

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ROBERT J. COPELAND,

Defendant-Appellant.

UNPUBLISHED

September 29, 2005

No. 253676

Wayne Circuit Court

LC No. 03-007753-01

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to murder, MCL 750.83, and armed robbery, MCL 750.529. Defendant was sentenced to twelve to twenty-five years in prison for the assault with intent to murder conviction and twelve to twenty-five years for the armed robbery conviction. We affirm.

Defendant first argues that a new trial is required because he did not receive the effective assistance of counsel. We disagree. Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). “A judge must first find the facts, then must decide whether those facts establish a violation of the defendant’s constitutional right to the effective assistance of counsel.” *Id.* A trial court’s findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.* at 485.

To establish ineffective assistance of counsel, a defendant must show: (1) that the defense counsel’s performance was objectively unreasonable in light of prevailing professional norms; and (2) a reasonable probability that, but for the defense counsel’s error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Carbin, supra* at 600, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “The defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). This Court neither substitutes its judgment for that of counsel regarding trial strategy nor evaluates trial counsel’s decisions with the benefit of hindsight. *Id.*

Defendant's first ineffective assistance claim is predicated on defense counsel's failure to advise him that his decision to forego his right to testify might affect his self-defense claim. A defendant's decision whether to testify is a strategic decision best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985).

At trial, defense counsel stated, "Mr. Copeland is aware of the fact that he has a right to testify. Mr. Copeland wants to testify. I have advised him, in my professional opinion, the idea that he doesn't, . . . but I have advised him that he can." Further, while an on-the-record waiver of defendant's right to testify is not necessary, *id.* at 684, the trial court in this case meticulously obtained such a waiver:

The Court: Mr. Copeland, you know you can testify if you want to

Defendant: Yes, sir.

The Court: That's up to you and nobody else. That's your decision. Not your lawyer's, not anybody else's. Do you understand that?

Defendant: Yes, sir.

The Court: And only you can make it. Do you understand that?

Defendant: Yes.

The Court: And you have a right not to testify if you don't want to. Do you understand that?

Defendant: Yes.

The Court: And if you don't, nobody can hold that against you.

Defendant: Yes, sir.

The Court: But the decision whether or not is yours and yours alone. Although your attorney can advise you, that's only advice. You understand that?

Defendant: Yes.

The Court: So what do you want to do?

Defendant: Choose not to.

Because defendant waived his right to testify, any error was extinguished. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000).

Defendant contends that counsel was nonetheless ineffective because counsel failed to advise him about the effect that foregoing his right to testify might have on whether the court instructed on self-defense. At the *Ginther*¹ hearing, defendant testified that his testimony would have been that the victim, Ghaith Aboudi, initiated the fight and stabbed him and that defendant stabbed Aboudi only to defend himself. Counsel testified that he persuaded defendant to forego testifying out of the fear that defendant would “come undone” on the stand and because defendant’s testimony would not have substantially helped the defense. Defendant asks for a new trial because counsel’s advice to waive his right to testify alleged inevitably produced a guilty verdict. However, a particular strategy does not constitute ineffective assistance of counsel simply because it does not work. *Matuszak, supra* at 58.

Further, while the trial court may have decided to instruct the jury on self-defense based on defendant’s testimony, there is nothing in the record to indicate that defendant’s testimony would have altered the verdict. The evidence against him was overwhelming. Aboudi testified that defendant stabbed him five times, unprovoked, and took about \$1,800 from his store. Defendant did not alert the police about the stabbing and left Aboudi bleeding profusely. Carlene Stafford did not see any wounds on defendant when he fled the store. Trial counsel’s decision to advise defendant to waive his right to testify did not fall below the standard of reasonableness for an attorney.

Defendant next claims that counsel should have investigated whether there were surveillance cameras in the store. “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Grant, supra* at 485, quoting *Strickland, supra* at 690-691. Here, two months after the stabbing, defendant told counsel about the possibility of surveillance cameras in the store. A private investigator went to the store over five months later and saw cameras in the store. Aboudi denied that there were ever cameras in his store. Counsel used the conflicting testimony about the cameras to bolster his strategy of discrediting Aboudi. While it might have been better if counsel had investigated whether a visual recording of the stabbing existed as soon as he learned of the possibility, defendant failed to establish whether there were cameras in the store at the time of the stabbing or whether a recording of the stabbing ever existed. Thus, defendant failed to establish a reasonable probability that, but for the defense counsel’s error, a different outcome reasonably would have resulted. See *Carbin, supra* at 600.

Defendant next contends that because Aboudi’s medical records establish that his jugular vein, rather than his carotid artery, was lacerated when defendant stabbed him in the neck, counsel was ineffective when he did not object to references to a cut artery. Counsel’s failure to object to technically incorrect descriptions of Aboudi’s indisputably grave injuries may have been a strategic decision to avoid highlighting the injuries that defendant inflicted on Aboudi by stabbing him in the neck. This Court will not substitute its judgment for that of trial counsel

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

regarding matters of trial strategy. *Matuszak, supra* at 58. Counsel's failure to object to these references was not ineffective assistance of counsel.

Defendant next argues that counsel was ineffective for failing to object to several instances of purported prosecutorial misconduct. Defendant argues that the prosecutor improperly elicited an inference from Detroit Police Officer DaNeil Mitchell that defendant refused to speak with him. A defendant's right to due process guaranteed by the Fourteenth Amendment is violated where the prosecutor uses the defendant's postarrest, post-*Miranda*² warning silence for impeachment or as substantive evidence unless it is used to contradict the defendant's trial testimony that he made a statement or that he cooperated with police. *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573 n 5; 628 NW2d 502 (2001). The defendant's right to due process is implicated only when his silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda* warnings. *People v McReavy*, 436 Mich 197, 201 n 2; 462 NW2d 1 (1990); *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992).

In this case, nothing in the trial or *Ginther* hearing transcript indicates that the police ever read defendant the *Miranda* warnings, even after his arrest, or that defendant invoked his constitutional right to silence. When a defendant has received no *Miranda* warnings, no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege. *Schollaert, supra* at 165-166.

Further, while the prosecutor may not treat the defendant's exercise of his right to silence as substantive evidence of guilt, she may fairly respond to an argument of the defendant by referring to that silence. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995). The propriety of the comment depends upon the circumstances. See, generally, *id.* at 110-111. Here, it is clear from context that the prosecution was attempting to rebut defendant's implication that he was injured in the altercation:

The Prosecutor: And did you come in physical contact with Mr. Copeland soon after his arrest, did you see him?

Mitchell: No, I didn't see him. I went to the Wayne County Jail to see if I could recover a statement from him.

The Prosecutor: Okay, and then was that – how soon after he was taken into custody did you see him?

Mitchell: Actually I didn't see him.

* * *

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The Prosecutor: And to the best of your knowledge, at the time of his arrest, did he have any visible injuries or was [he] injured?

Mitchell: To the best of my knowledge, I didn't ever have any visual contact with the defendant. I really couldn't tell you. No reports came across my desk whatsoever.

Clearly, the prosecutor's questions were aimed at finding out the state of defendant's scars, not defendant's refusal to be interviewed. See *Dennis, supra* at 575. Further, there was no constitutional violation because the prosecution did not attempt to use the failed jail visit against defendant. The prosecutor did not ask any other questions about the visit or mention it during her closing argument. The failure to assert a meritless objection does not constitute ineffective assistance of counsel. *Matuszak, supra* at 58. Because there was no error, counsel was not ineffective for failing to object.

Defendant next contends that counsel was ineffective because counsel did not object to testimony that defendant did not mention his injury to the police. "[T]he right against self-incrimination prohibits a prosecutor from commenting on the defendant's silence in the face of accusation, but does not curtail his conduct when the silence occurred before any police contact." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). "Thus, a prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true." *Id.*

In redirect, the prosecution asked Mitchell about defendant's scars:

The Prosecutor: You've never seen those scars before?

Mitchell: Never seen the scars, I've never seen him, other than being in court.

The Prosecutor: Okay. And so he never made an effort to notify you that he had these?

Mitchell: Correct.

The Prosecutor: And you don't know if he got those when he was twelve-years-old?

Mitchell: That's correct. They do look rather old.

Here, if, as defendant contends on appeal, he stabbed Aboudi in self-defense, it would have been natural for him to go to the police to show his defensive wounds and tell his version of events. Thus, the prosecutor properly asked about whether defendant notified the police about the injuries.

Defendant argues in the alternative that the prosecution impermissibly shifted the burden of proof onto him. This argument is unavailing. Under the doctrine of fair response, "a party is entitled to fairly respond to issues raised by the other party." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). In this case, the prosecutor's argument was fair response to the

defendant's assertion that Aboudi had stabbed him. Because there was no error, counsel was not ineffective for failing to object to this question.

Defendant next contends that counsel was ineffective because counsel failed to object to the introduction of evidence of his prior police contacts. This argument is meritless because it is clear from the record that the prosecutor did not elicit this information. The prosecution asked Mitchell about the identification process:

The Prosecutor: Okay, and after you took a statement you showed Ms. Stafford some photographs, is that correct?

Mitchell: Correct. Once the statements were completed, I then recovered a name . . . from the complainant on the possible suspect. At that time, I utilized resources available: computer systems, data tracks and everything to recover a photograph of the – using the name I recovered. And at that time he, defendant, Mr. Copeland's name and picture appeared on the computer system and at that time I recovered the picture, as well as, other matching physical characteristics of other individuals that were also in the computer system. I compiled those pictures and at that time I had performed a photo line-up with all the witnesses involved.

Defendant argues that the jurors likely inferred from the availability of his photograph on a police computer that he had prior contacts with the police and, therefore, counsel was ineffective for failing to object. We conclude that the prosecutor's question was proper and was not aimed at eliciting information about the origins of the photograph. Moreover, there was no mention that defendant had been previously arrested or convicted. The failure to assert a meritless objection does not constitute ineffective assistance of counsel. *Matuszak, supra* at 58.

Defendant also asserts that counsel was ineffective because he failed to request CJI 17.4, which provides:

(1) The defendant can only be guilty of the crime of assault with intent to commit murder if [he / she] would have been guilty of murder had the person [he / she] assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder.

(2) Voluntary manslaughter is different from murder in that for manslaughter, the following things must be true:

(3) First, when the defendant acted, [his / her] thinking must have been disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been caused by something that would cause an ordinary person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide. [If the defendant is mentally or emotionally impaired in some way, you may consider that.]

(4) Second, the killing itself must have resulted from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and before reason took over again. The law does not say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

(5) If you find that the crime would have been manslaughter had the person died, then you must find the defendant not guilty of assault with intent to murder.

“Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). In order to mitigate homicide to manslaughter, a defendant must act out of passion rather than reason. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The victim must arouse such an emotion in the perpetrator that it distorts the very process of rational choice. *Id.* The provocation must be one that would make a reasonable person lose control. *Id.*

Defendant’s argument is premised solely on a police report in which Stafford told a police officer that Aboudi told her that he had been in a fight. Defendant failed to establish that Aboudi did anything to arouse anger or passion in defendant. Because defendant offered no evidence to support a mitigating circumstances defense, asking for such an instruction would have been futile. To provide effective assistance of counsel, defense counsel is not required to pursue meritless motions. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant argues that the cumulative effect of defense counsel’s putative errors warrants reversal. “This Court reviews a cumulative-error argument to determine whether the combination of alleged errors denied the defendant a fair trial.” *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Only actual errors are considered in determining their cumulative effect. *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). Here, because defendant failed to establish any instances of ineffective assistance of counsel, his cumulative error argument is without merit.

Finally, defendant argues that the trial court erred when it denied his request for a self-defense instruction. We disagree. Defendant’s claim of instructional error is reviewed de novo. See *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). “A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.” *Id.* If a defendant requests a self-defense instruction and it is supported by the evidence at trial, the trial court must give the instruction to the jury. *Id.* “However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court’s failure to give the requested instruction resulted in a miscarriage of justice.” *Riddle, supra* at 124; MCL 769.26. A defendant’s conviction will not be reversed unless it affirmatively appears more probable than not that the error was outcome determinative. *Riddle, supra* at 124-125.

“[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.” *Id.* at 127. Defendant did not present any evidence to support this self-defense theory. There was no testimony or evidence presented at trial that showed the stabbing was precipitated

by defendant's fear for his life or that Aboudi threatened defendant with great bodily harm. Defendant merely points to a police report in which Stafford told a police officer that Aboudi told her that he had been in a fight. Stafford did not recall making this statement. This statement is not sufficient to support a theory of self-defense. Because there was no evidence to support defendant's self-defense theory, the trial court did not err when it refused to give the requested instruction. *Riddle, supra* at 124.

In any case, defendant failed to meet his burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. Because the evidence against defendant was overwhelming, a self-defense instruction would not have more likely than not resulted in a different outcome.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette