IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JASON A. COPELAND,

Appellant,

v. Case No. 5D18-2869

STATE OF FLORIDA,

Appellee.

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Opinion filed August 23, 2019

Appeal from the Circuit Court
for Lake County,
Mark J. Hill, Judge.

James S. Purdy, Public Defender, and Raymond M. Warren and Brian F. Smith, Assistant Public Defenders, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

LAMBERT, J.

Jason A. Copeland was convicted after trial of aggravated assault with a deadly weapon resulting from a "road rage" incident. He raises two arguments in this direct appeal, one of which we find to be dispositive. We agree that, on the face of the record,

Copeland's trial counsel was ineffective for failing to request a jury instruction for the justifiable use of nondeadly force. Accordingly, we reverse.[1]

Copeland and the victim, Troy Twigg, both testified at trial. Without going into great detail, Copeland was riding on his motorcycle, and Twigg was driving his car in the same direction on U.S. Highway 27 in Lake County, Florida, when their respective driving patterns apparently became disagreeable to each other. They do agree, however, on one thing: Copeland pulled out a handgun. Twigg testified that Copeland pointed the gun at him and threatened to kill him. Copeland denied making any threats, testifying that he only pulled his gun out to deter Twigg from pursuing him. Notably, Copeland never discharged the handgun.

At some point thereafter, both vehicles stopped in the road, with Copeland ahead of Twigg. Copeland got off his motorcycle and approached Twigg's car, still holding the gun. Twigg ducked down in his car; and when he looked up, Copeland had retreated to his motorcycle and no longer had the gun in his hand. Twigg testified that he then attempted to exit his vehicle but that Copeland ran back towards him, pinning Twigg between the driver's door and car frame, causing damage to his car window. Copeland disagreed, testifying that he merely approached the car.[2] Eventually, Copeland and Twigg went their separate ways, and Twigg called 9-1-1. Shortly thereafter, Copeland

[1] We decline to address Copeland's other argument on appeal that the trial court committed fundamental error when it modified the language of the standard jury instruction on justifiable use of deadly force prior to instructing the jury.

[2] Copeland was also charged with battery and criminal mischief regarding this portion of the criminal episode. The jury acquitted him on these two counts.

was detained by a deputy from the Lake County Sheriff's Office who recovered a loaded handgun from him.

At trial, Copeland's sole defense was that he acted in self-defense. He conceded that he displayed the loaded handgun, but testified that he did so only because he was in fear for his life due to Twigg's aggressive driving towards him. During the charge conference, Copeland's counsel specifically requested that the trial court instruct the jury on the justifiable use of deadly force in self-defense, which it did. This instruction provides that a person is justified in using deadly force if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or to prevent the commission of a forcible felony. *See* Fla. Std. Jury Instr. (Crim.) 3.6(f). Copeland's counsel did not separately request Florida Standard Jury Instruction (Criminal) 3.6(g) on the justifiable use of nondeadly force, which states that nondeadly force may be used when and to the extent a person reasonably believes that such conduct or force is necessary to defend himself or another against the imminent use of unlawful force. *See also* § 776.012(1), Fla. Stat. (2017).[3]

Copeland argues that his trial counsel was ineffective for failing to request this nondeadly force self-defense jury instruction. *See Aversano v. State*, 966 So. 2d 493, 495 (Fla. 4th DCA 2007) (recognizing an ineffective assistance of counsel claim on direct appeal for failing to request a specific jury instruction). To prevail on his ineffective

[3] This statute provides that "[a] person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force."

assistance of counsel claim, Copeland must show: "(1) that [his trial] counsel's performance was outside the wide range of reasonable professional assistance, and (2) that such conduct prejudiced the outcome of the trial because without it, there is a reasonable probability that the outcome would have been different." *See Mathis v. State*, 973 So. 2d 1153, 1156–57 (Fla. 1st DCA 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Spencer v. State*, 842 So. 2d 52, 61 (Fla. 2003); *Betts v. State*, 792 So. 2d 589, 589–90 (Fla. 1st DCA 2001)). A "reasonable probability" is explained as "a probability sufficient to undermine confidence in the outcome [of the trial]." *Id.* at 1157 (quoting *Spencer*, 842 So. 2d at 61).

Typically, ineffective assistance of counsel claims are not cognizable on direct appeal. *Robards v. State*, 112 So. 3d 1256, 1266 (Fla. 2013). This is because such claims are generally fact-specific and evidence may be necessary to explain why certain actions were taken or omitted by trial counsel. As such, the trial court, in the context of a post-judgment Florida Rule of Criminal Procedure 3.850 or 3.851 proceeding, is the proper forum to receive and evaluate such evidence. *See McKinney v. State*, 579 So. 2d 80, 82 (Fla. 1991). However, in rare instances, ineffective assistance of counsel claims may be addressed on the merits on direct appeal where "(1) the ineffectiveness is apparent on the face of the record, and (2) it would be 'a waste of judicial resources to require the trial court to address the issue.'" *Robards*, 112 So. 3d at 1267 (quoting *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987)).

In determining whether this is one of those rare cases, we must first address whether Copeland's actions in brandishing a handgun entitled him to the nondeadly force self-defense jury instruction. When the type of force used by a defendant is clearly deadly

or nondeadly as a matter of law, only the applicable instruction should be given. *DeLuge v. State*, 710 So. 2d 83, 84 (Fla. 5th DCA 1998) (citing *Stewart v. State*, 672 So. 2d 865, 868 (Fla. 2d DCA 1996)). However, "[w]here the evidence at trial does not establish that the force used by the defendant was deadly or non-deadly as a matter of law, the question is a factual one to be decided by the jury, and the defendant is entitled to jury instructions on the justifiable use of both types of force." *Cruz v. State*, 971 So. 2d 178, 182 (Fla. 5th DCA 2007) (citing *DeLuge*, 710 So. 2d at 84).

Here, Copeland's display of his handgun does not fall under the category of deadly force as a matter of law. While a firearm is, by definition, a deadly weapon,[4] "the mere display of a gun, or even pointing a gun at another's head or heart without firing it, is not deadly force as a matter of law." *Jackson v. State*, 179 So. 3d 443, 446 (Fla. 5th DCA 2015). Stated differently, the use of a deadly weapon in self-defense does not summarily equate to the use of deadly force. *DeLuge*, 710 So. 2d at 84 (citing *Howard v. State*, 698 So. 2d 923, 925 (Fla. 4th DCA 1997)). Deadly force occurs "where the natural, probable, and foreseeable consequences of the defendant's acts are death." *Cruz*, 971 So. 2d at 182 (citing *DeLuge*, 710 So. 2d at 84; *Garramone v. State*, 636 So. 2d 869, 871 (Fla. 4th DCA 1994)). In Florida, to date, the only type of force that has been held to be deadly force as a matter of law is the discharge of a firearm. *Id.*

Arguably, it was error for Copeland's trial counsel to have requested the deadly force jury instruction because it is undisputed that Copeland never fired his gun or attempted to discharge his gun during his altercation with Twigg. *See Marty v. State*, 210

[4] *See Miller v. State*, 613 So. 2d 530, 531 (Fla. 3d DCA 1993) ("A firearm is, by definition, a deadly weapon which fires projectiles likely to cause death or great bodily harm . . . .").

So. 3d 121, 125–26 (Fla. 2d DCA 2016) (holding that trial counsel was ineffective for requesting self-defense instruction involving deadly force instead of nondeadly force because when "there is no dispute that [the defendant] never fired his gun, there can be no dispute that [the defendant] used nondeadly force rather than deadly force," and "[t]hus, the only self-defense instruction that fits [those] undisputed facts . . . is an instruction for the justified use of nondeadly force"); *Stewart*, 672 So. 2d at 868 (holding that the defendant was entitled to an instruction on justifiable use of nondeadly force in an aggravated assault prosecution, but not to an instruction on deadly force, when the defendant used a gun, but only waved it without firing it); *see also Rivero v. State*, 871 So. 2d 953, 954 (Fla. 3d DCA 2004) ("The use-of-force statute looks to the amount of force which is actually used. Pointing a firearm (without firing it) amounts to the use of nondeadly force.") (emphasis omitted). Copeland, however, has not argued that his trial counsel erred in requesting the deadly force instruction, arguing only that his trial counsel erred in failing to request the nondeadly force instruction.

It is clear that under the facts of this case, Copeland was entitled to a nondeadly force self-defense jury instruction. Counsel's failure to request this instruction is significant because a defendant's use of deadly force is justifiable in much narrower circumstances (to prevent imminent death or great bodily harm or the commission of a forcible felony) than the use of nondeadly force (the preventing of imminent use of unlawful force).[5] Much like the Second District Court observed in *Marty*, we conclude that

[5] The jury's finding that Copeland was guilty of aggravated assault with a deadly weapon does not negate his right to the nondeadly force jury instruction. It is the nature of the force used by the defendant that is the focus, not the type of weapon used. *See McComb v. State*, 174 So. 3d 1111, 1113 (Fla. 2d DCA 2015).

Copeland's counsel's performance was deficient here because we can "glean no strategic reason" why counsel would request the deadly force instruction that arguably made it more difficult for Copeland to show that he acted in self-defense, yet fail to request the nondeadly force instruction that was, from an evidentiary standpoint, both easier to establish and factually justified in this case where Copeland's own trial testimony was that he simply displayed his firearm. *See* 210 So. 3d at 126.

We next address whether Copeland has demonstrated under the second prong in *Strickland* that he was prejudiced by his counsel's failure to request the nondeadly force jury instruction. We conclude that he was. First, the failure to request a specific jury instruction that provides a legal defense to undisputed facts is patently unreasonable. *Michel v. State*, 989 So. 2d 679, 681 (Fla. 4th DCA 2008). Here, the undisputed facts—that Copeland did not fire his gun—indicate that he acted in self-defense through the use of nondeadly force rather than deadly force. Second, the State emphasized to the jury in its closing arguments that it should reject Copeland's defense that he acted in self-defense because his actions showed that he "was not in fear of either death or serious bodily injury." If Copeland's trial counsel had requested only the nondeadly force instruction, this argument could not have been made. At the very least, if both the deadly force and nondeadly force jury instructions had been given, this argument would not be applicable to Copeland's nondeadly force defense. Third, in counsel's own closing argument, he told the jury:

> The reality is my client fears for his safety and he has got the right to use the force necessary to deter an aggressor. *All he had to do was draw his weapon, and at that point the aggressor backed down.*

Defense counsel essentially asserted that Copeland had used what amounted to nondeadly force (drawing a gun), and that this force was entirely appropriate to halt Twigg's aggressive driving towards him. However, without the nondeadly force instruction, the jury had no ability to evaluate whether Copeland had acted in self-defense with nondeadly force, consistent with his counsel's argument. Stated differently, we conclude that Copeland was prejudiced because the jury may very well have concluded that the deadly force instruction was not applicable because Copeland was not in imminent danger of death or great bodily harm at the time but, had it been also instructed on the use of nondeadly force, could have found that Copeland was justified in displaying his firearm to prevent Twigg's alleged "imminent use of unlawful force" and acquitted him. Instead, the jury was left with no choice but to decide Copeland's fate without the benefit of a proper instruction to evaluate his best, and arguably only, defense.

Under *Strickland*, a defendant successfully establishes an ineffective assistance of counsel claim when he or she shows that trial counsel's deficient performance was sufficiently prejudicial such that an appellate court's confidence in the outcome of the trial has been undermined. Concluding that Copeland has met this burden, we reverse his judgment and sentence and remand this case for a new trial.

REVERSED and REMANDED.

EISNAUGLE and HARRIS, JJ., concur.