STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GABRIEL EBERHARDT,

Defendant-Appellant.

UNPUBLISHED
December 13, 2002

No. 229702
Wayne Circuit Court
LC No. 00-002396

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to fifteen to twenty-five years for the assault conviction and a consecutive term of two years for the felony-firearm conviction. We affirm.

Defendant first[1] asserts that there was insufficient evidence to support a finding that he assaulted the victim with the intent to kill. We disagree. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). "The question is whether the evidence presented at trial, together with all reasonable inferences therefrom, was sufficient to allow a rational trier of fact to find each element of the crime proven beyond a reasonable doubt." *Id.*

The elements of assault with intent to commit murder are "'(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999) (citation and footnote omitted). "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of [assault with intent to commit murder]." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

To the extent that defendant argues that the prosecution failed to prove beyond a reasonable doubt that he was the one who shot the victim, we observe that there was evidence

[1] The two other issues raised by counsel were dismissed by stipulation. The remaining issues were raised by defendant in a supplemental brief filed in propria persona.

that defendant and the victim exchanged words just prior to the shooting. There was testimony that defendant had a gun in his hand just moments after the victim was shot. There was also testimony that, as the victim lay on the ground bleeding, defendant taunted him. Thus, there was sufficient evidence to support the conclusion that defendant was the shooter.

There was also sufficient evidence to support the conclusion that defendant shot the victim with the intent to kill him. "The intent to kill may be proved by inference from any fact in evidence." *McRunels, supra*, at 181. "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Id.* While doing an act, the natural tendency of which is to produce death, alone, is insufficient to establish a defendant's intent to kill, *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985), the fact that defendant shot the victim in the chest supports an inference that defendant intended to kill the victim.

Defendant argues that the evidence shows that he was merely trying to scare the victim, who was threatening him. However, there was evidence that defendant shot the victim in the chest, before the victim had even gotten out of his car, and that afterwards defendant said "Yeah, yeah, I told you I wasn't no hoe." (The victim testified that he had called defendant a "hoe" a few months before the shooting.) This evidence was sufficient to support a finding that defendant acted with an intent to kill, rather than an intent to scare, or to do great bodily harm less than murder.

Defendant next asserts that he was denied the effective assistance of counsel, pointing to four examples of alleged errors committed by defense counsel. There has been no *Ginther*[2] hearing, thus this Court's review of this issue is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that counsel's defective performance prejudiced the defendant. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Prejudice sufficient to warrant reversal of a defendant's conviction has been defined as prejudice that "affect[s] the outcome of the trial." *People v Pickens*, 446 Mich 298, 332; 521 NW2d 797 (1994). Defendant has failed to show that counsel neglected viable defense strategies, or that there is a reasonable probability that had counsel done what defendant asserts he should have done, the outcome would have been different.

Defendant's final argument is that he was denied the effective assistance of counsel by counsel's decisions to choose a bench trial over a jury trial and to have defendant decline to testify. Since defendant voluntarily waived his rights to a jury trial and to testify on his own behalf, and because defendant cannot show that these decisions were the result of bad advice from his attorney, defendant was not denied the effective assistance of counsel.

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

A defendant who waives his rights under a rule may not then seek a reversal of his conviction based on a claimed deprivation of those rights because his waiver has extinguished any error. *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000). In order for a defendant's waiver of the right to a jury trial to be valid, the trial court must comply with MCR 6.402. "Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court." MCR 6.402(B).

In the present case, the trial court specifically asked defendant whether he "freely and voluntarily" waived his right to a jury trial. The trial court, however, did not explicitly state on the record that the right to a jury trial is a constitutional right. However, this Court concludes that the requirements of MCR 6.402(B) were still met. Immediately before the trial court questioned defendant regarding whether he was voluntarily waiving his right to a jury trial, defense counsel stated: "I've advised my client of his constitutional right to proceed to trial by a jury." In addition, the trial court referenced, on the record, a jury trial waiver form that defendant had signed. This waiver form states that defendant understands that he has "a constitutional right to a trial by jury." This form also states that defense counsel advised defendant that he has a "constitutional right to a trial by jury." Given that the waiver form twice states that the right to a jury trial is a constitutional right, that the trial court specifically referred to this form on the record, and that defense counsel stated on the record that he told defendant that the right to a jury trial is a constitutional right, the requirements of MCR 6.402(B) were satisfied.

Because defendant waived his right to a jury trial, he cannot claim an error based on a deprivation of that right. *Carter, supra,* at 215. In addition, defendant has not shown that his decision to waive his right to a jury trial was the result of ineffective assistance of counsel. There is nothing on the record to shed light on the advice counsel gave defendant on the issue, and therefore, there is nothing to indicate that defense counsel's performance in this respect was inadequate.

Similarly, defendant has failed to show how his decision not to testify was the result of ineffective assistance of counsel. Defendant knowingly and voluntarily waived his right to testify. The trial court asked defendant whether the decision not to testify was his and defendant said "yes." Again, there is nothing on the record to indicate how this decision was the result of ineffective assistance of counsel. Thus, defendant would have to show that defense counsel's failure to present defendant as a witness deprived him of the opportunity to present a substantial defense. As indicated above, the facts of this case would not lend themselves to the theories of self-defense and imperfect self-defense. The victim was unarmed and shot as he was getting out of his car. Defendant was not facing imminent harm when he shot the victim.

Lastly, defendant's argument that he was denied a fair trial based on the cumulative effect of numerous minor errors also fails because only actual errors are aggregated to determine their cumulative effect, *People v Rice (On Remand),* 235 Mich App 429, 448; 597 NW2d 843 (1999), and we have concluded no actual errors occurred.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Christopher M. Murray