STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2016
v	No. 325852 Wayne Circuit Court
TREMAYNE WILLIAM ANDERSON, Defendant-Appellant.	LC No. 14-003712-FC

Before: RONAYNE KRAUSE, P.J., and JANSEN and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, three counts of second-degree child abuse, MCL 750.136b, and one count of domestic violence, MCL 750.812. Defendant was sentenced as a fourth-habitual offender, MCL 769.12, to serve 6 to 36 years for each of the assault and child abuse convictions, and to time served (93 days) for the domestic violence conviction. Defendant appeals as of right. We affirm.

I. FACTS

Kishwar Smith and defendant were in a dating relationship in April 2014. Smith testified that on April 19, 2014, she, defendant, nine-year old Tahara Ahmad (Smith's daughter), nine-year-old Brenae Rice (Ahmad's friend), and 18-month-old Ethan Monk (Smith and defendant's son) were all at Smith's friend's house. Smith testified that later that evening at her friend's house, defendant called her a "bitch," provoking a fight between defendant and another guest in which defendant got "beat . . . up." Smith testified that the incident made defendant angry. Smith testified that she and the children then left with defendant in his car, and that defendant became irate and began to punch her in the head and rip her hair out. According to Smith, defendant then said, "I might as well just kill us all." Ahmad and Rice confirmed that defendant threatened to kill everyone. Smith said that defendant abruptly turned, accelerated, and drove over a curb and directly into another car. Smith testified that defendant then put the car in reverse and pulled away. Before he did so, Ahmad and Rice managed to get out of the car. Defendant continued to drive and punch Smith until he accelerated, jumped some railroad tracks, sending the car airborne, and crashed into a concrete barrier near the Detroit River. According to Smith, the airbags deployed and defendant was knocked unconscious.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his assault with intent to do great bodily harm less than murder convictions, which pertained to Smith and Monk.[1] We disagree.

When reviewing a sufficiency challenge, "evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

In *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), this Court explained the following regarding assault with intent to do great bodily harm less than murder:

> The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. This Court has defined the intent to do great bodily harm as an intent to do serious injury of an aggravated nature. [Citations, quotation marks, and emphasis removed.]

Defendant's argument is that there was insufficient evidence presented in regard to the second element. Specifically, defendant asserts that his "conduct showed no conscious or goal-directed desire to assault his passengers when he became involved in a collision with another car and later struck a barrier as he fought with his front seat passenger."

Defendant's argument is without merit. Intent "may be proven directly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992) (citations omitted). Here, there was ample evidence to support the jury's determination that defendant had the requisite intent. First, defendant himself told the passengers that he was going to kill them and that he was going to drive the car into the river. From his statements, a reasonable jury could conclude that defendant intended to do serious injury of an aggravated nature. Second, defendant drove the car into a concrete barrier near the Detroit River. It is clear from the testimony that if this barrier had not been present defendant might have been successful in driving the car into the river. From defendant's act of driving the car into the barrier near the river, a reasonable jury could also infer that defendant intended to do serious injury of an aggravated nature. Accordingly, viewing the evidence in the light most favorable to the prosecution, a rational jury could find defendant guilty beyond a reasonable doubt of assault with intent to do great bodily harm less than murder.

III. FAILURE TO PROVIDE JURY INSTRUCTIONS ON LESSER OFFENSES

[1] Defendant was acquitted of related charges relative to Ahmad and Rice.

Defendant next argues that the trial judge erred and denied him his right to a fair trial by not instructing the jury on the lesser included offenses of third and fourth-degree child abuse. We disagree.

First, defendant waived any challenge to the jury instruction. After reading the jury instructions, the trial court asked, "are there any objections or corrections to the jury instructions as read to the jury?" In response, defense counsel stated, "No, Your Honor." This statement constituted an affirmative approval of the trial court's jury instruction, waiving any claim of error. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) ("One who waives his rights . . . may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.") (Citation omitted); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004) (observing that an affirmative statement by defense counsel that there are no objections to the jury instructions constitutes express approval of the instructions, waiving appellate review).

Second, although a trial judge may instruct sua sponte on a lesser included offense if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded fair notice of those lesser included offenses, the trial judge is not required to do so unless the defendant is charged with first-degree murder. *People v Johnson*, 409 Mich 552, 562; 297 NW2d 115 (1980). Accordingly, even if the issue were not waived, we would conclude that the trial court did not err in failing to give the instructions sua sponte.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his counsel rendered ineffective assistance. We disagree.

The determination as to whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact. The factual findings are reviewed for clear error and the matters of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The ultimate decision whether counsel rendered ineffective assistance is reviewed de novo. *Id.* Because no evidentiary hearing on the effectiveness of counsel was held, there are no factual findings on defendant's ineffective assistance of counsel claims, and this Court is left to review this issue on the existing record. *People v Thomas*, 260 Mich App 450, 457-458; 678 NW2d 631 (2004); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendant argues that he was denied his right to the effective assistance of counsel when counsel: (1) failed to request instruction on lesser included offenses to second-degree child abuse, and (2) failed to object to testimony that implied that defendant had previously been incarcerated.

Effective assistance of counsel is presumed and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated counsel's conduct. *LeBlanc*, 465 Mich at 578. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v*

Mack, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Here, defendant is unable to overcome the strong presumption that sound trial strategy motivated counsel's conduct in regard to counsel's "failure" to request the lesser included offense instructions. Defense counsel could have correctly assumed that instruction on lesser offenses might have reduced defendant's chance at acquittal, especially where counsel's theory was that defendant did not actually intend to hurt anyone and made the threatening statements because he was drunk. "The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982).

In regards to defendant's second argument, at trial, the following exchange occurred between the prosecutor and Ahmad:

> *Q.* How long had you known Mr. Anderson?
>
> *A.* Three or four years.
>
> *Q.* And you had been around Mr. Anderson often?
>
> *A.* Yes, if he's not in jail, yeah.

On appeal, defendant argues that he was denied his right to the effective assistance of counsel because counsel failed to object, ask for a curative instruction, or ask for a mistrial.

In regards to counsel's failure to request a mistrial, the general rule is that "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). The improper comment by the child that defendant had been previously incarcerated was not grounds for a mistrial because it was not elicited by the prosecutor's questioning. Instead, the information was volunteered and was an unresponsive answer to a proper question. Accordingly, counsel did not err in failing to make a mistrial request that would have been denied. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004) (observing that counsel was not ineffective for failing to make a futile or meritless objection).

In regards to counsel's failure to object and request a limiting instruction, defendant is unable to overcome the strong presumption that sound trial strategy motivated counsel's conduct. Counsel may have soundly chosen not to object and request a limiting instruction so that no further attention would be drawn to the child's statement that defendant had spent time in jail. See e.g. *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 178 (1999) ("because a special instruction concerning defendant's having been incarcerated would necessarily have highlighted that fact, defense counsel may well have decided not to bring that double-edged sword into play as a matter of sound strategy"), overruled on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). Moreover, there was substantial evidence of guilt adduced at trial, and defendant cannot show that but for counsel's alleged errors, the result of his trial would have been different.

IV. PROSECUTORIAL MISCONDUCT

Defendant's final argument is that he was denied his due process rights by the prosecutor's alleged misconduct. We disagree.

Defendant did not object to the instance of prosecutorial misconduct that he raises on appeal. Thus, this issue is unpreserved, and review is for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

> When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Further, the propriety of a prosecutor's remarks will depend upon the particular facts of each case. In addition, a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*Id*., at 330 (citations omitted).]

Defendant argues that the prosecutor improperly vouched for the two children who testified. Specifically, defendant claims that the prosecutor implied that he had special knowledge that the children testified truthfully, and refers to the following statement, which was made during the prosecutor's closing argument:

> The judge is going to tell you how you judge people's credibility. You have to ask yourself, okay, are the children lying. Are these children making this up? Are they so young that they're so confused that they cannot articulate what happened that day. You've got to ask yourself that. The witness stand is in close proximity to you so you can assess the witnesses to make a determination yourself on whether or not these people have the ability to recall things, whether or not they have the ability and the recall to tell you exactly what happened. You have to make that determination.
>
> **In my opinion the kids were very credible**. The kids were very articulate. They were bright children. They were able to tell you how mad he was, and they were able to tell you that nothing was obstructing their view, and they saw him beating her face and about her body. They saw him pulling her hair out. [Emphasis added.]

First, viewing the prosecutor's statements in context and as a whole, it is clear that the prosecutor improperly argued that the children's testimony was credible because they were articulate, bright, and were able to describe events that were corroborated by other evidence. "[A] prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Callon*, 256 Mich App at 330. Further, the prosecutor did personally vouch for the credibility of the children, and later advanced his position that the facts and evidence demonstrated that the children were credible. This error, however was harmless. Indeed, immediately before the "my opinion" comment the prosecutor clearly explained the jury's role in judging the credibility of a witness. In this context, the remarks were not improper. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (noting that although a prosecutor cannot vouch for the credibility of a witness or suggest that the government has special knowledge regarding the witness's truthfulness, the prosecutor may argue from the facts that a witness is credible). Second, a timely objection and cautionary instruction could have cured any

possible prejudice from the prosecutor's extremely brief comment. In fact, the trial court instructed the jury that the attorney's statements were not evidence, that the jury should only accept things that an attorney said that are supported by the evidence or by its own common sense, and that the jury was to decide the facts of the case, including whether to believe a witness, presumably curing any prejudice arising from the comments. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."). Finally, even if the comment by the prosecutor was prejudicial, reversal is not warranted because the alleged error did not result in the conviction of an actually innocent defendant, or seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Callon*, 256 Mich App at 329-330. Accordingly, defendant's arguments on this issue fail.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens