STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2008
v	No. 270832 Macomb Circuit Court
LEROY MARKEITH SIMMONS, Defendant-Appellant.	LC No. 2005-001942-FC

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant Leroy Markeith Simmons appeals as of right his jury trial convictions for two counts of assault with intent to murder, MCL 750.83; and one count of being in possession of a firearm during the commission of a felony, MCL 750.227(b). Defendant was sentenced to 6 to 20 years' imprisonment for each conviction of assault with intent to murder, and two years' imprisonment for the felony-firearm conviction. Defendant's sentence for possessing a firearm during the commission of a felony is to be served consecutively to the other sentences. We affirm.

Defendant first argues that there was insufficient evidence to support his convictions for assault with intent to commit murder. We review challenges to the sufficiency of the evidence de novo and view the evidence in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Assault with intent to commit murder is a specific intent crime that requires evidence that defendant committed; (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would have resulted in a murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). A prosecutor can establish an assault by showing either an attempt to commit a battery, or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005).

Defendant first argues that the prosecution did not prove beyond a reasonable doubt that defendant did not act in self-defense, *People v Elkhoja*, 251 Mich App 417, 443; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003), and thus, his convictions were

improper. An assault may be excused as justified self-defense if, under the circumstances, a defendant honestly and reasonably believed that it was necessary to use force to protect himself from harm. *People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002). Evidence that defendant could have safely avoided using deadly force is relevant in determining whether it was reasonably necessary for him to use force. *Id*. at 142. The amount of force used must be proportionate to the danger. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). Here, the victim testified that defendant initiated both assaults. The first assault took place when defendant struck the victim in the face without warning and subsequently fired a gun at him. The second assault occurred after the victim left the parking lot in his vehicle and defendant followed him in another vehicle, which pulled up along side the victim at a stop light. Defendant fired a gun at the victim's car. A defendant may not claim self-defense where he used excessive force or was the initial aggressor. *Kemp*, *supra* at 322-323.

Defendant also argues that the evidence produced at trial was insufficient to show that defendant had the intent to kill, as the evidence only showed that he acted recklessly. It is not enough that a defendant acted only with an intent to cause serious bodily injury or with a conscious disregard of the risk of death; rather, "[i]t must be shown that the defendant intended to kill the victim under circumstances that did not justify, excuse, or mitigate the crime." *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988). The intent to kill can be reasonably inferred from any facts in the evidence, including circumstantial evidence such as the extent of a victim's injuries, or the use of a dangerous weapon by the defendant, or any other conduct the natural tendency of which is to cause death. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993); *People v Eisenberg*, 72 Mich App 106, 114; 249 NW2d 313 (1976). Moreover, because of the difficulty of proving a person's state of mind, even minimal circumstantial evidence is sufficient to prove the intent to kill. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The victim testified that, during the first incident, defendant struck him in the face without provocation and fired a gun at him. In addition, a witness who observed the event testified that defendant stood over the victim and attempted to fire a handgun in the victim's direction. The prosecutor presented evidence that defendant's gun may have jammed when defendant stood over the victim, supporting the inference that defendant would have killed defendant if the gun had functioned properly. During the second incident, the victim testified that defendant followed his car, pulled along the side of it at a traffic light, and fired a gunshot directly into the victim's vehicle. The jury was permitted to infer that defendant intended to kill the victim because he used a firearm at close range during both assaults. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997); *People v Brown*, 196 Mich App 153, 159; 492 NW2d 770 (1992). While defendant argued that the fact that he did not hit defendant with the gunshots indicated that he did not intend to kill him, the prosecutor was not required to disprove every reasonable theory consistent with innocence, and questions of credibility and intent are for the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant next argues that he was denied his right to be free from multiple prosecutions for the same event when he was convicted of two separate charges of assault with intent to commit murder. We disagree. Because defendant failed to properly preserve this issue, we review for plain error. *People v Barber*, 255 Mich App 288, 291; 659 NW2d 674 (2003). Both

the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15.

> The Double Jeopardy Clause affords individuals 'three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense' . . . The first two protections are generally understood as the 'successive prosecutions' strand of double jeopardy, while the third protection is commonly understood as the 'multiple punishments' strand. [*People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007) (citation omitted).]

Here, defendant argues that both assaults were part of the same criminal transaction, and thus were required to be charged as one offense. Where assaults are separate events, interspersed by other events, they may properly constitute the basis for separate convictions. *People v Bulls*, 262 Mich App 618, 628-630; 687 NW2d 159 (2004). "There is no violation of double jeopardy protections if one crime is complete before the other takes place." *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). In the instant matter, the act resulting in the first assault with intent to commit murder conviction was complete before the act leading to the second assault with intent to commit murder conviction occurred, and the assaults were not contemporaneous. After the first assault, the victim entered his vehicle and drove down Van Dyke Road. He stopped at a traffic signal. Defendant pulled up along side the victim and committed the second, separate assault. Therefore, defendant's double jeopardy rights have not been violated.

Defendant finally argues that he was denied the effective assistance of appellate counsel by his appellate counsel's decision to refrain from raising issues related to the effective assistance of trial counsel. Defendant preserved the issue whether he was denied the effective assistance of appellate counsel by filing his supplemental brief; however, because the trial court denied defendant's motion for a *Ginther*[1] hearing, the issue of whether defendant was denied the effective assistance of counsel is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000); *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). The standards that apply to ineffective assistance of trial counsel apply equally to a claim of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Ineffective assistance of counsel is a question of law, which we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of his trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

(2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant first argues that his trial counsel unreasonably failed to move to suppress the in-court identifications of defendant made by witnesses Davis, Carter, and Sanders, and by the victim. Generally, the decision to move to suppress an in-court identification is a matter of trial strategy, and this Court will not invalidate that decision in hindsight. *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985). On the record before us, defendant cannot show that the outcome of the trial would have been different if his trial counsel had successfully challenged the witnesses' identifications. Defendant's sister testified that defendant was present at the scene of the assaults, and defendant presented no evidence supporting that he was in a different place, or that the assaults were perpetrated by somebody else. He claimed self-defense. A defendant must show that, but for his trial counsel's alleged error, the outcome of the trial would have been different. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). Defendant has not done so.

Defendant next argues that his trial counsel unreasonably failed to impeach the victim with purported inconsistencies between his trial testimony and his testimony at the preliminary examination. The decision whether to question or cross-examine witnesses is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 76-77. On the record before us, it is evident that none of the inconsistencies raised by defendant involved matter of importance to the elements of the charges at issue. Further, to the extent that the purported inconsistencies undermined the victim's general credibility, defendant's trial counsel specifically tested the victim's credibility by emphasizing his difficulty in remembering events of the night at issue during his cross-examination. Therefore, defendant has not shown that, but for his trial counsel's conduct, he would have been acquitted. *Toma, supra* at 302.

Defendant next argues that his trial counsel unreasonably failed to remove an unidentified juror, who he claims was biased. He also challenges counsel's decisions with respect to jurors 45 and 74. Generally, the failure to challenge a juror is not a basis to claim ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). That decision is a matter of trial strategy, and this Court does not evaluate the decision in hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). This Court assumes that jurors are competent and impartial, and the burden of proving otherwise is on the party seeking a particular juror's disqualification. *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). Nevertheless, we cannot review the issue because defendant did not provide the transcript of vior dire on appeal. Defendant had the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Next, defendant argues that his trial counsel was ineffective for failing to object to a misstatement of law during the prosecutor's opening statement, and a misstatement of fact during the prosecutor's closing argument. A prosecutor's comments must be examined in context, and their propriety depends on the particular facts of the case. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). A prosecutor's clear misstatement of the law, which remains uncorrected, may deprive a defendant of a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, if the jury is correctly instructed on the law by the trial court,

an erroneous legal argument made by the prosecutor can be cured. *Id.* at 357. Here, the trial court corrected any purported error by correctly instructing the jury regarding self-defense, and by instructing the jury that "the lawyer's statements and arguments are not evidence." Thus, defendant cannot demonstrate that, but for counsel's failure to object, the outcome of trial would have been different.

Defendant next argues that his trial counsel unreasonably failed to investigate whether defendant was competent to stand trial. To establish that competency was a valid issue, defendant has the burden to demonstrate that he was incapable, because of his mental condition, of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. MCL 330.2020(1); *People v McSwain*, 259 Mich App 654, 692; 676 NW2d 236 (2003). It violates an incompetent defendant's right to due process to subject him to a criminal trial. *Cooper v Oklahoma*, 517 US 348, 354; 116 S Ct 1373; 134 L Ed 2d 498 (1996). Here, defendant presents no evidence on appeal that he lacked competence to stand trial in March 2006. Defendant does not provide evidence that he failed to understand the nature of the charges against him, or that he was unable to assist in his trial preparation.

Defendant additionally argues that his trial counsel unreasonably failed to call two key witnesses, who observed the events surrounding the assaults, during trial. Trial counsel has a duty to make an independent examination of the facts, laws, pleadings and circumstances involved in the matter, and to pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004). A sound trial strategy is based on investigation and supported by reasonable professional judgments. *Id*. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is a defense that could have made a difference at trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant does not explain what these witnesses would have testified about, or how these witnesses would have affected the trial. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *Hoag, supra* at 6. He has not done so.

Finally, defendant argues that his trial counsel unreasonably failed to challenge the expert testimony of an expert who opined about the trajectories of the bullets that entered the victim's car. The questioning of witnesses is presumed to be a matter of trial strategy. *Rockey, supra* at 76-77. Ineffective assistance will be found only if the failure to present evidence deprives a defendant of a substantial defense. *Dixon, supra* at 398. "A substantial defense is one that might have made a difference in the outcome of the trial." *Kelly, supra* at 526. While defendant asserts that the expert's testimony was inconsistent with "reports in the discovery packet," defendant does not specify the allegedly inconsistent reports on appeal, and thus, he fails to satisfy his burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *Hoag, supra* at 6. Further, defendant's trial counsel cross-examined the expert in question for approximately 32 pages of trial transcript, mentioning several inconsistencies between his opinion and the victim's testimony. Thus, defendant was not deprived of a substantial defense.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh