

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY MONTEZS GIBBS,

Defendant-Appellant.

UNPUBLISHED

October 19, 2001

No. 219075

Oakland Circuit Court

LC No. 98-163043-FC

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, and possession of a firearm during commission of a felony, MCL 750.227b. The court sentenced defendant to consecutive terms of eleven to thirty years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court improperly excluded evidence of prior threats the victim made against defendant, thereby violating defendant's constitutional right to present a defense. We disagree.

In cases where a defendant presents evidence of self-defense, the victim's prior threats and past acts of violence against the defendant are admissible if offered to show the defendant's reasonable apprehension of danger. *People v Harris*, 458 Mich 310, 316-317; 583 NW2d 680 (1998). However, if the facts elicited at trial do not support a theory of self-defense, prior threats may be excluded as hearsay. *People v Griner*, 30 Mich App 612, 616; 186 NW2d 800 (1971). The facts of this case do not support a theory of self-defense because defendant had no reasonable belief that his life or his brother's life was in imminent danger and because defendant could have left the area without the use of deadly force. *People v Daniels*, 192 Mich App 658, 672; 482 NW2d 176 (1991); *People v Fisher*, 166 Mich App 699, 711; 420 NW2d 858 (1988). We recognize that the trial court instructed the jury on self-defense, but we find the instruction was given in error. The court's error in instructing on self-defense was harmless, however, because it was in defendant's favor. *Griner, supra* at 616.

Defendant next argues that the evidence was insufficient to support the jury's verdict because the prosecution failed to prove beyond a reasonable doubt that defendant intended to kill the victim and failed to disprove self-defense beyond a reasonable doubt. We disagree. To

determine if the evidence was sufficient to support the jury's verdict, we must determine if the evidence, viewed in the light most favorable to the prosecution, was sufficient to show that the essential elements of the crime were proved to a rational trier of fact beyond a reasonable doubt. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

The crime of assault with intent to murder has three elements: an assault, with an actual intent to kill, which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences arising out of that evidence can constitute proof of the elements of the crime. *Id.* The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id.*

The evidence in this case, viewed in the light most favorable to the prosecution, supports the jury's verdict. Defendant had former confrontations with the victim, with the victim the aggressor. When defendant got out of his car in the parking lot, he brought a gun with him. Although defendant and the victim evidently argued briefly, the victim did not physically attack either defendant or his brother. The victim did not have a weapon. Defendant aimed a gun at the victim's head and chest and fired twice, striking the victim in the chest and grazing his neck. The chest injury was life-threatening. Based on this evidence, we conclude that the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant intended to kill the victim, *People v Plummer*, 229 Mich App 293, 305-306; 581 NW2d 753 (1998), and that defendant did not act in self-defense, *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Defendant also argues that we should apply the theory of imperfect self-defense to his case. We decline to do so.

No Michigan court has ever extended the imperfect self-defense theory to circumstances like this one, where the defendant either reacted with excessive force or unreasonably believed himself to be in imminent danger. *People v Kemp*, 202 Mich App 318, 325; 508 NW2d 184 (1993). Moreover, defendant failed to raise this theory in the trial court or request an instruction on imperfect self-defense. *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999). Therefore, we decline defendant's invitation to extend the theory in this case.

Defendant also argues that the trial court abused its discretion by admitting rebuttal testimony related to the victim's partial paralysis, thereby violating defendant's right to a fair trial and due process of law. We agree the rebuttal testimony was improperly admitted, but find that the error did not affect substantial rights.

"Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending to directly weaken or impeach the same." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), citing *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947). The test of whether rebuttal evidence was properly admitted is whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *Id.* Evidence of the victim's partial paralysis did not disprove, explain, or contradict any evidence presented by defendant. However, defense counsel failed to object to the introduction of rebuttal testimony. Therefore, the issue is unpreserved. This Court reviews unpreserved claims of constitutional and nonconstitutional error only if the defendant establishes

plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To affect substantial rights, generally the error must affect the outcome of the trial. *Id.* at 763. The error did not affect the outcome of this trial.

Defendant established plain error because the testimony related to the victim's partial paralysis was neither proper rebuttal nor relevant. MRE 401; *Figures*, *supra* at 399. However, admission of the evidence did not affect the outcome of the trial. The victim admitted to "whipping" defendant in the past and several witnesses testified about the earlier attack on defendant. Therefore, the jury was not left with a false impression of the victim's physical abilities.

Defendant finally argues that his counsel was ineffective. Once again, we disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001), citing *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995). A defendant must demonstrate that defense counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *Knapp*, *supra* at 385, citing *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Knapp*, *supra* at 385-386, citing *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant claims three errors by defense counsel. First, defendant claims his counsel failed to move for directed verdict at the end of the prosecution's case. However, we find no likelihood that a motion for directed verdict would have been granted. *People v Chinn*, 141 Mich App 92, 98; 366 NW2d 83 (1985). Defense counsel is not required to bring frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Therefore, defense counsel's decision not to file a motion for directed verdict does not support defendant's claim of ineffective assistance of counsel.

Next, defendant claims that his counsel failed to object to rebuttal testimony related to the victim's partial paralysis. We acknowledge that this evidence was admitted in error, and defense counsel's failure to object to the evidence was also a mistake. However, this mistake was not so prejudicial that it denied defendant the right to a fair trial because the jury was aware of the victim's violent actions and threats against defendant through other testimony, including the victim's. Moreover, the only disputed issue in this case was whether defendant acted in self-defense. In the context of ample evidence that defendant was not in immediate fear for his or his brother's life, this evidence did not prejudice defendant's right to a fair trial. *Truong*, *supra* at 339.

Finally, defendant claims that his counsel's failure to call surrebuttal witnesses was a serious mistake because it left the impression that defendant attacked a helpless one-armed man. The decision to call a witness to testify is a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant is entitled to relief only in those instances where counsel's failure to call witnesses deprived the defendant of a substantial defense. *People*

v Stubli, 163 Mich App 376, 381; 413 NW2d 804 (1987). During his case in chief, defendant presented substantial evidence of the victim's violent tendencies. Therefore, the jury was not left with the impression of the victim's helplessness that defendant fears. We conclude that defense counsel's decision not to call surrebuttal witnesses was sound trial strategy and did not constitute ineffective assistance of counsel. *Knapp, supra* at 385-386.

Affirmed.

/s/ Jessica R. Cooper

/s/ David H. Sawyer

/s/ Donald S. Owens