STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2018
v	No. 328572 Macomb Circuit Court
GERALD ANDREW KUPINSKI, Defendant-Appellant.	LC No. 2015-000099-FC

Before: MURPHY, P.J., and JANSEN and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Gerald Andrew Kupinski, appeals as of right his jury convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury acquitted defendant of an additional charge of second-degree murder, MCL 750.317. The court sentenced defendant to 38 to 60 months in prison for the felon-in-possession conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. We vacate defendant's convictions and sentences and remand for a new trial.

This case arises out of the shooting death of Adam Abraham in defendant's home. Defendant admitted that he used his wife's gun to shoot Abraham, his defense being that he acted in self-defense and in defense of his family members. For purposes of the felon-in-possession charge, defendant stipulated that he had previously been convicted of a specified felony and was ineligible to possess a firearm on the date of the shooting. Defendant initially denied any prior relationship with Abraham, and defendant's wife claimed to have committed the shooting. However, defendant's wife was shown not to have been home at the time. Defendant's teenage son, however, was there during the incident.

Specifically, the defense theory was that: (1) Abraham was an "associate" of convicted felon Dino Lukas, (2) Lukas owed defendant a substantial sum of money and had become annoyed by defendant's attempts to collect the debt, (3) as a result, Lukas prompted Abraham to either assault or kill defendant, (4) on the night of the shooting, an intoxicated Abraham came to defendant's home unannounced, dressed entirely in black, with a knife and a handgun, (5) defendant, in fear for his life, and that of his teenage son, obtained his wife's handgun from her gun safe, and (6) after defendant let Abraham in, Abraham pulled out a handgun, and defendant reacted by fatally shooting him. Abraham was intoxicated at the time of the shooting, and

although emergency responders disrupted the scene, a gun was found with Abraham's DNA on the gun and its ammunition.

At trial, defendant was represented by 2 attorneys. The parties agreed that the model criminal jury instructions for use of deadly force in self-defense, M Crim JI 7.15, and use of deadly force in defense of another, M Crim JI 7.21, would be provided with minor alterations. Specifically, they agreed that both self-defense and defense of others could serve as valid affirmative defenses to all three charged offenses, but that, as drafted, M Crim JI 7.15 and M Crim JI 7.21 only directly addressed the second-degree murder charge (i.e., defendant's *use* of deadly force). Consequently, the parties agreed that M Crim JI 7.15 and M Crim JI 7.21 would be modified to recognize that self-defense and defense of others could constitute a valid defense to each charge against defendant, further agreeing that M Crim JI 11.34c (the model instruction specifically addressing self-defense as it relates to felony-firearm) would thus be rendered repetitive and unnecessary. The modified instructions agreed upon by the parties were subsequently provided to the jury.

On appeal, defendant argues that his trial attorneys performed ineffectively by, among other things, failing to ensure that the jury received proper instructions regarding self-defense and defense of others as affirmative defenses to felon in possession of a firearm.[1] We agree.

The issue of whether trial counsel properly sought an appropriate jury instruction was addressed at the *Ginther*[2] hearing, albeit briefly. Although the trial court did not address the issue in its ruling, because defendant raised the issue below and pursues it on appeal, it is preserved for this Court's review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). "[W]hether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). Counsel is presumed to have been effective, and a defendant must show both that counsel performed objectively unreasonably and a "reasonable probability" that the outcome of the proceedings would have differed if counsel had performed effectively. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Counsel is afforded a wide degree of latitude to make strategic decisions. See *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012).

In pertinent part, MCR 2.512(D)(2) provides that the model criminal jury instructions "must be given in each action in which jury instructions are given if (a) they are applicable, (b) they accurately state the applicable law, and (c) they are requested by a party." However, as tacitly recognized in Michigan Nonstandard Jury Instructions, Criminal, § 13:22, which includes a proposed instruction for self-defense as it relates to felon in possession of a firearm, there is no

[1] To the extent defendant also attempts to raise this issue as a direct claim of instructional error, his efforts are misplaced. Defendant's trial attorneys waived any claim of instructional error by expressly approving the instructions that were subsequently read to the jury. See *People v Kowalski*, 489 Mich 488, 503-505; 803 NW2d 200 (2011).

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

model instruction for that affirmative defense. Hence, in this instance the allegation is not that defendant's trial attorneys failed to request an applicable model instruction. Rather, it is that they agreed to largely rely on the model instructions, specifically M Crim JI 7.15 and M Crim JI 7.21, for a matter that those model instructions do not properly address. Defendant does not contend that the instructions as given were inappropriate to his felony-firearm or second-degree murder charges.

Our Supreme Court has recognized that "the traditional common law affirmative defense of self-defense is generally available to a defendant charged with being a felon in possession if supported by sufficient evidence." *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010) (*Dupree II*), affirming the result of *People v Dupree*, 284 Mich App 89; 771 NW2d 470 (2009) (*Dupree I*). The Self-Defense Act (SDA), 780.971 *et seq*., has since "codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *Id*. at 708. Notwithstanding the codification, "a felon possessing a firearm is not precluded from raising self-defense under the SDA when there is evidence that would allow a jury to conclude that criminal possession of a firearm was" appropriately justified. *People v Guajardo*, 300 Mich App 26, 40; 832 NW2d 409 (2013).

The prosecutor argues that the evidence failed to show that defendant's "resort to potentially lethal force satisfied the legal standard for necessity" or that defendant "took and maintained possession of a firearm only for the time necessary to respond to an imminent threat," relying on this Court's note about relevant circumstances in *Guajardo*, 300 Mich App at 40 n 4. We observe that the prosecution explicitly agreed to such instructions below, and it was the prosecution, not the defense, that prepared the proposed instructions that attempted to modify M Crim JI 7.15 and M Crim JI 7.21 to fit felon in possession of a firearm. Additionally, we disagree. Defendant asserted in a written statement that he obtained the gun-safe code from his wife, and then obtained the handgun, only after an unidentified man dressed fully in black, with black gloves, showed up at defendant's house unannounced after dark. Similarly, evidence was introduced showing that Abraham was armed with a knife and a revolver not registered in his name, that Abraham had communicated to others his intention of confronting defendant, that Abraham had an inclination toward violence and "busting in" to others' premises, and that Abraham had reason to be upset with defendant because defendant had recently cut Abraham out of a planned heist. It was the jury's prerogative to credit or reject the evidence of how or when defendant obtained the handgun, whether defendant had adequate reason to believe his possession of the handgun was necessary, and the credibility of the witnesses. See *People v Hardiman*, 466 Mich 417, 430-431; 646 NW2d 158 (2002) and *People v Musser*, 494 Mich 337, 348-349; 835 NW2d 319 (2013).

The prosecutor further argues that a reasonable person in defendant's position would have summoned the police instead of arming himself, and that a reasonable person would not have allowed Abraham to enter the house. The latter may suggest negligence or fault for inviting the threat, but that is a relevant consideration for purposes of a duress defense, see *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997), and the prosecution cites no authority that it is relevant for purposes of self-defense or defense of others. Likewise, while summoning the police might have been prudent, Abraham's alleged reputation for "busting in" to the premises of others also supports a finding that defendant could reasonably have believed that he lacked the time required to call 911 and await an unpredictable amount of time for the police to respond.

Again, such a decision is plausible, and it is the role of the jury to evaluate credibility and choose what evidence to accept.

We appreciate the prosecutor's argument that "both the amount of time an accused possessed a firearm and the manner in which an accused came into possession of the firearm can be part of a totality-of-the-circumstances inquiry into whether there is evidence that a felon's possession of a firearm was justified because the felon honestly and reasonably believed that the use of deadly force was necessary to prevent imminent death, great bodily harm, or sexual assault." *Guajardo*, 300 Mich App at 40 n 4. As noted, the jury has the exclusive right to determine whether, as the prosecution argues, defendant armed himself before it was necessary to do so. Furthermore, our Supreme Court concluded that a self-defense instruction was warranted even though the defendant possessed the gun for some time after the shooting. See *id*.; see also *Dupree II*, 486 Mich at 699, 708. Although the facts here pertain to defendant's alleged possession prior to the shooting, there is evidence from which the jury could reasonably conclude that he only retrieved it *after* he may have had a reasonable and honest belief that there was an imminent threat of death or great bodily to himself and his son. We therefore do not believe defendant's possession of the gun for longer than the literal amount of time taken to perform the act of shooting it inherently precludes a self-defense instruction.

Defendant was therefore entitled to a proper jury instruction regarding self-defense and defense of others as to his felon in possession charge. "Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We find that the instructions as given did not sufficiently address defendant's felon in possession charge.

The model jury instructions used, M Crim JI 7.15 and M Crim JI 7.21, are drafted to state the essential elements of self-defense and defense of others as those affirmative defenses relate to assaultive crimes, generally homicides. Because a person need not use a firearm to wield deadly force, neither instruction specifically addresses firearms. Significantly, the instructions to the jury explicitly stated, twice, that "at the time he acted the defendant must not have been engaged in the commission of a crime." As it pertains to a felon-in-possession charge, however, this creates a Catch-22: after the jury was instructed that defendant's possession of a firearm on the date in question was a criminal offense, it was further instructed that—as to all three charged offenses—defendant could not assert self-defense or defense of others if he was committing a crime at the time he used deadly force. This was akin to instructing the jury that if defendant used lethal force to kill Abraham, it followed that he had committed a criminal act, and ergo he was not entitled to assert self-defense or defense of others as a defense against the second-degree murder charge. The SDA, however, explicitly preserves "an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006." MCL 780.973. We note also that unaltered, M Crim JI 7.15 contains no requirement that a defendant must not have been engaged in the commission of a crime. A reasonably competent defense attorney would have objected, arguing that, as modified, the versions of M Crim JI 7.15 and M Crim JI 7.21 provided to the jury did not state a valid defense to felon in possession of a firearm.

On this record, we can conceive of no valid strategic rationalization for counsel's failure to object or to request different instructions. Notwithstanding the great deference given to strategic decisions made by trial counsel, "a court cannot insulate the review of counsel's performance by calling it trial strategy." *Trakhtenberg*, 493 Mich at 52. At the *Ginther* hearing, when one of the defense attorneys was asked about the defense theory of the case, he acknowledged that "[t]here was evidence that supported at least the idea that one could have become a felon in possession in the self defense or enter a self-defense theory, . . . which . . . could in turn . . . tie into . . . the felony firearm charge." Additionally, at trial, both defense attorneys argued extensively about the need to tailor M Crim JI 7.15 and M Crim JI 7.21 to cover felon in possession of a firearm, explicitly citing *Dupree II* in support. Hence, counsels' decision regarding the jury instructions cannot be rationalized as a decision to focus the defense on the second-degree murder charge to the detriment of defending against the less serious charges. Although that might have been a facially reasonable strategy, it was not the strategy that the defense attorneys actually pursued in this case. The instructions approved of by counsel were directly contrary to the rule of law set forth in *Guajardo*, 300 Mich App at 40 and n 4, for no justifiable reason. Because it is undisputed that defendant was inside his own home at all relevant times, we respectfully fail to perceive the relevance of our concurring colleague's discussion of the requirements for a defendant to claim the independent and additional statutory right to stand one's ground under the SDA.

We therefore find that trial counsel's performance fell below an objective standard of reasonableness. We also find that defendant has established a "reasonable probability" that this error affected the outcome of the proceedings. Establishing a "reasonable probability" requires less than a preponderance of evidence. *Trakhtenberg*, 493 Mich at 56. Although we cannot know for certain why the jury acquitted defendant of second-degree murder, there is at least a significant likelihood that the jury found that the prosecution had failed to disprove beyond a reasonable doubt that defendant did not act in self-defense or defense of others when he shot Abraham. Indeed, on the record, we are persuaded that a rational juror could have reached that conclusion. Consequently, there is a reasonable probability that, had the jury been properly instructed on self-defense and defense of others as they relate to felon in possession of a firearm, it might have acquitted defendant of felon in possession of a firearm, eliminating the only possible predicate felony for felony-firearm. Therefore, defendant has carried his heavy burden of establishing a valid claim of ineffective assistance of counsel.

"The remedy for deprivation of the Sixth Amendment right to counsel must be tailored to the injury suffered." *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995). "The appropriate remedy on a finding of ineffective assistance of counsel is retrial and not the discharge of the defendant." *People v Gridiron*, 439 Mich 880, 880; 476 NW2d 411 (1991). However, double jeopardy prevents defendant from being retried for the second-degree murder charge, because he was previously acquitted by a jury. See *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). Accordingly, we vacate defendant's convictions and sentences and remand for a new trial with regard to felony-firearm and felon in possession of a firearm only. In

light of this disposition, we do not consider or decide defendant's remaining claims of error on appeal, all of which are rendered moot by our instant decision.

Vacated and remanded for a new trial in accordance with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Amy Ronayne Krause

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Before: MURPHY, P.J., and JANSEN and RONAYNE KRAUSE, JJ.

MURPHY, P.J. (*concurring*).

I agree with the majority that reversal is necessary, but I would employ a different analysis. Accordingly, I respectfully concur.

I. INTRODUCTION

The issue posed to us concerns the proper manner in which to instruct a jury with respect to self-defense and the crime of felon in possession of a firearm. Defendant challenges the following language in the trial court's instructions, "First, at the time he acted the defendant must not have been engaged in the commission of a crime." This language was read twice to the jury, once for the instruction on defense of oneself and again for the instruction on defense of others.[1] Defendant argues that this language necessarily undermined his claim of self-defense in regard to felon-in-possession, because he had stipulated to being a "felon" and his possession of the firearm before the shooting could be viewed as constituting the "commission of a crime," i.e., felon-in-possession, effectively and immediately short-circuiting the claim of self-defense before the jury moved on to the other elements. Defendant also contends that the general framework of the self-defense instructions, which spoke to justifying or excusing the *use of deadly force*, could have led the jury to believe that justifying or excusing the mere *possession* of a firearm was not encompassed by the instructions.

[1] The jury was also instructed on the duty to retreat under M Crim JI 7.16, which provides, in part, that retreat is not required if the defendant was not "engaged in the commission of a crime at the time the deadly force [was] used . . . ."

The prosecution argues that the trial court's instructions on self-defense relative to felon-in-possession were consistent with the law. The prosecution also contends that the evidence did not support a conclusion that defendant possessed the gun for purposes of self-defense. To the extent that the prosecution is maintaining that the evidence did not support instructions on self-defense in regard to the offense of felon-in-possession, the prosecution agreed to the instructions at issue, so that claim was waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

II. SELF-DEFENSE UNDER THE COMMON LAW

In *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010), our Supreme Court held as follows:

> Having necessarily limited our analysis to the specific issue properly raised and preserved before the trial court, we conclude that the *traditional common law* affirmative defense of self-defense is generally available to a defendant charged with being a felon in possession if supported by sufficient evidence. We also conclude that self-defense was available under the facts of this case. Once a defendant satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of disproving the affirmative defense of self-defense beyond a reasonable doubt. [Emphasis added.]

The *DuPree* Court tackled the issue of self-defense in relation to felon-in-possession under the common law, and the Court explained the general nature of common-law self-defense, stating:

> At common law, the affirmative defense of self-defense justifies otherwise punishable criminal conduct, usually the killing of another person, if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself. Generally,
>
> > one who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.
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> A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions. [*Id.* at 707 (citations, quotation marks, and alteration brackets omitted).]

In *People v Riddle*, 467 Mich 116, 119, 126; 649 NW2d 30 (2002), the Michigan Supreme Court indicated that common-law self-defense may be raised where a defendant "is free from fault" and is "a nonaggressor." In *People v Reese*, 491 Mich 127, 144-145; 815 NW2d 85 (2012), our Supreme Court explained that self-defense is focused on the concept of "necessity."

In *People v Townes*, 391 Mich 578, 593; 218 NW2d 136 (1974), the Supreme Court, addressing common-law self-defense and quoting *State v Perigo*, 70 Iowa 657, 666; 28 NW 452 (1886), observed:

> It may be conceded that everything that was done by defendant in the transaction, up to the moment of the final attack by the deceased, was unlawful and wrongful; yet, if that assault was felonious and was of such a character as to clearly indicate an intention by the assailant to take defendant's life, or to inflict on him some enormous bodily injury, there is no valid ground for holding that he was precluded from the right to defend himself against it by the mere fact that he had been, or then was, engaged in the commission of a trespass upon the property of the deceased.
>
> The general doctrine undoubtedly is that one who has taken the life of an assailant, but who was himself in the wrong, cannot avail himself of the plea of self-defense. But the wrong which will preclude him from making that defense must relate to the assault in resistance of which the assailant was killed. If at the time the assault is made upon him, he is engaged in the commission of an act which is wrongful, but which is independent of the assault, he may lawfully defend himself against it, to the extent even of slaying the assailant, if it is felonious, unless, indeed, his act is of such a character as to justify the assault. The mere fact, then, that defendant was engaged in committing a trespass when deceased attacked him, does not necessarily constitute him a wrong-doer in the matter of the assault, or preclude him from making the defense of self-defense. [Citations, quotation marks, and ellipses omitted.]

As reflected in the Michigan Supreme Court precedent, the common law does not automatically deny a defendant a claim of self-defense in situations wherein the defendant is engaged in the commission of a crime when deadly force is exerted by the defendant. Rather, criminal activity by a defendant can only defeat a claim of self-defense if it entails the defendant acting as the aggressor, e.g., the defendant initiates a felonious assault, or if the criminal activity otherwise justifies a forceful response to which the defendant forcefully reacts. In other words, even if a defendant is engaged in the commission of a crime, self-defense can still be claimed so long as the crime is independent of the other person's assaultive behavior, freeing the defendant from fault. Thus, for example, a defendant who participates in an illegal drug transaction with another individual would not be precluded from raising a claim of self-defense if the other person initially attempts to fatally stab the defendant during the transaction and the defendant responds by killing the individual. In that scenario, defendant's engagement in an otherwise non-violent drug deal would be independent of the other person's decision and act to knife the defendant. As an additional example, a woman engaged in an act of prostitution can claim self-defense if, during the act, she kills the "john" after he first violently assaults her, given that the woman's involvement in the commission of a crime, prostitution, would not justify a physically assaultive response. Accordingly, the common law does not mechanically require general non-engagement in crime as a prerequisite to pursuing self-defense. Consistently with this proposition, nowhere in the *DuPree* opinion did the Supreme Court state that a defendant facing a charge of felon-in-possession is required to show that he or she was not engaged in the commission of a crime when exercising deadly force in order to claim self-defense. Of course, if

a defendant had committed a crime that amounted to him or her being the initial aggressor, self-defense would not be available. See M Crim JI 7.18.

III. SELF-DEFENSE PURSUANT TO STATUTE

Pursuant to 2006 PA 309, the Legislature enacted Michigan's Self-Defense Act (SDA), MCL 780.971 *et seq.*, which was made effective October 1, 2006.[2] MCL 780.972 provides, in pertinent 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 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. [Emphasis added.]

Except as provided in MCL 780.972, the SDA did "not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force." MCL 780.973. And the SDA did "not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006." MCL 780.974.[3] The SDA "altered the common law of self-defense concerning the duty to retreat."

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[2] Although the Supreme Court's decision in *Dupree* was issued in 2010, the altercation at issue occurred in September 2005; therefore, the Court did not look to the SDA for resolution. *Dupree*, 486 Mich at 708.

[3] MCL 780.961 provides:

> (1) An individual who uses deadly force or force other than deadly force in compliance with section 2 of the self-defense act and who has not or is not engaged in the commission of a crime at the time he or she uses that deadly force or force other than deadly force commits no crime in using that deadly force or force other than deadly force.
>
> (2) If a prosecutor believes that an individual used deadly force or force other than deadly force that is unjustified under section 2 of the self-defense act, the prosecutor may charge the individual with a crime arising from that use of deadly force or force other than deadly force and shall present evidence to the judge or magistrate at the time of warrant issuance, at the time of any preliminary examination, and at the time of any trial establishing that the individual's actions were not justified under section 2 of the self-defense act.

People v Conyer, 281 Mich App 526, 530; 762 NW2d 198 (2008). The SDA "created a new substantive right, i.e., the right to stand one's ground and not retreat before using deadly force in certain circumstances in which a duty to retreat would have existed at common law." *Id.* The *Conyer* panel compared the duty to retreat under the common law to the duty to retreat under the SDA, explaining:

> [U]nless attacked inside one's own home, or subjected to a sudden, fierce, and violent attack, a person has a common-law duty to retreat, if possible, as far as safely possible. *People v Riddle*, 467 Mich 116, 118-121; 649 NW2d 30 (2002). Conversely, under § 2 of the SDA, there is no duty to retreat if the person has not committed or is not committing a crime and has a legal right to be where the person is at the time he or she uses deadly force. MCL 780.972(1). Section 2 of the SDA thus constitutes a substantive change to the right of self-defense. [*Conyer*, 281 Mich App at 530 n 2.]

IV. ANALYSIS

As reflected above, self-defense under the common law and self-defense under the SDA take a parallel track with similar requirements, except with respect to the duty to retreat, with the SDA allowing a person to stand his or her ground in self-defense and not retreat, even outside a homestead, but only if the "individual . . . has not or is not engaged in the commission of a crime at the time he or she uses deadly force[.]" MCL 780.972(1). The Legislature plainly intended to give Michiganders the right to stand their ground, limited, however, to law-abiding citizens; any involvement in criminal activity negates the right. In the instant case, defendant shot the alleged assailant inside defendant's home. Therefore, there was no duty to retreat under the common law, nor would there have been a duty to retreat under the SDA; however, the SDA would have demanded evidence that defendant was not engaged in the commission of a crime when he shot and killed the purported assailant. Thus, because the duty to retreat was not in dispute, the proper tactical approach here from defense counsel's perspective would have been to seek jury instructions that did not require the jury to entertain the question whether defendant was engaged in the commission of a crime at the time of the shooting, as the law would support entirely the omission of such instructional language under a common-law view.[4] Instead, defense counsel agreed to instructions that raised that precise issue for the jury's contemplation and resolution in three instructions, which was of no benefit whatsoever to defendant and only to his detriment, considering the likely confusion generated by the instructions as argued by defendant and

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[4] I cannot emphasize enough that the SDA generally preserved self-defense under the common law; therefore, the Supreme Court's common-law-based opinion in *DuPree* remains relevant, and *DuPree* did not indicate or suggest that the defendant, who claimed self-defense in regard to the crime of felon-in-possession, had any obligation to show that he was not engaged in the commission of a crime at the time he employed deadly force.

recognized by the majority.[5] This constituted deficient performance, as counsel's representation fell below an objective standard of reasonableness. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Finally, I agree with the majority's analysis and conclusion that the instructional error was prejudicial.[6]

I respectfully concur.

/s/ William B. Murphy

[5] I recommend that the Committee on Model Criminal Jury Instructions work to formulate and draft an instruction that is neatly tailored for self-defense when a defendant is charged with the crime of felon-in-possession.

[6] I note that my discussion of the statutory right to stand one's ground under the SDA, MCL 780.972(1), is to show that it is necessarily connected to the very language at issue in this case regarding whether defendant was engaged in the commission of a crime at the time he used deadly force, which is part of the statutory language, not the common law. And because defendant was in his home when the shooting occurred, he did not have to resort to the statutory stand-your-ground provision; therefore, there was no basis in law to instruct the jury of the need to show that defendant was not engaged in the commission of a crime when he shot the assailant. The whole purpose of my concurrence is to demonstrate that the challenged instructions were improper under the law of self-defense, as framed by the common law and the SDA, in the context of this case, and not because a "Catch-22" was created, although that concern certainly supports the determination that the error was prejudicial.