STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAR PINKNEY, SR.,

Defendant-Appellant.

UNPUBLISHED
November 15, 2012

No. 300214
Wayne Circuit Court
LC No. 09-029532-FC

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, three counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 35 to 80 years for the murder conviction and two to four years for each felonious assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We vacate one of defendant's felonious assault convictions, but affirm his remaining convictions and sentences.

I. FACTS

This case involves the shooting death of JP, who was the 15-year-old son of defendant and Lazette Cherry. JP admitted to his family that he had sexually abused his younger half-sister, defendant's daughter. Defendant first learned about this during a phone conversation in the middle of the night. The next morning, defendant went over to the duplex house where JP and Lazette were located. After JP admitted the sexual abuse to defendant in person, defendant started beating on JP.

Yolanda Cherry, who is Lazette's sister, and LaTonya Prather were in the upstairs portion of the duplex, while defendant, Lazette, and JP were in the downstairs portion. When defendant started to beat JP, Yolanda and Prather both heard the commotion coming from downstairs and both went down to investigate, with Yolanda quickly heading down first. Because the units were in a duplex, they had to walk down, exit outside, and then enter the front door of the downstairs unit.

Yolanda was first to enter the downstairs unit, and she saw defendant beating on JP. Yolanda moved in and pushed defendant away from JP. It is not clear from the record which

way people were facing and where everyone was located with respect to the front door at this point. Regardless, Prather testified that when she entered the downstairs unit, Yolanda was shoving defendant. Prather also testified that in response to being shoved by Yolanda, defendant pulled a gun and pointed it first at Yolanda and then later at Lazette, while issuing threats to the both of them. When asked where she was when defendant pointed the gun at the other two women, Prather stated that she was "to the right of [defendant], but in back of him." Yolanda testified that after defendant pulled the gun, she raised her hands and started backing away from defendant toward the front door and that defendant then resumed his attack on JP.

After Yolanda and Prather left, defendant forced JP to strip, forced him outside to a nearby field, and shot him in the head. Defendant did not deny shooting JP, but claimed that he became enraged after JP disclosed the sexual abuse and shot JP in the heat of passion and, therefore, was only guilty of voluntary manslaughter. Defendant denied threatening any other individuals.

II. SUFFICIENCY OF THE EVIDENCE

A.

Defendant first argues that the evidence was insufficient to support his convictions for second-degree murder and one count of felonious assault. A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both the direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). 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 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). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To establish second-degree murder, the prosecution must prove "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have a lawful justification or excuse." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be inferred from the facts and circumstances of the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Circumstantial evidence and the inferences from the evidence are admissible to establish malice. *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003). Malice may be inferred from a defendant's use of a deadly weapon, *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999), because such use "support[s] an inference of an intent to kill." *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975). The crime of murder is reduced to voluntary manslaughter if the defendant

lacked malice because he acted in the heat of passion without time for reflection. *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). Ultimately, "[i]t is for the jury to determine whether the element of malice can be inferred from all the evidence." *People v Flowers*, 191 Mich App 169, 176-177; 477 NW2d 473 (1991).

The evidence, when viewed in a light most favorable to the prosecution, showed that JP spoke to defendant on the phone during the middle of the night and confessed to sexually abusing his younger half-sister. Later that morning, defendant confronted JP and demanded to know the details of the incident. According to two witnesses, after JP reported what he did, defendant told JP, "[Y]ou want to hump on somebody? I'm going to show you. I'm going to show you how it feel." Defendant, who was armed with a gun, assaulted JP, forced him to strip, directed him out of the house and into a field, and then shot JP in the head. This evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant acted with an intent to kill. While defendant may have been angry about the sexual assault of JP's half-sister, he was aware of it several hours beforehand and had time to reflect on it and to discuss it with JP and JP's mother. Thus, the jury could reasonably find that he was not acting in the heat of passion, without time for reflection. Therefore, the evidence was sufficient to support defendant's conviction of second-degree murder.

B.

Defendant next argues that the evidence was insufficient to support his conviction for feloniously assaulting Prather. We agree.

"Felonious assault is defined as a simple assault aggravated by the use of a weapon." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). "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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

The first element of felonious assault is established by showing "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). An attempted-battery assault is one which is "sufficiently proximate to the intended victim," thus evincing the defendant's actual ability to inflict injury on the victim. *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998). The key question for this element in the instant case is whether Prather had an apprehension of *imminent* injury and whether that apprehension was reasonable. *Id.*

Further, the crime of felonious assault is a specific intent crime. *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551 (1985), citing *People v Johnson*, 407 Mich 196; 284 NW2d 718 (1979). "Thus, felonious assault requires the additional showing that the defendant intended to injure or intended to put the victim in reasonable fear or apprehension of an immediate battery." *Robinson*, 145 Mich App at 564.

On appeal, plaintiff contends that the following testimony by Yolanda is sufficient to show that defendant also assaulted Prather with the gun:

> *Q*. And where is she [Prather] when the gun gets pulled?
>
> *A*. When I was backing up she was on the side of me. And then that's when she went out the door behind me.

We find that the prosecution's reliance on this testimony is misplaced. While this testimony (somewhat) addresses the physical proximity of Prather to Yolanda while Yolanda was backing out, it does not address where the gun was pointed during this time,[1] does not address whether defendant intended to place Prather in fear of an imminent battery, and it does not address whether Prather herself was in fear of an imminent battery. We note that regardless of whether Prather was "on the side" of Yolanda at some point or not, Prather never testified that the gun was pointed at her at any time, never testified that defendant threatened her with the gun, and, most importantly, never testified that she thought she was about to be shot. Instead, she testified that she was behind defendant when he threatened the other two women with the gun. Without any overt action or threat directed at Prather, there is insufficient evidence that defendant assaulted her. As our Supreme Court noted, "the assault element is satisfied where the circumstances indicate that an assailant, by overt conduct, causes the victim to reasonably believe that he will do what is threatened." *Reeves*, 458 Mich at 244. But those threats have to be directed at the victim. See *id.* Here, even if Prather reasonably believed that defendant was going to follow through on his threats, those threats were directed solely at Lazette and Yolanda, not her. Accordingly, there is insufficient evidence that Prather had a reasonable apprehension of an *immediate* battery.

Further, the evidence does not establish that defendant possessed the requisite intent to be convicted of this crime. While the evidence was abundantly clear that defendant threatened and intended to put Yolanda and Lazette in fear of being shot, there was no evidence that defendant specifically intended to place Prather in the same position. Again, the record indicates that Prather testified that defendant only issued threats toward and pointed the gun at Yolanda and Lazette. Therefore, there is insufficient evidence to establish that defendant specifically intended to place Prather in fear of an imminent battery.

Plaintiff also relies on Lazette's testimony that after defendant shot JP in the field, he stood over JP with the gun and did something to indicate "don't nobody come out. . . . I don't want nobody to come help." However, Prather was not in the field at this time and instead testified that after defendant shot JP, she left the front porch of the house and went inside the home. She also did not indicate that she heard defendant say anything after the shooting. As a result, there is no evidence that Prather felt she was in imminent danger of being shot by defendant.

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[1] In fact, Yolanda's other testimony provides that when she started backing away, defendant "steady [sic] went back to [JP]," which seems to mean that defendant turned his attention back to JP.

We further note that plaintiff's reliance on *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980), is misplaced. In *Pace*, the Court stated that "[a] felonious assault conviction can be sustained without proof of the use or attempt to utilize any force." *Id.* at 534. But this does not negate or alter the elements of felonious assault – the prosecution must still prove that the victim had an apprehension of an *immediate* battery. *Reeves*, 458 Mich at 244. An example illustrating the concept in *Pace* would include the situation where a defendant opens a coat to reveal a gun and then demands money from a victim; even though there was no force utilized, the threat of an immediate battery from a dangerous weapon is nonetheless present. Accordingly, because there was insufficient evidence establishing that Prather had an apprehension of an immediate battery, we vacate defendant's conviction of felonious assault with respect to the charged assault of Prather.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that improper remarks by the prosecutor during opening statement and closing argument denied him a fair trial. Because defendant did not object to the prosecutor's remarks at trial, this issue is not preserved. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Unpreserved issues of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764; *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). Thus, reversal is not required if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction, *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006).

Most of the challenged remarks are within the bounds of fair comment on the evidence and reasonable inferences drawn therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Although the prosecutor harshly criticized defendant's conduct, a prosecutor is permitted to "use 'hard language' when it is supported by evidence and [is] not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996) (citations omitted).

The prosecutor's affirmative statements regarding the facts were not improper personal opinion regarding defendant's guilt or the evidence. See *People v Nimeth*, 236 Mich App 616, 626-627; 601 NW2d 393 (1999). The remarks were tied to the evidence and the fact that the prosecutor did not preface her remarks with a statement like "The evidence shows that . . ." or "You can infer from the evidence that . . ." does not change the remarks from proper commentary to assertions of fact based on personal knowledge. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995). The prosecutor's argument that defendant's version of events was a lie also was not improper. The argument was tied to the evidence and the prosecutor may "argue from the facts that . . . the defendant or another witness is not worthy of belief" or is lying. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). The prosecutor's requests for the jury to "do justice" was not an improper civic duty argument because it was tied to the evidence. *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987). Even if the requests could be deemed improper, they were relatively innocuous for a civic-duty argument and any resultant prejudice could have been cured had an instruction been requested. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

We agree that the prosecutor improperly made a statement of fact that was unsupported by the evidence. See *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Contrary to the prosecutor's argument that the jury had not "heard anything like" the phrase "you violated my baby," Lazette testified that defendant told JP, "You violated my daughter." However, any prejudice from this isolated statement was mitigated by the trial court's instructions that the lawyers' closing arguments are not evidence and that the jury can accept what a lawyer says in closing only if it is "supported by the evidence or your own common sense and general knowledge." The trial court's instruction was sufficient to protect defendant's substantial rights. See *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005).

To the extent that some of the prosecutor's remarks could be considered improper appeals to the jury to sympathize with the victim, see *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008); *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994), the trial court instructed the jury that the lawyers' opening statements and closing arguments are not evidence, and that it was not to let sympathy or prejudice influence its decision. Again, these instructions were sufficient to protect defendant's substantial rights. Accordingly, we find no basis for relief.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was deprived of the effective assistance of counsel. Defendant did not preserve this issue by raising an ineffective assistance of counsel claim in a motion for a new trial or request for an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Therefore, our review is limited to errors apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish ineffective assistance of counsel, a defendant must show "that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

Defendant first argues that trial counsel was ineffective for failing to retain and call Dr. Gerald Shiener as an expert witness. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). 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.* "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant contends that Dr. Shiener could have "weighed . . . potential state of mind defenses" such as temporary insanity or psychosis, acute psychosis, or some other temporary mental aberration. The record shows that defendant was referred to the Center for Forensic Psychiatry and the examiner determined that defendant was not mentally retarded or mentally ill at the time of the offense and that there was "no basis for a finding of legal insanity." Defense counsel then successfully petitioned the court to appoint Steven Miller as an independent forensic psychologist to evaluate defendant. In his witness lists, defendant named Dr. Shiener as a possible witness in addition to Miller. Defense counsel later advised the court that Miller's evaluation "was consistent with the finding of the Forensic Center." Dr. Shiener did not testify at trial.

The record does not show why Dr. Shiener was not called as a witness at trial. But it also does not show that Dr. Shiener could offer any admissible evidence that was beneficial to the defense. Dr. Shiener could not testify that defendant possessed any "special mental qualities" to show that he acted in response to adequate provocation so as to reduce the offense to voluntary manslaughter because adequate provocation is that which would cause a reasonable person to lose control. *People v Tierney*, 266 Mich App 687, 715; 703 NW2d 204 (2005); *People v Sullivan*, 231 Mich App 510, 519; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000).

Defendant contends that Dr. Shiener could possibly have testified to "potential state of mind defenses." "[T]he insanity defense as established by the Legislature is the sole standard for determining criminal responsibility as it relates to mental illness or retardation." *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001). Diminished capacity short of legal insanity is not a viable defense. *Tierney*, 266 Mich App at 712-713. Therefore, "a defendant is not entitled to offer evidence of a lack of mental capacity for the purpose of avoiding or reducing criminal responsibility by negating the intent element of an offense." *People v Yost*, 278 Mich App 341, 354-355; 749 NW2d 753 (2008). There is nothing in the record to show that Dr. Shiener could testify that defendant was legally insane, and defendant has not shown that there is a legally recognized state-of-mind defense short of legal insanity on which Dr. Shiener could have offered an opinion or that defendant's state of mind was relevant for some reason other than negating criminal intent. See *id.* at 355-357. Thus, the record does not show that counsel's failure to call Dr. Shiener deprived defendant of a substantial defense. As a result, defendant cannot establish an ineffective assistance of counsel claim related to Dr. Shiener not testifying.

Defendant also argues that trial counsel was ineffective for failing to object to the prosecutor's improper remarks. As noted, the prosecutor did make some inappropriate comments in her opening statement and closing argument. The decision whether to object to the prosecutor's remarks is a "quintessential example of trial strategy." *Reed*, 449 Mich at 400. A lawyer's decision to "declin[e] to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. Had counsel objected, the court could have given an appropriate instruction to cure any perceived prejudice. But as previously indicated, the trial court did just that in its final instructions when it instructed the jury that it was not to let sympathy or prejudice influence its decision and that the lawyers' opening statements and closing arguments are not evidence. Because those instructions were sufficient to protect defendant's rights, there is no reasonable probability that the outcome would have been different had counsel objected. Thus, defendant was not prejudiced by counsel's failure to object.

V. DEFENDANT'S STANDARD 4 BRIEF

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that he was denied due process by the prosecutor's failure to provide recordings of 911 calls made by witnesses during the incident. Defendant raised this issue at trial only in the context of a request for an adverse inference instruction, which the trial court declined to give. Defendant does not challenge that decision on appeal. Because defendant did not raise a due process claim below, and an objection on one ground will not preserve an appellate challenge based on a different ground, *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993), this issue is not preserved. Therefore, defendant must establish a plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

A defendant's due process right to evidence has been recognized in cases such as *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). In *Brady*, 373 US at 87, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). In *Youngblood*, 488 US at 58, the Court held that the failure to preserve potentially useful evidence does not constitute a denial of due process absent a showing of bad faith by the police. To establish a *Youngblood* violation, "the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before the destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means." *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996).

Prather, Yolanda, and Yolanda's mother all testified that they called 911 during the incident. At defendant's arraignment, defense counsel stated that he had subpoenaed "whatever 911 tapes exist from Highland Park" and was still waiting to receive them. The prosecutor stated that she would "follow-up with it." No discovery order was entered. The record does not indicate whether the prosecutor attempted to obtain the recordings. Defense counsel did not raise the issue again in court until the first day of trial. By that time, the tapes had been reused and the recorded calls were no longer available. Defendant has not established a *Brady* violation because there is no evidence that the prosecutor ever possessed the recordings or that witnesses said anything favorable to defendant during the calls. Defendant simply speculates that such might be the case. Nor has defendant established a *Youngblood* violation. Any negligence by the state in failing to preserve the recordings despite defendant's timely request does not constitute bad faith. *Jobson*, 102 F3d at 218. Even assuming that there was some bad faith involved, defendant has not shown that the recordings had any apparent exculpatory value. Again, defendant's claim is based on mere speculation that the recordings may have revealed something favorable. Therefore, defendant has not established a plain error entitling him to relief.

We vacate defendant's conviction and sentence for one count of felonious assault (count IV), but affirm defendant's remaining convictions and sentences.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder