STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2010
v	No. 290885 Wayne Circuit Court
JASON LAWRENCE RIVERS, Defendant-Appellant.	LC No. 08-013138

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, assault with a dangerous weapon (felonious assault), MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 15 to 30 years for the assault with intent to commit murder conviction, two to four years for the felonious assault conviction, and 2-1/2 to 5 five years for the CCW conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals by right. We affirm.

Defendant's convictions arise from an altercation with Derrell Fuqua, who was shot once in the arm. Earlier on the day of the assault, defendant and Fuqua encountered each other at the home of Lawanda Jones, who was formerly involved in a relationship with defendant, but was then pursuing a relationship with Fuqua. Fuqua testified that when he arrived at his home later in the day, defendant approached him, produced a gun, and shot him. Fuqua stated that he was wounded in his arm and then struggled with defendant over the gun, which discharged two more time during the struggle. When the gun appeared to jam, Fuqua let defendant go and defendant left. Defendant claimed that it was Fuqua who initiated the confrontation and produced the gun, which discharged about two times during a struggle.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence of his intent to kill Fuqua to support his conviction of assault with intent to commit murder. When a defendant challenges the

sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the charged crime was proven beyond a reasonable doubt. *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

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 Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Defendant only challenges the second element. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent is sufficient. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). Defendant argues that evidence indicating that Fuqua was only shot in the arm at close range precludes a finding that he actually intended to kill. We disagree. A person's intent to kill may be inferred from any facts in evidence, including the use of a gun at close range. *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974); *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). Here, a rational trier of fact could reasonably find that defendant intended to kill Fuqua when he shot him at close range, but that Fuqua's effort to defend himself resulted only in a nonfatal wound. The evidence was sufficient to support defendant's conviction of assault with intent to commit murder.

II. PROSECUTOR'S CONDUCT

Defendant argues that the prosecutor's conduct denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, this issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Claims of prosecutorial misconduct are decided case-by-case, and this Court reviews the pertinent record and evaluates the prosecutor's remarks in context. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's comments must be read as a whole and evaluated in light of their relationship to defense arguments and the evidence presented at trial. *Id.*

Defendant argues that the prosecutor improperly suggested during his rebuttal argument that defendant was responsible for the nonappearance of witness James Fleming. We disagree. The prosecutor's remarks were responsive to defense counsel's closing argument in which defense counsel suggested that Fleming, who was present during the altercation between defendant and Fuqua, would have testified at trial that Fuqua's account of the events was accurate. In rebuttal, the prosecutor explained that there are different reasons why a witness may not appear at trial and asked the jury not to speculate what those reasons might be. The prosecutor properly responded to defense arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, contrary to what defendant argues, the prosecutor did not suggest that defendant was somehow responsible for Fleming's not appearing but rather asked the jury not to speculate about Fleming's absence. Accordingly, there was no plain error.

Defendant also argues that during the prosecutor's cross-examination of defendant the prosecutor improperly elicited that defendant had been incarcerated. We disagree. A claim of prosecutorial misconduct cannot be based on good-faith efforts to admit evidence. *People v*

Noble, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, defendant testified that during his struggle with Fuqua, the gun discharged, and a bullet grazed his hand. The prosecutor cross-examined defendant regarding this claim, asking if he sought medical treatment for his injury or reported the wound to jail personnel when the police arrested him for this offense. Defendant testified that he was admitted to the jail with the wound, but medical treatment was not provided.

The prosecutor's cross-examination tested the credibility of defendant's claim that he sustained a gunshot injury during the altercation with Fuqua and, was therefore, relevant. MRE 401; *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995). Further, because the questioning referred to defendant's incarceration immediately after his arrest, and it would be reasonable for a jury to expect that a person arrested for a violent shooting offense would be subject to a period of detention following the arrest, the questioning was not unfairly prejudicial under MRE 403. *Mills*, 450 Mich at 75. There was no suggestion that defendant had been incarcerated for some other matter. Therefore, the prosecutor's questioning was not improper.

Because the prosecutor's conduct was not improper, defendant's related claim that defense counsel was ineffective for not objecting to the challenged conduct also cannot succeed. Counsel is not required to make a meritless objection. *Unger*, 278 Mich App at 255.

III. DOUBLE JEOPARDY

Defendant lastly argues that his dual convictions for assault with intent to commit murder and felonious assault, arising from a single assault, violate his double jeopardy protections against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15. Because defendant did not raise this double jeopardy issue below, our review is limited to plain error affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

The Double Jeopardy Clauses of the United States and Michigan Constitutions protect against multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). Whether two offenses constitute the "same offense" for purposes of this double jeopardy protection is determined by applying the same-elements test set forth in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). See *People v Smith*, 478 Mich 292, 295-296, 324; 733 NW2d 351 (2007). Under that test, two offenses do not constitute the same offense for double jeopardy purposes if each offense requires proof of a fact that the other does not. *Id.* at 304, 315-316, 324; *Blockburger*, 284 US at 305.

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. *Davis*, 216 Mich App at 53. The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). Thus, an actual intent to kill is an element of assault with intent to commit murder, but is not required to prove felonious assault. Conversely, felonious assault requires proof that the defendant committed an assault using a dangerous weapon, an element not required to prove assault with intent to commit murder. Because each offense contains an element that the other does not, defendant's multiple punishments do not violate his double jeopardy protections, even if the acts that led to the two assault convictions occurred during a single temporal transaction. See also *People v Strawther*,

480 Mich 900; 739 NW2d 82 (2007) (holding that the defendant's dual convictions for felonious assault and assault with intent to do great bodily harm less than murder did not violate the defendant's double jeopardy protections because the two crimes have different elements).

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis