STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2009
v	No. 285384 Kent Circuit Court
MARCHRIS LEONARD BATES, Defendant-Appellant.	LC No. 07-005355-FC

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm, MCL 750.84[1]; possession of firearm by felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 9 to 30 years' imprisonment for his assault conviction; 9 to 30 years' imprisonment for his felon-in-possession conviction; and, two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant first asserts that the trial court erroneously refused to deliver a jury instruction on self-defense. We disagree. A trial court's decision whether an instruction applies to the facts is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

While a defendant does not have to testify to merit an instruction on self-defense, there must be some evidence to establish to support such a theory. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978). A claim of self-defense first requires that a defendant has acted in response to an assault. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). "A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions." *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990) (opinion by Riley, C.J.). However, a defendant may

[1] The jury acquitted defendant of assault with intent to murder, MCL 750.83.

not use any more force than is necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

In the instant case, there was no evidentiary support for a claim of self-defense. Here, it is undisputed that the victim, Michael Seymour, initiated an assault on defendant; thus, the first requirement of a claim of self-defense was established. See *Smith*, *supra* at 238. At some point during the altercation, Seymour indicated that he was "easing up" on defendant when a shot was fired. Seymour then abandoned his attack and began to retreat. Defendant's criminal charges stem from two subsequent shots fired by defendant at Seymour as Seymour was fleeing from defendant. On appeal, defendant asserts that he disarmed Seymour, and then fired shots at Seymour in self-defense. Other than a self-serving statement by defendant in a letter to an eyewitness, the evidence adduced at trial did not support that assertion.

At trial, the only evidence regarding who possessed the gun was through Seymour's testimony, and he claimed that he and his cousins were unarmed. One eyewitness testified that she did not see a gun until Seymour "got off" of defendant after the initial shot sounded. The other eyewitness only observed the altercation after she heard gunshots. Seymour and the two eyewitnesses all testified that defendant fired two more shots at Seymour as Seymour was attempting to flee the scene. One eyewitness estimated that defendant fired those shots when Seymour was 10 feet away and then 50 to 60 feet away from defendant. The evidence does not support a finding that defendant could have reasonably and honestly believed that he was in imminent danger or that such action was justified under the circumstances when he fired the two shots at Seymour as Seymour fled from defendant. See *Heflin*, *supra* at 502-503. Because there was no evidentiary support for an instruction of self-defense, the trial court properly denied defendant's request for such an instruction. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). We conclude that the trial court did not abuse its discretion in denying defendant's request for a self-defense instruction. *Gillis*, *supra* at 113.

Defendant also raises numerous issues *in propria persona*, none of which has merit. He first claims that the prosecutor engaged in three instances of misconduct during trial. We review unpreserved claims of prosecutorial misconduct de novo, *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005), and on a case by case basis, *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vac'd in part on other gds 477 Mich 856 (2006). "The test is whether defendant was denied a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

First, defendant contends that the prosecutor improperly commented on defendant's right not to testify. During closing argument, the prosecutor stated the elements for the lesser charge of assault with intent to do great bodily harm. In discussing the intent element, the prosecutor asserted in relevant part:

> Actual injury is not necessary. [Defendant] did not have to actually hit Mr. Seymour with a bullet. He only had to intend to hit him and intend to cause great bodily harm.
>
> Again, how do we know what intent is? We know it from what people say. We don't have any statements from the defendant here, but we . . .

At that point, defense counsel raised an objection without specifying any grounds, which the trial court sustained.

A prosecutor may not comment on a defendant's post-arrest silence. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). However, examining the entire record and evaluating the prosecution's remarks in context, *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004), we conclude that the prosecutor was attempting to argue that the intent element for the lesser offense was proved. Certainly, the prosecutor's argument regarding this element could have been more precise. However, when viewed in context, the argument was not an improper comment on defendant's failure to testify. Moreover, defense counsel immediately raised an objection, and the trial court provided a subsequent instruction that a defendant has no obligation to testify in a criminal case. When the prosecutor resumed his argument, he emphasized that point, affirmatively stating that one who exercises his right to remain silent should not have his silence held against him, and that this fundamental right should be protected and solemnly kept by the jury. Further, the trial court later instructed the trial that "[e]very defendant has the absolute right not to testify," and that "[t]he lawyers' statements and arguments are not evidence." See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Defendant was not denied his right to a fair trial by the challenged remarks by the prosecutor. *Paquette*, *supra* at 342.

Additionally, we reject defendant's other allegations of prosecutorial misconduct related to improper vouching and improper commenting on defendant's guilt. Defendant has failed to cite any specific instances to support these allegations of prosecutorial misconduct. He has not indicated for which complaining witnesses the prosecutor allegedly vouched. Further, defendant has misstated the record by asserting that the prosecutor stated "Mr. Bates was given the opportunity to testify and he chose not to, by him chosing [sic] not to shows some form of guilt when he was given the opportunity." The prosecutor's closing argument and rebuttal contains no such statement. We will not search for a factual basis to sustain or reject defendant's position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

Next, defendant asserts that the district court improperly adjourned the May 1, 2007 preliminary examination. We review a decision regarding the adjournment of a preliminary examination for an abuse of discretion. *People v Williams*, 51 Mich App 758, 760; 216 NW2d 499 (1974). A preliminary examination should be set for a day not exceeding 14 days after the arraignment. MCL 766.4. MCL 766.7 provides that "[a]n adjournment, continuance, or delay of a preliminary examination shall not be granted by a magistrate except for good cause shown." At the May 1, 2007 hearing, the prosecutor explained that Seymour had not yet been served, and the district court adjourned the preliminary examination because Seymour was not available. The preliminary examination took place on May 22, 2007, during which Seymour indicated that he had been incarcerated on or around May 1, 2007. Defendant argues that Seymour's incarceration did not constitute good cause for the adjournment; however, he cites no authority to support that proposition. In *People v Horne*, 147 Mich App 375, 377; 383 NW2d 208 (1985), this Court found that good cause existed where witnesses were unavailable or on vacation. Notably, in that case, one of "the essential witness had to leave immediately for a matter currently pending in federal court." *Id.* Seymour's unavailability constituted good cause, and even if we concluded to the contrary, defendant has not demonstrated any prejudice stemming from the adjournment. *People v Haines*, 105 Mich App 213, 215; 306 NW2d 455 (1981). The

district court did not abuse its discretion in adjourning the May 1, 2007 preliminary examination until May 22, 2007. *Williams, supra* at 760.

Defendant next claims that the district court improperly bound him over on the original charge of assault with intent to murder. We review a decision regarding bindover for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). "Probable cause that the defendant has committed the crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). "To establish that a crime has been committed, the prosecution only had to present some evidence of each element." *Id.* at 319. Circumstantial evidence and reasonable inferences from the evidence may be sufficient. *Id.* The offense of assault with intent to commit murder has the following elements: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). We conclude that the prosecutor presented some evidence of each element of the offense at the preliminary examination. There was testimony from Seymour and another eyewitness that defendant fired two shots from relatively close range at Seymour as Seymour was fleeing from defendant. Thus, the evidence and the reasonable inferences derived there from established an assault with intent to kill, and if defendant would have hit Seymour with the shots, there could have been a killing. *Id.* Additionally, we reject defendant's claim that he was acting in self-defense, where the evidence refuted such a theory. See *Kemp, supra* at 322. There was probable cause that the defendant committed the offense of assault with intent to murder, and that the district court did not abuse its discretion. *Henderson, supra* at 312.

