

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LESLIE WHITE,

Defendant-Appellant.

UNPUBLISHED

September 14, 2004

No. 247132

Wayne Circuit Court

LC No. 02-009424-01

Before: Donofrio, P.J. and White and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of ten and a half to twenty years on the assault conviction and one to five years on the felon in possession conviction, to be served consecutively to the mandatory two-year term for felony-firearm. Defendant appeals as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the prosecutor failed to exercise due diligence in producing various *res gestae* witnesses, including defendant's girlfriend, Jerry Ward, defendant's sister, Paula White, Alvin Stone, Lamont Fields, and another unnamed woman, and the trial court erred in failing to inquire whether the prosecutor had exercised due diligence in producing them. Defendant did not raise this issue below and thus it has not been preserved for appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The prosecution did not have an obligation to use due diligence to produce any of the witnesses because they were not named as witnesses to be called at trial. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995); MCL 767.40a. Thus, it was not "necessary to determine whether the prosecutor acted with due diligence in trying to locate or produce" them. *People v Calhoun*, 178 Mich App 517, 522; 444 NW2d 232 (1989). The unnamed woman has not been identified and there is no evidence that she, Stone, and Fields were known to the prosecutor or to the police. The prosecutor does not have a duty to discover, endorse, or produce unknown witnesses. *Burwick*, *supra* at 289. Therefore, defendant has failed to show that plain error occurred with respect to the nonproduction of the witnesses.

Defendant next contends that he is entitled to a new trial due to ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant first asserts that trial counsel was ineffective for failing to call Ward and White to testify at trial or to seek assistance to compel Ward's attendance. The record shows that counsel intended to call Ward but she failed to appear. Counsel's failure to call a witness is considered ineffective assistance "only if the failure deprives the defendant of a substantial defense." *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Because the record is silent regarding the testimony Ward and White would have offered if called, defendant has not shown that a reasonable probability exists that, if counsel had presented the testimony of either witness, the outcome of the trial would have been different. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant next asserts that counsel was ineffective for failing to object to photographs showing the shotgun wound to Pickett's head. The record shows that the prosecutor introduced photographs showing only the wounds to Pickett's hand, leg, and shoulder. Because no photographs of the wound to Pickett's head were offered, counsel was not ineffective for failing to object to the admission of any such photographs. In any event, the photos would have been admissible to show intent as long as they were supported by testimony that they accurately reflected the location of a wound from the shooting.

Defendant next contends that the trial court erred in failing to infer that Ward's testimony would have been adverse to the prosecution, taking its cue from the missing-witness criminal jury instructions. CJI2d 5.12. Because the prosecutor was not required to produce Ward and there is nothing in the record to show that defendant requested and was not provided reasonable assistance in locating her, the instruction and therefore, the inference, was not applicable. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). In any event, the inference is permissive, not mandatory, so even if applicable, the court was not required to infer that Ward's testimony would be adverse to the prosecution. *People v Fields*, 450 Mich 94, 105; 538 NW2d 356 (1995). Cf. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997).

In his Standard 11 brief, defendant raises various other issues, none of which merit relief.

Defendant contends that the evidence was insufficient to sustain the verdict as to assault with intent to murder. We disagree.

The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). The intent to kill may be proven by inference from any facts in evidence, including proof of the victim's injuries, and minimal circumstantial evidence is sufficient. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995); *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The evidence showed that while Burt Pickett was standing outside the house arguing with defendant's brother David White, defendant appeared "on the top porch with a shotgun." He

pointed the weapon at Pickett and urged Ward to move so he could shoot Pickett. Shortly thereafter, as Pickett started to leave, defendant began shooting at him. The intentional discharge of a firearm at someone within range, done under circumstances that did not justify, excuse, or mitigate the crime, is sufficient to prove assault with intent to commit murder. *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988); *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). Therefore, the evidence was sufficient to enable a rational trier of fact to find that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

Defendant contends that the court improperly relied on the photographs of Pickett's wounds to find that Pickett had been shot in the head when his medical records indicated otherwise. As noted above, no photographs showing any wounds to Pickett's head appeared to have been admitted into evidence. The court found from the pictures showing "the wounds to the right shoulder, to the right thigh area and to the right hand" that Pickett "received injuries as a result of a shooting."

Finally, defendant contends that he was denied a fair trial due to prosecutorial misconduct. The issue has not been preserved because defendant did not object at trial. Therefore, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant argues that the prosecutor improperly "minimized Pickett's violent character and allowed him to give testimony that conflicted with an investigator's report. Because defendant has not briefed the merits of the claim or cited any supporting authority, the issue is deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Green Oak Twp v Munzel*, 255 Mich App 235, 244; 661 NW2d 243 (2003).

Defendant complains generally that the prosecutor not only presented false evidence, he argued facts that were not part of the record. As noted, a prosecutor may not knowingly use false testimony to obtain a conviction. This issue is also deemed abandoned due to defendant's failure to brief the merits of the claim or to cite any supporting authority. That aside, because defendant has not cited to the relevant portions of the transcript, it is nearly impossible to evaluate his claim. A review of the transcript does not bare-out defendant's assertions. The prosecutor's arguments reached the admitted evidence and the reasonable inferences of fact to be drawn from that evidence.

Affirmed.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot