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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2021
v	No. 353775
ERNEST WADE STURGILL, Defendant-Appellant.	Wayne Circuit Court LC No. 19-008478-01-FC

Before: SAWYER, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder (AGBH), MCL 750.84, felonious assault, MCL 750.82, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, and reckless use of a firearm, MCL 752.863a. The trial court sentenced defendant to serve 2 to 10 years in prison for the AGBH conviction, one to four years in prison for the felonious-assault conviction, two years in prison for the felony-firearm convictions, and one year of probation for the reckless-firearm-use conviction. The two felony-firearm sentences are consecutive, respectively, to the two assault sentences, but all sentences are otherwise concurrent with each other. Defendant appeals as of right, alleging ineffective assistance of counsel. We affirm.

This case arises out of the shooting of Thomas Jacob Harris at a masonry and chimney services business, Chimney Cricket, in Livonia, on April 23, 2019. At trial, defendant maintained that he shot Harris, who was having an affair with defendant's wife, Della, in self-defense.

Defendant filed an ineffective assistance claim in the trial court, which denied his request for an evidentiary hearing to develop that claim[1] within his motion for a new trial. Our review of defendant's claim of ineffective assistance of counsel is thus limited to errors apparent from the

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

existing record. See *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. This Court reviews de novo the constitutional question whether defendant was deprived that right. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 US at 694.

Defendant argues on appeal that defense counsel was ineffective for failing to investigate and present evidence regarding a previous incident when Harris had allegedly pulled a gun on defendant, in order to show that he honestly and reasonably believed that deadly force was necessary at the time he acted. We disagree.

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses, meaning those that might make a difference in the outcome of the trial. *In re Ayres,* 239 Mich App 8, 22; 608 NW2d 132 (1999). Counsel thus has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Trakhtenberg*, 493 Mich at 52 (quotation marks and citation omitted). "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). But "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy . . . ." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

"In a self-defense claim, the accused's conduct is judged according to how the circumstances appeared to him at the time he acted." *People v Adamowicz*, 503 Mich 880; 918 NW2d 532 (2018). An individual may employ deadly force if that individual is not engaged in the commission of a crime, he or she has no duty to retreat, and 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." MCL 780.972(1). See also *People v Stevens,* 306 Mich App 620, 630; 858 NW2d 98 (2014).

Defense counsel asserted in his opening statement that defendant was acting in self-defense, and argued such at closing. Defense counsel relied on defendant's testimony to suggest that Harris possessed a gun, that Harris was the aggressor, and that Harris's peculiar behavior after the shooting, including lying to the hospital and his family about how he had been shot, supported the self-defense theory.

Defense counsel also introduced testimony from defendant that he fired a shot through his windshield because he thought Harris was pulling a gun and so honestly and reasonably believed that deadly force was necessary. Defendant further testified that Harris had pulled a gun on him twice before and had otherwise threatened him repeatedly. Defendant testified, and even Della

admitted, that Harris brandished a weapon against defendant at Chimney Cricket, Della's employer, in February 2019, around the time that defendant grew suspicious about the affair between Della and Harris. When questioned about whether he was afraid of Harris because he had pulled guns before, defendant added that Harris "came to my house after me . . . trying to get me." Harris admitted that, when attempting to intimidate defendant and impress Della, he falsely claimed that he was in a gang based in the "murder capital," that he had a real gun, and that he was willing to shoot somebody for Della. At the close of proofs the trial court instructed the jury on self-defense.[2]

We are not persuaded that information about an additional prior incident would have led to a different outcome at trial, particularly in light of undisputed evidence already in the record about the turbulent relationship between Harris and defendant. Any additional such evidence would have been cumulative. What was missing from the record was any evidence supporting defendant's self-serving claim that Harris was armed, and even pulled a gun on him, before defendant shot him. Harris denied that he was armed that day, and the persons standing right next to him during the shooting—Della and one of her coworkers—testified that they never saw Harris with a gun. According to Harris, defendant was not responding to a perceived threat from him, but rather drove toward Harris with the gun pointed at him. Moreover, Harris maintained that he did not reach for anything, but was instead merely holding a bottle of alcohol and a beverage. Without evidence supporting defendant's account of facing an imminent threat of death or great bodily harm at the time of the shooting, the evidence of additional past conflicts between Harris and defendant would have been cumulative with regard to the existence of some personal tensions between them, and would not have changed the outcome of the trial. For these reasons, defendant has failed to show that defense counsel was ineffective for failing to further develop his self-defense theory.

Defendant argues that defense counsel should have obtained and offered a police report about this prior incident. But police reports are generally inadmissible hearsay.[3] See MRE 801(c); *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 254; 805 NW2d 217 (2011). Counsel could thus have made little, if any use, of such documentation.

Defendant also argues that defense counsel's prior suspension by the Attorney Discipline Board for failures involving eight different clients in unrelated cases supports his claim that he was denied the effective assistance of counsel. According to the September 1, 2017 notice attached to defendant's brief on appeal, of which we take judicial notice as a public record, the 179-day suspension was complete by the time that defense counsel represented defendant. Moreover, our Supreme Court has explained as follows:

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[2] Defense counsel stated that he had no objection to the instructions that the trial court provided and in his brief on appeal, defendant does not challenge the instructions.

[3] Defendant attached a copy of the March 20, 2019 incident report to his brief on appeal. However, because that document was not part of the lower-court record, we decline to consult, let alone consider, it for purposes of this appeal. See *Matuszak*, 263 Mich App at 48; MCR 7.210(A) ("Appeals to the Court of Appeals are heard on the original record.").

> The suspension of an attorney reflects a decision that the attorney is not permitted to practice law during the period of the suspension, rather than a statement that the attorney is not competent to practice law. There is no necessary correlation between disciplinary action and an attorney's ability to practice law, and we decline to create such a connection as a matter of law. [*People v Pubrat*, 451 Mich 589, 597; 548 NW2d 595 (1996).]

Although the notice lists rules violations by defense counsel, it does not set forth facts from which this Court might rely upon to draw analogies to the instant case. And, as we concluded above, defendant has failed to bring to light any deficiency in defense counsel's trial performance.

Defendant next argues that defense counsel was ineffective by failing to adequately advise him with regard to the prosecutor's offer of a plea agreement, including by making an unfulfilled promise to win at trial. We disagree.

While a defendant does not have the right to demand a plea offer from the prosecution, *Lafler v Cooper*, 566 US 156, 168; 132 S Ct 1376; 182 L Ed 2d 398 (2012), "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused," *Missouri v Frye*, 566 US 134, 145; 132 S Ct 1399; 182 L Ed 2d 379 (2012). "The decision to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to permit the client to make an informed decision." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). Trial counsel is not required to recommend whether to accept a plea offer; instead, "[t]he test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea." *Id*.

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. [*Frye*, 566 US at 147.]

Defendant relies on *Lafler*, 566 US at 160. This Court explained as follows in *People v Walker*, 328 Mich App 429, 440; 938 NW2d 31 (2019):

> In *Lafler*, the defendant rejected a plea offer on the advice of his attorney. After the plea offer was rejected, the defendant had a full and fair jury trial that resulted in a guilty verdict, and the defendant received a harsher sentence than what was offered in the rejected plea bargain. The parties agreed in *Lafler* that the defense counsel's performance was deficient when he advised the defendant to reject the plea offer.

In *Lafler*, the defendant established prejudice because there was a reasonable probability that he and the trial court would have accepted the plea agreement. *Lafler*, 566 US 174. Moreover, because the defendant did not accept the offer and was convicted at trial, his sentence was more than three times greater than the sentence under that offer. *Id.* The United States Supreme Court concluded that the standard for ineffective assistance under *Strickland* was satisfied. *Id.*

In this case, defendant claims that defense counsel was deficient because he failed to relay the specifics of the offer to defendant. Although the communications between defense counsel and defendant are not part of the record, the record nevertheless shows that defendant was aware of the offer. At the pretrial hearing on February 13, 2020, the prosecutor explained the specifics of the offer on the record. In particular, defendant would have been required to plead guilty to Counts III (AGBH) and IV (felony-firearm), and the sentence would have been within the guidelines for AGBH plus two years for felony-firearm. Defense counsel stated that he had discussed the offer with defendant, and both he and defendant stated that defendant wanted to reject it.

Defendant now claims that defense counsel's prior licensing suspension indicated that he had a track record of failing to sufficiently inform clients. However, setting aside defendant's speculative attempt to connect the reasons for counsel's suspension with his claims relating to counsel's performance below, we note that the trial court explained at the postconviction motion hearing that, to avoid these types of claims, it made a habit of reviewing plea offers with defendants and asking them on the record if they understood them. We further note that the trial court acted accordingly here, including by eliciting from defendant that he fully understood the prosecutor's offer. On this record, defendant cannot establish that he was not able to make an informed and voluntary choice between trial and entering a plea agreement.

Moreover, defendant cannot establish the requisite prejudice in any event. Nothing in the record, nor even an assertion in defendant's brief on appeal, suggests that he would have accepted the plea offer but for defense counsel's alleged failures. Rather, the record clearly indicates that defendant maintained his innocence throughout the proceedings, claimed that he acted in self-defense, and preferred to go to trial. Defendant thus cannot establish that defense counsel was ineffective for failing to advise him of the plea offer.

Defendant also claims that he rejected the prosecutor's offer because defense counsel promised that he could "beat the charges at trial." But there is nothing in the record to suggest that any such guarantee induced defendant to reject the offer. Further, defendant on appeal provides no offer of proof in support for this bald assertion. Absent any factual support for defendant's claim, he cannot establish that he was denied effective assistance of counsel. See *Matuszak*, 263 Mich App at 48.[4]

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[4] The prosecutor argues that there was no prejudice because the convictions and sentences imposed were the same as those within the rejected plea offer. But the prosecution's argument is inapt, because defendant was convicted of, and sentenced for, five offenses, and the plea agreement would have resulted in only two convictions and related sentences. "[T]he conviction or sentence,

Defendant urges this Court to remand for an evidentiary hearing to develop his claim of ineffective assistance. But remand is unnecessary when the defendant has not demonstrated that such further development would support the claim. *People v Chapo*, 283 Mich App 360, 369; 770 NW2d 68 (2009). Defendant stated on the record that he understood the offer and had no questions about it. Further, defendant's protestations of innocence and self-defense below, and again on appeal, militate against crediting defendant's insistence that he would have accepted the plea offer but for defense counsel's promises or failures. Therefore, remand for further factual development of this issue is unwarranted.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Riordan
/s/ James Robert Redford

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or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 566 US 164.