Next, defendant alleges numerous instances of ineffective assistance of counsel. Specifically, defendant asserts that defense counsel rendered ineffective assistance of counsel for failing to object to certain comments by the district court and the trial court; for failing to file appropriate motions; for failing to properly investigate the case; for failing to object to certain comments by the prosecutor; failing to withdraw as defense counsel; and, for failing to exercise a peremptory challenge. Because defendant did not move for new trial or *Ginther*[2] hearing, *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002), our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

We have reviewed all of defendant's allegations of ineffective assistance of counsel, and find them lacking in merit. Generally, defendant's claims attack matters of trial strategy, which we will not review with the benefit of hindsight, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), or allege error related to the failure to make objections or motions, all of which would have been without merit. The failure to raise meritless objections or motions cannot sustain claims of ineffective assistance of counsel. *Goodin, supra* at 433. Ultimately, defendant failed to establish that defense counsel's conduct fell below an objective standard of reasonableness under prevailing norms, and that but for defense counsel's alleged defective performance, the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Matuszak, supra* at 57-58.

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

Next, defendant argues that the trial court failed to compel compulsory process to produce witnesses in favor of defendant. "Whether or not compulsory process is used to obtain witnesses requested by a defendant is a decision which is committed to the discretion of the trial court." *People v Williams*, 36 Mich App 118, 120; 193 NW2d 201 (1971). The United States and Michigan Constitutions guarantee an accused in a criminal proceeding the right to compulsory process of witnesses in his or her favor. US Const, Am VI; Const 1963, art 1, § 20. "However, a criminal defendant's right to compulsory process is not absolute, and the constitution does not grant the right to subpoena any and all witnesses a party might wish to call." *People v Loyer*, 169 Mich App 105, 112-113; 425 NW2d 714 (1988).

Defendant informed the trial court that he wanted to call Bobby Ray Palmer, Michael Antonio Cage, and Dr. Andrew Livingston to testify for the defense. The record suggests that Palmer drove defendant to the location of the fight on the day in question. However, the prosecutor indicated that the police could not locate him for trial. Further, there is no indication that Palmer would have provided inculpatory testimony. With respect to Cage and Dr. Livingston, defense counsel determined not to call these witnesses, because their testimony would not have added anything to the defense. Defendant has not demonstrated that any of the witnesses were material witnesses without whose testimony defendant could not safely proceed to trial. See MCL 775.15. Moreover, "[d]efendant may not assign error on appeal to something that his own counsel deemed proper at trial." *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). In reaching our conclusion, we note that the lower court file does not contain any other requests to the trial court for compulsory process of such witnesses.

Defendant next contends that the trial court erroneously denied his motion for a directed verdict on the offense of assault with intent to murder. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The testimony adduced at trial, when viewed in a light most favorable to the prosecutor, could have persuaded a rational fact finder that all of the elements of assault with intent to murder were proved beyond a reasonable doubt. *Brown*, *supra* at 147-148. Three witnesses testified that defendant pointed a gun and fired two shots at Seymour as Seymour was fleeing from defendant. The element of intent to kill may be proved by reasonable inferences from that testimony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Moreover, under the circumstances, if defendant would have hit and killed Seymour, this would have been a murder. See *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The trial court properly denied defendant's motion for directed verdict.[3]

[3] In his statement of the questions presented, defendant alleges that he was denied due process and a fair trial by the introduction of the lesser-included offense. Defendant, however, devotes no portion of his brief on appeal to this issue. "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

Next, defendant alleges that he was denied a fair and impartial jury of his peers. This unpreserved allegation of error lacks merit, where defendant essentially argues that the jury selected was not a fair cross-section of the community. "While a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community, he is not entitled to a petit jury that exactly mirrors the community." *People v Flowers*, 222 Mich App 732, 736-737; 565 NW2d 12 (1997). Defendant has failed to set forth support for a prima facie violation of the fair cross-section requirement, where there is no indication that African-Americans were underrepresented in the venire or jury pool, and that underrepresentation was the result of systematic exclusion. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Next, defendant contends that the trial court and prosecutor coerced the jury into reaching a hasty verdict. Claims of coerced verdicts are reviewed on a case-by-case basis, where the particular language of the trial court must be considered. *People v Pizzino*, 313 Mich 97, 103; 20 NW2d 824 (1945). Unpreserved allegations of error, however, are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Most of the comments cited by defendant occurred outside the presence of the jury at the end of the third day of trial. Further, we have closely reviewed the trial court's comments and rulings during the instant trial and its instructions to the jury, and we find no support for defendant's assertion that the trial court coerced the jury to reach a hasty verdict. See *People v London*, 40 Mich App 124, 128; 198 NW2d 723 (1972) (a defendant is denied a fair trial where the trial court creates an atmosphere that seemingly requires a hasty verdict). On the contrary, the trial court repeatedly underscored the importance of the jury's deliberation process. Ultimately, defendant has failed to establish plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

Defendant next sets forth a general claim that the judges in the lower court proceedings were biased against him and abused their discretion throughout the proceedings. We reject defendant's unpreserved claim of judicial bias; significantly, he has failed to provide any specific instances of bias, other than what amounts to ruling against defendant at various times during the proceedings. Defendant has failed to overcome the heavy presumption of judicial impartiality in this claim of judicial bias. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Defendant also claims that the judges in the lower court proceedings made erroneous decisions throughout the proceedings, thereby depriving him of due process and a fair trial. Defendant claims that the trial court failed to take any action in light of allegations that the prosecutor forced Seymour to testify a certain way. We reject this unpreserved claim of error, where defendant has cited no authority to support a proposition that a trial court must *sua sponte* order a hearing to investigate self-serving claims of witness tampering. Ultimately, defendant has failed to establish plain error affecting his substantial rights. *Carines, supra* at 763-764.

Defendant also contends that the trial court erroneously denied his motion to reduce bond. Defense counsel filed a motion for release on personal recognizance pursuant to MCR 6.004. He was in custody for 181 days at the time of its filing. MCR 6.004(C) provides, in relevant part, that a defendant in a felony case must be released on personal recognizance if that defendant has been incarcerated for a period of 180 days or more, "unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community."

The trial court denied defendant's motion, finding that "defendant committed a sufficiently dangerous crime." This finding was not clearly erroneous, where defendant was charged with assault with intent to murder after firing two shots at another individual. Additionally, the bond motion report provided that defendant has a history of noncompliance with two probation violations, three bench warrants, and three parole violations. Defendant was not entitled to release pursuant to MCR 6.004(C), where there was clear and convincing evidence that defendant was likely a danger to other persons or the community. Moreover, even if it was error to deny the motion, reversal is not warranted because, given the overwhelming evidence of defendant's guilt, the error was not outcome-determinative, *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant next raises claims that he was denied a fair trial because of numerous rulings, already addressed herein. We also reject defendant's argument that the trial court erroneously denied his motion to dismiss on procedural grounds, thus denying him a fair trial. Defendant filed a motion *in propria persona*, and defense counsel later filed a similar motion, essentially arguing that the charges against defendant should have been dismissed, because defendant's May 1, 2007 preliminary examination was adjourned without good cause, and because the facts did not support a violation of MCL 750.83. These arguments lack merit for the reasons previously discussed. Thus, the trial court did not abuse its discretion in denying defendant's motions to dismiss. *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004).

Defendant next contends that his double jeopardy protections were violated; however, defendant has not identified a double jeopardy issue nor has he presented any coherent arguments related to a double jeopardy violation. This claim of error is abandoned. *McPherson*, *supra* at 136.

Finally, defendant argues that he was deprived of his right to a speedy trial. This claim is not presented in defendant's statement of the questions presented; as such, this Court need not review this claim. See MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, we have reviewed this issue and conclude that defendant was not deprived his right to a speedy trial, particularly where there was no prejudice from any delay. *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra