reasonable doubt. See *People v Anderson (After Remand)*, 446 Mich 392, 404-407; 521 NW2d 538 (1994).

Mazzio next argues that the trial court erred when it scored the sentencing guidelines using impermissible judicial fact-finding. Mazzio specifically relies on the decision in *Alleyne v United States*, 570 US \_\_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013), for the proposition that a trial court may not make factual findings that will increase a defendant’s minimum sentence.

In *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court held that in sentencing, the discretion of the judge is limited, and “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Accordingly, a judge may not find facts independent of those found by the jury to increase a statutory maximum criminal sentence. *Id.*

The Court applied the logic underlying *Apprendi* to mandatory minimum sentences in *Alleyne*. There the Court held that “any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” *Alleyne*, 133 S Ct at 2155. Specifically, the Court stated that because mandatory minimum sentences increase the penalty for a crime, “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” *Id.*

This Court, however, has recently held that *Alleyne* does not prohibit Michigan Courts from scoring the sentencing guidelines using judicially determined facts. *People v Herron*, 303 Mich App 393, 403-404; \_\_\_ NW2d \_\_\_ (2013). That holding stemmed from the fact that Michigan’s sentencing guidelines scheme does not generally create a *mandatory* minimum sentence; rather, the sentencing guidelines produce a recommended sentencing range. *Id.* The Court stated “judicial fact-finding to score Michigan’s sentencing guidelines falls within the “wide discretion” accorded a sentencing court “in the sources and types of evidence used to assist [the court] in determining the kind and extent of punishment to be imposed within limits fixed by law[.]”” *Id.* at 405, quoting *Alleyne*, 570 US at \_\_\_ n 6, quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Consequently, the trial court did not violate Mazzio’s constitutional rights by scoring the guidelines using judicially determined facts.

Further, because the trial court properly calculated the guideline range, Mazzio’s arguments regarding that range are meritless. Mazzio has not challenged the specific factual findings and the trial court imposed a minimum sentence within the properly calculated guidelines range. Therefore, there were no sentencing errors warranting relief.

Mazzio next argues that his trial lawyer provided ineffective assistance. Specifically, he argues that his lawyer should have requested an instruction on provocation. See CJI2d 17.4. Where, as here, the trial court did not conduct an evidentiary hearing on the claim of ineffective assistance, this Court’s review is limited to mistakes that are apparent on the record. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864.

In order to establish a claim of ineffective assistance, Mazzio must show that his trial lawyer’s act or omission fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the act or omission, the result of the proceeding would have been different. *Id.* at 22. Mazzio must also overcome a

strong presumption that his lawyer's acts or omissions were a matter of trial strategy. With this presumption, if "after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission," the reviewing court must conclude that the act or omission fell within the range of reasonable professional conduct. *Id.* at 22-23.

The instruction stated under CJI2d 17.4 addresses circumstances mitigating an unlawful assault. At trial, Mazzio's lawyer elected to present evidence and argue that Mazzio acted in self-defense or in defense of Kilcher and that Otis was injured by accident. And that theory was consistent with Mazzio's own testimony. Because Mazzio's lawyer could legitimately conclude that a mitigation defense might undermine the strength of his self-defense theory, we must presume that Mazzio's lawyer's decision to forego that instruction fell within the range of professional conduct. *Gioglio*, 296 Mich App at 22-23. Therefore, Mazzio has failed to establish that his trial lawyer's decision amounted to ineffective assistance.

There were no errors warranting relief.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Michael J. Kelly