STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAKIM JACKSON,

Defendant-Appellant.

UNPUBLISHED
May 9, 1997

No. 175210
Recorder's Court
LC No. 93-010466

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive prison terms of twenty to forty years for the assault with intent to murder conviction and two years for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court should have granted his motion for a mistrial when the prosecutor asked defendant during cross-examination about his consultation with an attorney. Specifically, defendant's claim is that the prosecutor's questions were impermissible comment on defendant's right to counsel and his exercise of his right to remain silent. We disagree. A trial court's decision to grant or deny a mistrial will not be reversed on appeal absent an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 716 (1996). "A mistrial should only be granted for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*.

Regarding defendant's first contention, the record does not support defendant's claim that the "prosecution attempted to show by his questions that the defendant consulted with a lawyer because he was guilty." In fact, it was defendant who initially brought up the fact that he consulted with an attorney. Moreover, the record indicates that defendant was only asked about his attorney's presence during the police questioning in order to demonstrate that defendant could have asked what the term "confrontation" meant.

As to defendant's second argument, we conclude that the rules regarding postarrest, post-*Miranda*[1] silence are inapplicable here. The challenged questions did not address defendant's silence or any failure to make a statement. Rather, the prosecutor was merely asking about defendant's statement to police for the purpose of discrediting defendant's conflicting stories regarding his confrontation with the victim on the day of the shooting. See *People v Collier*, 105 Mich App 46, 51; 306 NW2d 387 (1981); *People v Richendollar*, 85 Mich App 74, 82; 270 NW2d 530 (1978). It was defendant who then volunteered testimony that his attorney at some point advised him not to answer any more questions. Based on these facts, the prosecutor's questions were proper. Hence, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

We next address defendant's remaining claims of prosecutorial misconduct. Defendant points to several instances of alleged misconduct during the prosecutor's opening statement, closing argument, and rebuttal. However, these claims were not preserved for appeal because defendant failed to timely and specifically object to any of the purported instances of misconduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Appellate review is therefore precluded unless a cautionary instruction could not have cured the prejudicial effect, or unless failure to review the issue would result in a miscarriage of justice. *Id*.; *People v Dunham*, 220 Mich App 268; 559 NW2d 360 (1996). Upon review of the record, we conclude that the prosecutor's remarks did not exceed the permissible scope of prosecutorial responsibility. No miscarriage of justice would result from our refusal to review the issue. Moreover, any alleged prejudice was cured by the trial court's instruction that the arguments of counsel were not evidence. *People v Ullah*, 216 Mich App 669, 683; 550 NW2d 568 (1996).

Defendant also argues that he was denied his right to a properly charged jury by the following actions of the trial court: (1) told the jury during voir dire that a transcript would not be available during deliberations; (2) made an erroneous statement concerning the definition of evidence, again during voir dire; and (3) erred in instructing the jury that it had to find defendant not guilty of the principle charge before considering lesser offenses. Since defendant failed to object to any of these purported errors, our review is limited to a determination of whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995); MCR 2.516(C). After a review of the record, we find no manifest injustice.

Regarding defendant's first contention, the trial court never foreclosed the possibility of having testimony reread. Rather, the court merely explained that a full-blown transcript would not be available and that the jurors would have to listen carefully. This was not an abuse of discretion. See *People v Robbins*, 132 Mich App 616, 621; 347 NW2d 765 (1984). Next, defendant's attempt to challenge the trial court's entire evidence instruction on the basis of one isolated statement during voir dire must likewise fail. Instructions may not be extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). In its instructions prior to deliberation, the trial court repeatedly emphasized that the jury should not base its verdict on the lawyers' arguments. Those instructions were sufficient to eliminate any potential prejudice resulting from the court's earlier remark. Finally, although we agree with defendant that the trial court's instruction regarding the order of deliberation had the improper effect of requiring the jury to find defendant not guilty of the principal offense before considering any lesser offenses, reversal is not required where, as here, the issue was not

preserved by an objection to the instruction in the trial court. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982).

We next turn to defendant's claim that there was insufficient evidence of an intent to kill to convict him of assault with intent to murder. When reviewing a challenge based on the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 Mich 748, amended 441 Mich 1201 (1992); *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

The elements of assault with intent to murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Id*. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. "The intent to kill may be proven by inference from any facts in evidence." *Id.* at 674.

Viewed in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's conviction. The prosecution's evidence showed that the victim was at home talking on the phone while lying on a couch in his living room. The couch was located approximately ten to fifteen feet from the front door. The door was open while the outside screen door remained closed. The victim heard gunshots and saw defendant standing on the porch shooting at him through the doorway. The victim was hit three times: one bullet struck him in the upper arm, one in the leg, and one grazed his side. Based on this evidence, a rational jury could find that the elements of assault with intent to murder, including an intent to kill, were proven beyond a reasonable doubt.

Defendant also argues that he was denied effective assistance of counsel at trial. Defendant cites several specific instances of counsel's purported deficiency. This issue was the subject of defendant's motion for remand for a *Ginther*[2] hearing, which was granted. A hearing was held, following which the trial judge denied defendant's motion for a new trial.

In order to establish a claim of ineffective assistance of counsel under the Sixth Amendment, as well as the analogous provision in the Michigan Constitution, a defendant must show that "counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial." *Barclay*, *supra* at 672; see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996). The errors complained of must be so serious that defense counsel "was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra* at 687. Moreover, counsel's performance must be viewed in light of all of the facts and circumstances, and there is a strong presumption that counsel rendered adequate assistance and exercised reasonable judgment. *Id.* Finally, a defendant must show that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable. *Id.* at 694; see also *People v Messenger*, ___ Mich App ___; ___ NW2d ___ (Docket No. 178923, released 01/21/97).

Defendant first claims that he was denied effective assistance of counsel because his attorney introduced evidence that defendant and another defense witness had been convicted of drug offenses. We agree with defendant that the prior drug convictions were inadmissible for the purpose of impeachment as the crimes did not involve an element of dishonesty, false statement, or theft. See MRE 609. However, nothing in the rule prohibits defense counsel from eliciting such evidence for other purposes, such as to *bolster* the credibility of a witness. This was a matter of trial strategy and, as such, will not be second guessed on appeal. See *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990), superseded on other grounds 190 Mich App 707; 476 NW2d 500 (1991).

Defendant also argues that counsel was ineffective for failing to either request an instruction on specific intent or to challenge the specific intent element of the charged offense. At trial, defendant and four others gave alibi testimony. Because an instruction on specific intent or cross-examination on the extent of the victim's injuries would have tended to negate this defense, we conclude that counsel's failure to defend on that basis does not rise to the level of ineffective assistance. See *People v Duff*, 165 Mich App 530, 545; 419 NW2d 600 (1987).

We next turn to defendant's claim that counsel was ineffective for failing to object: (1) to the trial court's remark on the rereading of testimony; (2) to the trial court's comment regarding the definition of evidence; and (3) to the trial court's instruction on the proper order of deliberation. As we indicated earlier in this opinion, there was no reversible error in the trial court's instruction regarding the definition of evidence, or the remark concerning the availability of a transcript during deliberations. Therefore, counsel's failure to object regarding those matters did not amount to ineffective assistance.

With respect to the trial court's jury instruction regarding the order in which the jury could consider the principal and lesser offenses, defendant argues that his attorney should have objected. As discussed above, we agree that this instruction was erroneous and, therefore, an objection would have been appropriate. Nevertheless, we are satisfied that reversal is not required on this basis. The jury later asked for reinstruction on the elements of all three offenses, indicating that it considered the charged offense as well as both lesser offenses. Moreover, there was ample evidence to support the jury's verdict. Thus, we conclude that defendant has not established that he was prejudiced by his attorney's failure to object to the court's instructions on this issue.

Next, defendant argues that he was denied ineffective assistance of counsel by his attorney's failure to object to the trial court's use of the "struck jury method" of jury selection. We agree that the court rule was technically violated when the trial court permitted multiple peremptory challenges to be exercised. MCR 2.511(F); *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981); *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987). However, we find that the record does not support defendant's claim that his attorney's failure to challenge the procedure was objectively unreasonable. There is no indication that the trial court mandated or even requested that the parties exercise more than one peremptory challenge at a time. The decision to deviate from the court rule was left to the discretion of the parties. Since the trial court did not interfere with defense counsel's ability to effectively exercise peremptory challenges, there was no need for an objection. Finally, the record does not support defendant's inference of "confusion" on the part of defense counsel as a result. Therefore,

we conclude that defendant has not demonstrated that counsel was ineffective regarding the jury selection procedure.

Defendant's remaining claims of ineffective assistance are without merit. First, because all of the prosecutor's remarks during the trial were proper, counsel was not ineffective for failing to object. Second, a motion to quash the information or for a directed verdict on the principle charge would have failed in light of the ample evidence supporting defendant's guilt. Defense counsel is not required to make useless motions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Third, in light of the fact that four witnesses were called to testify regarding defendant's alibi defense, defendant has failed to establish that further investigation by defense counsel would have uncovered any additional information to substantially benefit the defense. See *People v Alcorta*, 147 Mich App 326, 332; 383 NW2d 182 (1985).

Fourth, the statements transmitted over Officer Lee's radio were not hearsay because they were not offered to prove the truth of the matter asserted, and defense counsel was not ineffective for failing to object. See *People v Eady*, 409 Mich 356, 361-362; 294 NW2d 202 (1980). Finally, counsel was not ineffective for failing to challenge the validity of defendant's arrest. The record indicates that defendant never told counsel about defendant's girlfriend's claim that she did not give the officers permission to enter the house, and the officers' preliminary complaint report, which counsel testified he reviewed, indicated that Officer Lee was "let inside by unidentified black female." After a thorough review of the record, we conclude that defendant was not denied effective assistance of counsel.

Finally, defendant argues that admission of the prosecutor's rebuttal testimony denied him a fair trial. Specifically, defendant asserts the testimony violated the rule against using extrinsic evidence to impeach a witness on a collateral matter, citing *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981), and the rule that the prosecution may not divide up the evidence on which the people rest their case, citing *People v Bennett*, 393 Mich 445, 449; 224 NW2d 840 (1975). However, defendant's failure to object to the admissibility of the challenged testimony waives appellate review in the absence of manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Because we conclude that the challenged testimony was proper rebuttal evidence, we find no manifest injustice.

Affirmed.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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