STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTA VAN BUREN,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 356536
Wayne Circuit Court
LC No. 16-010382-01-FC

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

PER CURIAM.

In 2017, defendant, Roberta Van Buren, was charged with second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Her defense at trial was that she had been acting in self-defense when she shot and killed George Mealy. Following a jury trial, she was acquitted of the murder charge, but convicted of felony-firearm. She appealed by right to this Court, asserting that the trial court erred by not explicitly instructing the jury that self-defense applied to the felony-firearm charge. She also contended that her defense lawyer provided ineffective assistance because he did not request such an instruction and because he did not expressly argue that the defense of self-defense applied to the felony-firearm charge. This Court disagreed and affirmed her conviction.[1] Thereafter, on application for leave to appeal, our Supreme Court vacated this Court's opinion and remanded for a *Ginther*[2] hearing to determine "whether the defendant was denied the effective assistance of trial counsel." *People v Van Buren*, 505 Mich 851 (2019). Following the *Ginther* hearing, the trial court found that Van Buren had not been denied the effective assistance of a lawyer, so it entered an order denying Van Buren's motion for a new trial on the basis of ineffective assistance. Van Buren appeals as of right from that order. For the reasons stated in this opinion, we affirm.

[1] *People v Van Buren*, unpublished per curiam opinion of the Court of Appeals, issued January 17, 2019 (Docket No. 339119), vacated 505 Mich 851 (2019).

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

Van Buren argues that her trial lawyer provided ineffective assistance by failing to object to the jury instructions, by not arguing during closing argument that self-defense applied to the felony-firearm charge, and by not requesting the trial court to specifically instruct the jury that self-defense applied to the felony-firearm charge. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *Id*. Evaluation of the merits of a defendant's claim of ineffective assistance should be based on "a full review of the evidence revealed at the evidentiary hearing." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

In order to show that her lawyer provided ineffective assistance, Van Buren must show that her lawyer's performance was deficient and that, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. See *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864 (quotation marks and citation omitted). A defense lawyer's performance is deficient if it is "below an objective standard of reasonableness under prevailing professional norms." *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000). That evaluation requires the reviewing court to determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (quotation marks and citation omitted). "[A] defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Trakhtenberg*, 493 Mich at 52. "Yet a court cannot insulate the review of counsel's performance by calling it trail strategy." *Id*. A defendant is prejudiced if there is a reasonable probability, i.e., "a probability sufficient to undermine confidence in the outcome," that, in the absence of the defense lawyer's unprofessional errors, the result of the proceedings would have been different. *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018) (quotation marks and citation omitted). We presume that the defendant's lawyer provided effective assistance, "and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Van Buren argues that her trial lawyer's performance was deficient because he did not object to the jury instructions given to the jury. Such an objection, however, would have been meritless because the instructions given were not improper. The trial court instructed the jury on the elements of second-degree murder and the lesser included offense of voluntary manslaughter. Thereafter, the court instructed the jury on both self-defense and defense of others. In doing so, the court specifically stated that "[i]f a person acts in lawful self-defense, that person's actions are justified and she is not guilty of second degree murder or voluntary manslaughter." Finally, the court instructed the jury on the elements of felony-firearm, stating:

> The Defendant is also charged with the separate crime of possessing a firearm at the time she committed the crime of second degree murder or voluntary manslaughter.

> To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the Defendant committed either the crime of second degree murder or voluntary manslaughter, which have been defined for you. It is not necessary, however, that the Defendant be convicted of those crimes.[3]
>
> Second, that at the time the Defendant committed the crime, she knowingly carried or possessed a firearm.
>
> A pistol is a firearm.

Considering the jury instructions as a whole, it is clear that the trial court did not omit an element of any offense, misinform the jury on the law, or otherwise present erroneous instructions. See *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). Instead, the jury was accurately informed that the charge of second-degree murder (or voluntary manslaughter) was directly linked to the crime of felony-firearm. Further, the instructions conveyed to the jury that second-degree murder and voluntary manslaughter were subject to the defense of self-defense, that if the jury found Van Buren acted in self-defense she would not be guilty of second-degree murder or voluntary manslaughter, and that the first element of felony-firearm required a finding—beyond a reasonable doubt—that Van Buren committed second-degree murder or voluntary manslaughter. Although the trial court could have more clearly stated that self-defense was applicable to the charge of felony-firearm, the instructions given nevertheless fairly presented the issues to be tried and sufficiently protected Van Buren's rights. See *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). As a result, any objection to the instructions given would have been futile. Consequently, Van Buren cannot show that her lawyer's performance fell below an objective standard of reasonableness. See *People v McGhee*, 268 Mich App 600, 627; 709 NW2d 595 (2005) (noting that the failure to raise "a futile objection does not constitute ineffective assistance of counsel.").

Next, Van Buren argues that her lawyer should have requested additional jury instructions that would have explicitly informed the jury that self-defense applied to the felony-firearm charge. Specifically, she asserts that her trial lawyer should have requested that the general self-defense instruction be re-read after the trial court instructed the jury on the elements of felony-firearm. Alternatively, she asserts that her lawyer should have requested the trial court read M Crim JI 11.34c, which is the self-defense instruction specific to felony-firearm charges. She contends that no strategic reason existed to not make one or both of those requests. In contrast, relying on *People*

[3] Although not at issue in this case, the instruction for felony-firearm comes dangerously close to encouraging the jury to return an inconsistent verdict. The jury is first instructed that the prosecution must prove beyond a reasonable doubt that the defendant has committed an underlying felony offense; it is then told that even if the jury decided to acquit the defendant of that offense, it may still convict the defendant of felony-firearm. Although the instruction is consistent with caselaw that holds inconsistent verdicts are permissible, see *People v Garcia*, 448 Mich 442, 461-462; 531 NW2d 683 (1995), there is a substantial difference between permitting an inconsistent verdict and encouraging one.

v Hudson, unpublished per curiam opinion of the Court of Appeals, issued July 25, 2019 (Docket No. 338655), the prosecution argues that Van Buren's lawyer could have had a strategy of not requesting M Crim JI 11.34c because it provides a stricter standard than the general self-defense instruction.

The prosecution's argument is misplaced. In *Hudson*, the defense lawyer testified at the *Ginther* hearing that he deliberately did not request M Crim JI 11.34c because he believed it was "less favorable to the defense than the general self-defense instruction" and he "did not want to introduce the more restrictive self-defense standard to the jury." *Hudson*, unpub op at 2. However, in this case, Van Buren's lawyer did not assert that he made a strategic decision using the same logic as the defense lawyer in *Hudson*. Instead, he testified that, although he believed he was aware of the distinctions between the general self-defense jury instruction and the self-defense instruction applicable to felony-firearm charges, he could only speculate as to whether he made a decision on that basis. Because he expressly testified that he could only speculate as to whether that was his strategy, we conclude that there is no factual basis to conclude that it was in fact his strategy. Instead, we must look at the actual record developed at the *Ginther* hearing to determine what strategy, if any, he employed.[4]

In that regard, Van Buren's argument that there could be no valid strategy for her lawyer not requesting M Crim JI 11.34c is without merit. At the *Ginther* hearing, her trial lawyer testified that he believed the instructions given "would be related to both charges and not just the primary charge." He also testified that he did not request M Crim JI 11.34c because he "was operating under the assumption that the jury would infer" self-defense applied to the murder charge and the felony-firearm charge. That belief was objectively reasonable given that the jury was never instructed that self-defense was inapplicable to the felony-firearm charge, but was expressly instructed that it had to find Van Buren committed second-degree murder or voluntary manslaughter and that she could not be found guilty of those offenses if she had acted in lawful self-defense. Thus, in light of all the circumstances, we conclude that Van Buren's lawyer's performance did not fall below an objective standard of reasonableness when he declined to request that the jury be given redundant—albeit more explicit—instructions that related to the less serious charge.

Van Buren also argues that her lawyer provided ineffective assistance during his closing argument because he did not specifically argue that self-defense was applicable to the felony-firearm charge. Yet, during closing argument, Van Buren's lawyer did argue that the jury should find her not guilty "by reason of self-defense." The fact that the specifics of the self-defense argument related to the murder charges was consistent with the strategy of highlighting the defense as it related to the objectively more serious offense. See *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (stating that a defense lawyer's "decision concerning what evidence to highlight during closing argument" is presumed to be a matter of trial strategy). Van Buren's lawyer's performance during closing argument, therefore, was not deficient.

[4] The fact that the lawyer's performance is measured by an objective standard does not mean that we are free to ignore his or her actual testimony in favor of possible strategic reasons for the acts or omissions of that lawyer.

Moreover, even if Van Buren's lawyer's performance was deficient during closing argument or by not requesting more explicit instruction, she would not be entitled to reversal because she has not met her burden of showing that she was prejudiced by the allegedly deficient performance. On appeal, she points out that the jury was expressly instructed that self-defense applied to second-degree murder and voluntary manslaughter, and it acquitted her of both charges. In contrast, the jury was not explicitly instructed that it could find her not guilty of felony-firearm if it found that she was acting in lawful self-defense. From these facts, she concludes that, had the jury been more explicitly instructed, it would have found that she was not guilty of felony-firearm because she was acting in self-defense. Her argument presumes that the jury would have consistently applied the self-defense to all the charges given that the facts of her defense were identical with respect to each charge.

Her argument presumes that the jury would have applied the instructions as given to them. The record, however, belies that assumption. Under the instructions given to the jury, the jury was explicitly instructed that it had to find beyond a reasonable doubt that Van Buren was guilty of an underlying felony before it could find her guilty of felony-firearm. The jury undeniably rejected that explicit directive. The inconsistency in the verdict suggests that the jury either compromised or was lenient. *People v Garcia*, 448 Mich 442, 462; 531 NW2d 683 (1995). Thus, on this record, we cannot find that there is a reasonable probability that, if faced with an equally clear directive that self-defense applied to the felony-firearm charge, the jury would have decided to acquit Van Buren of felony-firearm. Stated differently, because the jury was likely either compromised or was lenient when returning the verdict, we cannot say with any degree of certainty—much less a reasonable probability—that additional jury instructions or arguments would have made any difference to the outcome of the trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Kelly

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

Servitto, J. (*dissenting*).

I respectfully dissent.

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "The jury instructions must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them." *People v Thorne*, 322 Mich App 340, 347-348; 912 NW2d 560 (2017) (citation omitted). In order to assert an affirmative defense, such as self-defense, a defendant must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense. *People v Guajardo*, 300 Mich App 26, 34–35; 832 NW2d 409 (2013).

A defendant is also entitled to the effective assistance of counsel. To establish ineffective assistance of counsel, defendant "must establish (1) the performance of [her] counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Thorne*, 322 Mich App at 347. Counsel's failure to request a particular jury instruction can be a matter of trial strategy. *Id*.

Defendant's entire theory at trial was that she acted in self-defense, which may excuse not only the underlying felony, but also a charge of felony-firearm. *People v Goree*, 296 Mich App 293, 294; 819 NW2d 82 (2012). During both opening and closing argument, defense counsel indicated that defendant acted in self-defense, but did not specifically reference self-defense as applicable to defendant's charge of felony-firearm.

The trial court began its instructions by properly providing the jury with the elements of second-degree murder and the lesser charge of voluntary manslaughter. The trial court then immediately provided the jury with M Crim JI 7.15, which addresses the "use of deadly force in self-defense." Notably, that instruction provides that "If a person acts in lawful self-defense, that person's actions are justified and [he/she] is not guilty of [*state crime*]. The trial court thus instructed the jury, "If a person acts in lawful self-defense, that person's actions are justified and she is not guilty of second-degree murder or voluntary manslaughter." The trial court also instructed the jury on the use of deadly force in the defense of others, M Crim JI 7.21 and, consistent with that M Crim JI 7.21, instructed, "If a person acts in lawful defense of another, her actions are justified and she is not guilty of second-degree murder or voluntary manslaughter." M Crim JI 7.21 provides, and the trial court duly instructed, that to claim defense of others, "at the time she acted, the Defendant must not have been engaged in the commission of a crime."

The trial court then instructed the jury on the elements of defendant's charge of felony-firearm, M Crim JI 11.34:

> First, that the Defendant committed either the crime of second-degree murder or voluntary manslaughter, which have been defined for you. It is not necessary, however, that the Defendant be convicted of those crimes.
>
> Second, that at the time the Defendant committed the crime, she knowingly carried or possessed a firearm.

The trial court did not, however, provide the self-defense instruction again. In my opinion, this was error because the trial court *specifically* stated that self-defense was applicable to the charge of second-degree murder (or the lesser offense of voluntary manslaughter). Had the trial court included the charge of felony-firearm when specifically detailing the elements of self-defense, the jury would have been properly instructed. However, where, as here, the self-defense instruction was given immediately following the second-degree murder instruction and was explicitly tied only to that charge, there was no way for the jury to know that the self-defense instruction would also apply to the felony-firearm charge.

Indeed, the charge of felony-firearm carries with it a very specific jury instruction relevant to self-defense. M Crim JI 11.34b states, in relevant part:

> (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 . . . .

The above instruction specifies that self-defense is applicable when there has been no underlying felony committed. As argued by defendant, when the claim of self-defense is raised in conjunction with a felony-firearm charge, there is no strategic reason for defense counsel to forgo the above instruction.

The jury found defendant not guilty of either second-degree murder or voluntary manslaughter. Thus, it clearly determined that defendant did not commit either of those crimes. Had M Crim JI 11.34b been provided, or if the trial court had included the offense of felony-firearm when providing the jury with M Crim JI 7.15, it is likely the jury would also have found

defendant not guilty of felony-firearm. I would thus find that defense counsel's failure to request the specific self-defense jury instruction applicable to the offense charged and its failure to request that the trial court include felony-firearm when providing the jury with M Crim JI 7.15 constitutes ineffective assistance of counsel.

I also take this opportunity to point out the confusion raised by M Crim JI 11.34's instruction that to be guilty of felony-firearm the jury must necessarily find that defendant committed a felony, but "It is not necessary, however, that the Defendant be convicted of those crimes." M Crim JI 11.34 blatantly encourages inconsistent verdicts. And, when self-defense is raised to a charge of felony-firearm the confusion increases. This is particularly so when one considers the Self-Defense Act, MCL 780.971, *et seq*.

Under the Self-Defense Act, at MCL 780.972:

> (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.

Thus, while M Crim JI 11.34 requires the jury to necessarily determine that defendant committed a felony in order to convict a defendant of felony-firearm, a defendant raising self-defense to a felony-firearm charge cannot, under MCL 780.972 be engaged in the commission of a crime at the time he or she uses deadly force. I would thus find the language in M Crim JI 11.34 leads to a trial court to misinform the jury of the law.

/s/ Deborah A. Servitto