

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN THOMAS HILTON,

Defendant-Appellant.

UNPUBLISHED
December 13, 2012

No. 305059
Oakland Circuit Court
LC No. 2010-233650-FC

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 43 months to 8 years for each assault conviction, and 43 months to 10 years for the felon-in-possession conviction, to be served consecutive to three concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals by right. We affirm.

Defendant's convictions arise from an altercation in which 16-year-old Kenyatta Walker and 20-year-old Darchelle Hunt were both shot while at an Oak Park apartment complex's pool area on July 5, 2010. The prosecution's theory was that defendant became involved in an altercation with an unidentified man referred to as "Pep" and, because defendant was losing the fight, he pulled out a semi-automatic handgun and fired multiple shots, injuring Walker and Hunt. The defense conceded that defendant fired the shots, but claimed that he fired his weapon in self-defense. Defendant testified that Pep and several of his associates were upset that defendant had previously blamed the group for a young girl's drowning, so they came to the pool area to hurt him. Pep confronted defendant, a fight erupted between defendant and Pep, and defendant's foot became caught in a chain. When defendant could not move, Pep punched him in the head five times and then one of Pep's associates directed Pep to move and fired several shots toward defendant. The defense argued that defendant, who was not doing anything improper or illegal when he was confronted, returned fire in self-defense, accidentally hitting Walker and Hunt. The defense argued that defendant was unable to retreat because his foot was caught and Pep's associates were standing at the gate.

On appeal, defendant argues that the trial court erred by failing to instruct the jury consistent with CJI2d 7.16(3), which reflects the “no duty to retreat” language in the Self-Defense Act, MCL 780.971 *et seq.*, and that defense counsel was ineffective for failing to request the omitted instruction.

Defendant acknowledges he did not request a “no duty to retreat” instruction at trial. Indeed, defense counsel expressly agreed that it was appropriate to include an instruction on “[d]uty to retreat to avoid using deadly force” when instructing the jury on self-defense. Moreover, after the trial court completed its final instructions, it asked the parties whether there was “[a]ny objection to the instructions as read.” Defense counsel responded, “None, Your Honor.” By assenting to the trial court’s instructions as given, counsel waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). A waiver extinguishes any error, leaving no error to review. *Id.* at 216.

Defendant alternatively argues, however, that defense counsel was ineffective for failing to request CJI2d 7.16(3). Defendant contends that he was entitled to the instruction because he was present in a place where he had a right to be and was not acting illegally. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel’s performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel’s assistance was sound trial strategy. Second, defendant must show that, but for counsel’s deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

CJI2d 7.16(3) reflects language in the Self-Defense Act that 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. [MCL 780.972(1)(a) (emphasis added).]

A criminal defendant is only entitled to a jury instruction if it is supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Contrary to what defendant argues, CJI2d 7.16(3) does not apply because he was “engaged in the commission of a crime”—felon in possession of a firearm—at the time he used deadly force. MCL 780.972(1)(a). The defense stipulated that defendant had previously been convicted of a felony and was not eligible to possess a firearm on July 5, 2010. See MCL 750.224f; *People v Perkins*, 473 Mich

626, 630-631; 703 NW2d 448 (2005). Consequently, the trial court did not err by omitting CJI2d 7.16(3), and defense counsel cannot be deemed ineffective for failing “to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Further, reviewing the instructions as a whole, the self-defense instructions given by the trial court adequately protected defendant’s rights. The trial court gave a general self-defense instruction pursuant to CJI2d 7.15, and it instructed the jury, pursuant to CJI2d 7.16, that defendant had no duty to retreat from a sudden, fierce, and violent attack, or from an attack with a deadly weapon. These instructions were sufficient to outline defendant’s defense under the circumstances here. According to defendant’s version of events, defendant was subject to a sudden violent attack and an attack with a deadly weapon from Pep’s associate, and he could not safely retreat because his foot was stuck and Pep’s multiple associates were at the gate. In addition, the trial court’s general self-defense instructions required the jury to determine whether defendant acted honestly and reasonably in protecting himself. In light of the self-defense instructions given to the jury, defendant cannot establish that even if CJI2d 7.16(3) was applicable, defense counsel’s failure to request the additional instruction affected the outcome of the case. *Armstrong*, 490 Mich at 289-290.

Defendant also argues that the absence of CJI2d 7.16(3) violated his constitutional right to present a defense. Because defendant did not raise this constitutional claim in the trial court, this issue is not preserved. Therefore, defendant has the burden of establishing a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Although a defendant has a constitutional right to present a defense, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), the right is not absolute, and he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). In this case, the evidence did not support the instruction under established rules of evidence and procedure. Accordingly, there was no due process violation.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood