STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2004
v	No. 244114 Washtenaw Circuit Court
JIMMY ERIC GREENE, JR, Defendant-Appellant.	LC No. 01-000836-FC

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals his jury conviction of assault on a pregnant woman, MCL 750.90a, and assault with intent to do great bodily harm, MCL 750.84, for which he was sentenced to 240 to 360 months and 108 to 162 months in prison, respectively. We affirm.

I. Double Jeopardy

Defendant argues that his convictions under MCL 750.90a and MCL 750.84 violate the Double Jeopardy Clauses of the United States and Michigan constitutions, which protect a defendant against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15. Defendant maintains that both convictions arose out of the same assault and are indistinguishable for double jeopardy purposes.

"A double jeopardy challenge presents a question of law that we review de novo." *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). As our Supreme Court recently stated:

> Since the power to define crime and fix punishment is wholly legislative, the clause is not a limitation on the Legislature, *Whalen v United States* [445 US 684, 700; 100 S Ct 1435; 63 L Ed 2d 715 (1980)], and the only interest of the defendant is in not having more punishment imposed than intended by the Legislature, *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). Thus, "[even] if the crimes are the same . . . if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end," *Ohio v Johnson*, 467 US 493, 499 n 8; 104 S Ct 2536; 81 L Ed 2d 425 (1984). [*People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003), quoting *People v Sturgis*, 427 Mich 392; 397 NW2d 783 (1986).]

Therefore, we must determine whether the Legislature intended to authorize "cumulative" punishments. *Calloway*, *supra*. "Factors to consider include whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, the elements of each offense, and any other factors indicative of legislative intent." *People v Squires*, 240 Mich App 454, 457; 613 NW2d 361 (2000).

The fetal protection act, MCL 750.90a, provides:

> If a person intentionally commits conduct proscribed under sections 81 to 89 against a pregnant individual, the person is guilty of a felony punishable by imprisonment for life or any term of years if all of the following apply:
>
> (a) The person intended to cause a miscarriage or stillbirth by that individual or death or great bodily harm to the embryo or fetus, or acted in wanton or willful disregard of the likelihood that the natural tendency of the person's conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus.
>
> (b) The person's conduct resulted in a miscarriage or stillbirth by that individual or death to the embryo or fetus. [MCL 750.90a.]

The act "punishes an individual for causing a miscarriage or stillbirth with malicious intent toward the fetus or embryo or for causing a miscarriage or stillbirth while acting in wanton or willful disregard of the likelihood that the natural tendency of [his] conduct is to cause a miscarriage or stillbirth or great bodily harm to the embryo or fetus." *People v Kurr*, 253 Mich App 317, 322; 654 NW2d 651 (2002). "The plain language of these provisions shows the Legislature's conclusion that fetuses are worthy of protection as living entities as a matter of public policy." *Id*. Thus, the act is aimed at punishing individuals who harm fetuses or embryos.

The assault with intent to do great bodily harm statute, MCL 750.84, provides:

> Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars. [MCL 750.84.]

MCL 750.84 is aimed at "punishing crimes injurious to other people." *People v Harrington*, 194 Mich App 424, 429; 487 NW2d 479 (1992). MCL 750.84 focuses on the injury to the individual rather than the injury to her fetus. Therefore, there is no double jeopardy violation because two different interests are protected. *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

II. Jury Instruction

Defendant also alleges that his conviction for assault on a pregnant woman should be reversed because the trial court gave a misleading jury instruction. "We review claims of instructional error . . . de novo." *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521

(2002). Jury instructions are to be read as a whole and "must not be 'extracted piecemeal to establish error.'" *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), quoting *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000) (citation omitted). Defendant failed to object to the instruction at trial, and therefore, we review his unpreserved claim for plain error affecting defendant's substantive rights. *People v Carines*, 460 Mich 750, 763-766; 597 NW2d 130 (1999).

"Where confusion is expressed by a juror, it is incumbent upon the court to guide the jury by providing a 'lucid statement of the relevant legal criteria.'" *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974), overruled in part on other grounds, *People v Woods*, 416 Mich 581; 331 NW2d 707 (1982). Although the jury expressed some confusion, the trial court corrected the instructions and properly presented the elements of assault on a pregnant individual. Nothing in the record suggests the jury remained confused regarding the intent element required or that the jury could not follow the trial court's instructions. Defendant has failed to show plain error affecting his substantive rights.

III. Effective Assistance of Counsel

Defendant also says that he was denied the effective assistance of counsel. To preserve this claim, defendant must move for a new trial or an evidentiary hearing before the trial court. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant failed to do so, our review is limited to mistakes apparent on the record. *Id*.

To establish an ineffective assistance of counsel claim, a defendant must show: (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing norms, and (2) counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Moreover, to demonstrate prejudice, the defendant must show that but for counsel's errors, the result of the proceedings would have been different. *Strickland*, *supra* at 694. And, the defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant says that his trial counsel was ineffective because counsel failed to object to the display of a picture of the dead fetus. "All relevant evidence is admissible." MRE 402. The picture of the dead fetus allowed the jury to see the condition of the fetus compared to the other pictures of placental abruptions already presented. In addition, its probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403. Counsel "is not obligated to make futile objections." *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant also argues that counsel failed to present exculpatory evidence and failed to effectively cross examine and impeach certain witnesses. Decisions about what evidence to present and whether to call particular witnesses are presumed matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Trial counsel introduced the referenced exculpatory evidence during the cross examination of Dr. Anderson, and defendant has failed to show how further efforts in this regard would have affected the outcome of the proceeding.

Defendant further challenges counsel's failure to call defendant to testify. A defendant's right to testify is a constitutional right guaranteed under due process principles. *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985). Had defendant expressed a wish to testify, he must have been permitted to do so. *Id*. at 685. Yet, if the defendant "acquiesces in his attorney's decision that he not testify," his right to testify will be deemed waived. *Id*. Because defendant stood by silently while his counsel proceeded, he acquiesced in his counsel's decision and therefore waived his right to testify.

Defendant also challenges counsel's stipulation to plaintiff's due diligence in locating the complainant. Defendant states that the complainant would have testified that she was lying when she told police that defendant assaulted her. However, her preliminary examination testimony to that effect was read to the jury. Therefore, defendant failed to show that her appearance at trial would have affected the outcome of the proceeding.

Defendant also says that trial counsel failed to present defenses during his opening statement and failed to present an effective closing argument. However, "this Court will not second guess counsel regarding matters of trial strategy . . . [or] assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 591 NW2d 843 (1999). Though a "counsel's failure to raise a substantive defense" may amount to ineffective assistance of counsel, *People v Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984), defendant has not shown that counsel failed to do so.

Finally, defendant complains that counsel failed to call an expert witness to testify regarding the cause of the placental abruption in this case. Counsel's decisions to call or not to call certain witnesses are presumed matters of trial strategy, *Rockey*, *supra* at 76, unless the failure deprives the defendant of a substantial defense that would have affected the outcome of the proceeding. *Daniel*, *supra* at 58. However, defendant has not shown that counsel's failure to call the expert witness deprived him of a substantial defense.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra