

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FRANCIS GALLAGHER,

Defendant-Appellant.

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UNPUBLISHED

September 17, 2002

No. 224746

Macomb Circuit Court

LC No. 99-001764-FC

Before: Meter, P.J., and Saad and R.B. Burns\*, JJ.

PER CURIAM.

The jury convicted defendant of assault with intent to murder, MCL 750.83, and was sentenced to 135 to 360 months' imprisonment. He appeals as of right, and we affirm.

While drinking at a bar during a business trip, defendant stabbed a bartender in the heart with a pocketknife. Following the attack, other bar patrons beat defendant and held him until the police arrived. Defendant's primary defense at trial was that he was too intoxicated to form the specific intent necessary to be convicted of assault with intent to murder.

I.

On appeal, defendant argues that he was denied his constitutional right to the effective assistance of counsel because his lawyer failed to present expert testimony about the effects of intoxication. Defendant has not shown that his trial counsel's performance was so deficient that it denied him the effective assistance of counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Indeed, because defendant has filed an in pro per supplemental brief in which he expressly asserts that intoxication was *not* a legitimate defense in this case and that the presentation of that defense at trial was based on his perjured testimony, defendant cannot demonstrate that he was prejudiced by trial counsel's failure to present expert testimony. To the contrary, this basis for appeal is totally frivolous.

Defendant also says that he was denied the effective assistance of counsel because trial counsel presented an apparent inconsistent defense. Although an evidentiary hearing was conducted pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), there was

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

no testimony about the reasons for presenting the alternative defense and it is not apparent from the record that counsel acted deficiently. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). The additional allegations of ineffective assistance of counsel raised in defendant's supplemental brief likewise are not supported by the record and were not addressed in the *Ginther* hearing, thus precluding appellate review of those allegations.

## II.

On the night of the incident, defendant had been drinking with another man, Steven Spraguer, who some at the bar speculated was defendant's friend. After defendant stabbed the bartender, a bystander attacked Spraguer, thinking he was trying to assist defendant. Spraguer then disappeared and some thought he might be seriously injured. After police officers arrived at the bar, the officers went to defendant's hotel room to see if Spraguer was there and to look for defendant's identification to obtain medical care for defendant. During their search of defendant's room, the police found a handgun which did not belong to defendant. At trial, the court admitted into evidence a photograph of the handgun.

We reject defendant's argument that the trial court erred by admitting into evidence a photograph of a handgun. Defendant contends that the evidence of a gun was improper "bad acts" evidence designed to portray him as a "bad man." See MRE 404(b). Although defendant challenged the legality of the search in a pretrial motion to suppress, he failed to object to the admission of the photograph on any grounds at trial. Therefore, we review this issue for plain, prejudicial error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The gun simply is irrelevant because it was owned by a roommate, and defendant was not prejudiced by the evidence. Ownership or possession of a gun is not necessarily a "bad act." More importantly, and dispositively, it was established at trial that the gun belonged to defendant's roommate and, thus, the evidence did not reflect adversely upon defendant.

Defendant also maintains that the prosecutor committed misconduct during his closing arguments. Defendant did not object to the allegedly improper remarks at trial and, therefore, defendant failed to preserve this issue. Were we to review this issue, viewed in context, it is apparent that the challenged remarks were proper commentary or the remarks were about matters where any potential prejudice could have been cured by an appropriate instruction upon timely objection. Therefore, this unpreserved issue does not warrant appellate relief. *Carines, supra*; *People v Hall*, 396 Mich 650, 655; 242 NW2d 377 (1976).<sup>1</sup>

Finally, defendant argues the prosecutor abused his discretion by overcharging him. The prosecutor has discretion to bring any charges supported by the evidence. *People v Yeoman*, 218 Mich App 406, 413-414; 554 NW2d 577 (1996). Defendant has failed to show that the charge of assault with intent to commit murder was not supported by the evidence, nor has he demonstrated clear and intentional discrimination based on an unjustifiable standard such as

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<sup>1</sup> Defendant also argues the cumulative effect of each of the errors discussed above deprived him of a fair trial. Because there are no individual errors, there is no cumulative effect. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

race, religion, or some other arbitrary classification. *In re Hawley*, 238 Mich App 509, 512-513; 606 NW2d 50 (1999). We therefore reject defendant's claim.

Affirmed.

/s/ Patrick M. Meter  
/s/ Henry William Saad  
/s/ Robert B. Burns