

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REBECCA LYNN PURCELL,

Defendant-Appellant.

UNPUBLISHED

July 31, 2001

No. 221448

Delta Circuit Court

LC No. 99-006347-FC

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Evidence indicated that after a domestic dispute, defendant twice shot her husband, which shooting defendant characterized as self defense. The trial court sentenced defendant to five years' probation with the first year spent in the county jail for the assault conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor presented insufficient proofs to rebut her claim of self defense and justify her conviction beyond a reasonable doubt. In reviewing a claim of insufficient evidence, we consider the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of the crime. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). This Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Wolfe, supra*.

We find in the lower court record sufficient evidence to support the jury's rational conclusion beyond a reasonable doubt that defendant assaulted the victim while intending to inflict great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). It was uncontroverted that defendant assaulted the victim by shooting him twice. Furthermore, defendant's intent to inflict on the victim serious bodily harm reasonably was inferred from the facts that defendant fired her gun at the victim twice, striking his neck and

shoulder. *McRunels, supra* (noting that because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient).

Defendant, who at the time of the shooting was six months' pregnant, testified that immediately before shooting the victim she feared that the victim intended to seriously injure or kill her because (1) the victim had become increasingly angry over the course of lengthy arguments throughout the evening before and morning of the shooting, (2) the victim had a violent background, including that in the past the victim routinely had grabbed, pushed and screamed at defendant and her son, (3) on leaving the house shortly before the shooting, and on several previous occasions, the victim advised defendant that she was "not having this baby without me," which defendant interpreted as the victim's threat that he would force defendant to have a miscarriage, (4) hours before the shooting the victim also had threatened the victim that if she called the police she would be "the sorriest bitch alive. But not for long," (5) and immediately before the shooting the victim returned home screaming defendant's name, opened the door of the bathroom where defendant was hiding inside a bathtub, and tore open the shower curtain while raising a fist to strike defendant, who had no way out of the bathroom. While this testimony tended to establish a claim of self defense, the jury apparently rejected defendant's theory that her fear of imminent death or serious bodily harm was honest and reasonable or that defendant's shooting of the victim under the circumstances was immediately necessary. See CJI2d 7.15 (describing the use of deadly force in self defense). The jury's determination of defendant's guilt clearly involved an issue of credibility because both defendant and the victim offered widely varying recollections of the relevant events. To the extent that the jury chose to accept the prosecutor's theory that defendant induced the victim's entrance into the bathroom, where she laid in ambush, by hiding a set of vehicle keys and refusing to answer the victim's shouts or deliver the keys, we will not second guess the jury's weighing of the evidence or credibility determinations. *Wolfe, supra*.

Defendant next argues that actions of the prosecutor denied her a fair trial. Defendant specifically claims that the prosecutor's inquiries of defendant why before the shooting she did not call the police or flee, together with the prosecutor's closing argument, potentially confused the jury by improperly suggesting that defendant had a duty to retreat from her own home. We note initially that defendant's arguments of prosecutorial misconduct are unpreserved because defendant failed to object at trial to any of the prosecutor's statements now challenged on appeal. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992) (failure to object to assertedly improper remarks by the prosecutor precludes appellate review absent manifest injustice). Furthermore, we detect no prosecutorial misconduct because the prosecutor's inquiries of defendant were relevant to defendant's self defense theory, see *People v Heflin*, 434 Mich 482, 503, n 16; 456 NW2d 10 (1990) (indicating that a valid self defense claim depends on the defendant's showing of an honest and reasonable belief of imminent harm), and because the prosecutor properly and reasonably inferred from evidence that before the shooting defendant did not flee or call the police that defendant was not in fear of death or serious bodily harm when she shot the victim. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Moreover, no potential for jury confusion existed because the trial court correctly instructed the jury regarding the elements of self defense, and we presume that the jury followed the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant further asserts that her trial counsel's failure to object to the prosecutor's rebuttal witnesses constituted ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that but for counsel's error the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Because defendant did not move for a new trial or evidentiary hearing on the basis of the alleged ineffective assistance, our review is limited to the existing record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

The record demonstrates that the two challenged rebuttal witnesses, one being defendant's former husband and the father of her son and the other a Family Independence Agency (FIA) protective services worker, were properly called. Both witnesses appropriately testified responsively to evidence introduced by defendant and defendant's self defense theory, *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), and defendant's former husband properly testified regarding his opinion of defendant's trustworthiness, MRE 608(a), a relevant issue. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). In response to defendant's testimony that she feared the victim because of his repeatedly expressed apathy toward her pregnancy and threats that the baby, which the victim believed was fathered by another man, would miscarry, the prosecutor presented the FIA worker's testimony that after the shooting (1) the victim was anxious to visit his and defendant's newborn daughter and expressed appropriate concern regarding his inability to visit the daughter more frequently, and (2) the victim interacted appropriately with the newborn daughter during visits and displayed no signs of ill temperament.

In response to defendant's testimony that the victim regularly physically abused she and her son, the prosecutor presented defendant's former husband's testimony that despite regular contacts with defendant during the year before the shooting she never appeared injured or complained of abuse by the victim, and that although the former husband believed that his son would have spoken of abuse by the victim the son never so advised the former husband. Defendant's former husband testified that he had known the victim for years but never had seen him lose his temper. MRE 404(a)(2). The former husband further opined that based on his experience with defendant she was untruthful and a manipulator who would say whatever necessary to get what she wanted. MRE 608(a). In a trial that essentially was a credibility contest between the victim's and defendant's versions of events, the prosecutor's rebuttal evidence possessed significant probative value that does not appear to have been outweighed by any danger of unfair prejudice to defendant. MRE 403

Because the rebuttal testimony was appropriate, defense counsel was not ineffective for failing to object to it. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). We note, however, that defense counsel likely should have objected to the prosecutor's rebuttal elicitation of defendant's former husband's contradiction of defendant's earlier denial that she had staged a workplace injury for which she eventually received a settlement. This statement constituted an inappropriate attempt through extrinsic evidence of a specific instance of conduct to impeach defendant's credibility. MRE 608(b). Nonetheless, we conclude that no ineffective assistance of counsel occurred because in light of the other evidence bearing on defendant's

credibility and her commission of the crime, an objection by counsel to this one statement would not have altered the outcome of defendant's trial. *Pickens, supra*.

Lastly, defendant challenges her sentence as disproportionate. We note that because defendant's crime occurred on January 3, 1999, the statutory sentencing guidelines govern the length of her sentence. *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). We conclude that defendant's challenge to the sentence for her assault conviction must fail because the sentence fell within the prescribed statutory guidelines range, and defendant on appeal did not challenge the trial court's scoring of the sentencing guidelines or the accuracy of the information the court relied on in determining her sentence. MCL 769.34(10).

Affirmed.

/s/ Jeffrey G. Collins

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage