STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 288408 Allegan Circuit Court
AARON CLARENCE-EUGENE SUMMITT, Defendant-Appellant.	LC No. 08-015567-FC

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury 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 15 to 30 years in prison for assault with intent to commit murder, and to a consecutive two-year term for felony-firearm. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to convict him of the assault. 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 Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). Defendant asserts that the evidence of an actual intent to kill was deficient.

Scott Eilbes testified that after he accompanied defendant to defendant's truck, defendant asked for his money, that he said no, and that defendant pulled out a handgun. According to Eilbes, he grabbed the gun but when he couldn't "hold it anymore" he gave defendant the money in one of his pockets, which he estimated was $100 to $200. Defendant then asked for his wallet, which he said he did not have. Eilbes claimed that defendant got belligerent, that he turned and ran, and that while he was running, defendant shot him.

It is undisputed that defendant shot Eilbes. Defendant was apprehended shortly thereafter, and had $130 in cash in his front pockets. He gave two statements to the police claiming that Eilbes tried to sexually assault him, grabbed his crotch, and that he punched Eilbes and then proceeded to his truck. Defendant claimed that he had a .357 revolver in the truck, that when he got to the truck he loaded the gun with six individual rounds, and that Eilbes appeared at his truck and started grabbing his ankles and pulling him out of the truck. Defendant believed that he was being sexually attacked. He said he pointed the gun at Eilbes, told him to get out of

the way or he was going to shoot, and that Eilbes turned around just as he squeezed the trigger, shooting Eilbes in the back.

Eilbes' shirt had no gunshot residue. Given this, a forensics examiner determined that Eilbes was shot while he was at least three to four feet from the shooter.

In determining whether the evidence was sufficient, we review the record de novo, viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Viewed in a light most favorable to the prosecution, a rational jury could find that defendant had the intent to kill beyond a reasonable doubt. *Cline*, *supra*. Only minimal circumstantial evidence was required to establish this intent, see *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008), and the use of a lethal weapon supported the inference of an intent to kill, *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975). Based on Eilbes's testimony indicating that he was fleeing an armed robbery, the fact that a firearm was used, and that forensics evidence established that Eilbes was shot in the back at close range, but within a range suggesting that he was fleeing, the jury could have determined that defendant shot Eilbes intending to kill him, possibly because Eilbes could implicate him in the robbery.

Defendant next argues that his motion for an evidentiary hearing on an ineffective assistance of counsel claim should have been granted, and that he was provided with ineffective assistance. He asserts that counsel's advice not to testify was unwise and that counsel should have requested certain lesser included offense instructions. Defendant did not raise the first issue in his motion for an evidentiary hearing. Accordingly, review of this claim is limited to mistakes apparent on the record. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Because we find no evidence of a failure to advise, and hold that defendant was not entitled to the instructions as a matter of law, we conclude that defendant received effective assistance.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant must meet a heavy burden to overcome the presumption that counsel employed an effective trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

The record does not substantiate defendant's claim that counsel advised him not to testify. Thus, defendant cannot establish deficient performance on this basis. We also note that counsel may have determined that the defense was more advantageously presented through defendant's statements to the police. This may have been an appropriate trial strategy.

Regarding the lesser included offense arguments, defendant asserts that reckless discharge of a firearm is a lesser included offense of assault with intent to commit murder. Further, he asserts that carrying a firearm while intoxicated resulting in serious impairment of body function and reckless discharge of a firearm are lesser included offenses of felony-firearm.

In *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), our Supreme Court held:

> [A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and *a rational view of the evidence would support it*. [Emphasis added.]

Regarding the instructions for reckless discharge of a firearm, we need not address all of defendant's argument as we conclude that it was not supported by a rational view of the evidence. MCL 752.861 provides:

> Any person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor. . . .

The defense in this case was self-defense. Defendant claimed that he shot Eilbes to protect himself. Thus, by all accounts, the shooting in this case was purposeful. Since it was "wilfull," the jury could not have concluded that defendant was guilty of reckless discharge.

Defendant cites *People v Burton*, 87 Mich App 598; 274 NW2d 849 (1978), for the proposition that the underlying felony is always a lesser included offense of felony-firearm. He asserts that an instruction should have been given for any felony that rationally would have been supported by the evidence, including carrying a firearm while intoxicated resulting in serious impairment of body function.

Preliminarily, *Burton* is not binding since it predates 1990. See MCR 7.215(J)(1). Moreover, the underlying felony is regarded as a predicate offense to a charge of felony-firearm. See e.g., *People v Clark*, 463 Mich 459, 464; 619 NW2d 538 (2000). A predicate offense will not be regarded as a lesser included offense:

> Unfortunately, the underlying or predicate felony of a felony-murder charge, in this case larceny, is not so easily categorized as either a necessarily or cognate lesser included offense. While it is true that the underlying felony necessarily must be committed in order for a murder to constitute felony murder, it is also true that the particular predicate offense required for a finding of felony murder will differ depending on the facts of the case. Thus, the predicate felony

> of a felony-murder charge has characteristics of both a necessarily and a cognate lesser included offense.
>
> In truth, the underlying felony is not a lesser included offense at all. The concept of lesser included offenses implies a logically linked continuum in which the offenses share elements that coincide in violations of the societal interest to be protected. [*People v Ora Jones*, 395 Mich 379, 390; 236 NW2d 461 (1975)]. By contrast, a predicate-based offense and its predicate are tied together by the Legislature. The former offense is defined by reference to the latter offense, or in the case of felony murder a class of offenses, and proof of the latter is a prerequisite for proof of the former. See *People v Wilder*, 411 Mich 328, 359-360; 308 NW2d 112 (1981), (concurring opinion of Ryan, J.). *The underlying felony is more accurately classified as an element of the offense* of felony murder. See *id*., 345-348. [*People v Sanders (On Remand)*, 190 Mich App 389, 391-392; 476 NW2d 157 (1991) (emphasis added)].

In sum, defendant was not entitled to the specified lesser included offense instructions. Accordingly, there was no error giving rise to an ineffective assistance of counsel claim.

Finally, defendant argues that the trial court erred in scoring offense variable 6 at 25 points instead of 10 points. Defendant argues that he should have been scored 10 points under MCL 777.36(2)(b), averring that he was trying to fend off a sexual assault and accordingly, the shooting occurred in a "combative situation." We disagree.

Subsection (2)(b) was not applicable because it deals with a *killing*, which did not occur. Subsection (2)(a) dictates that the variable be scored in accordance with the verdict unless the judge has extraneous information. Here, the jury necessarily found that defendant had the intent to kill, which would support a score of 25 points under subsection (1)(b) unless the killing occurred while defendant was in an extreme emotional state caused by provocation. The jury rejected defendant's theory of self-defense, indicating it rejected defendant's claim that he was fending off a sexual advance. Accordingly, the score of 25 points was in line with the jury's verdict.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck