STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2012
v	No. 300320 Berrien Circuit Court
DONNELL DEFRANCE WILLIAMS, Defendant-Appellant.	LC No. 2010-001666-FC

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

PER CURIAM.

Defendant appeals by right his convictions of two counts of assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 75 to 125 years' imprisonment for each assault conviction and 6 to 14 years' imprisonment for the felon in possession of a firearm conviction, consecutive to two years' imprisonment for each felony-firearm conviction. We affirm.

This case stems from defendant's shooting at a vehicle driven by David Clark, an individual with whom he had a previous dispute; the shooting resulted in a young girl's being hit with a stray bullet and partially paralyzed. Defendant argues the trial court erred in denying his motion for a change of venue due to unfavorable pretrial publicity. We review for an abuse of discretion a trial court's determination on a motion for a change of venue. *People v Harvey*, 167 Mich App 734, 741; 423 NW2d 335 (1988). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Usually, a criminal defendant must be tried in the county where the crime occurred. *Unger*, 278 Mich App at 253. But a trial court may change venue to another county when special circumstances demonstrate good cause to believe it is in the interests of justice to do so. *Id.* at 253-254 n 12; MCL 762.7. To justify a change the venue on the basis of pretrial publicity, "[t]he burden rests on the defendant to demonstrate the existence of actual prejudice or the presence of strong community feeling or a pattern of deep and bitter prejudice so as to render it probable that the jurors could not set aside their preconceived notions of guilt, notwithstanding their statements to the contrary." *Harvey*, 167 Mich App at 741-742. A change of venue "might

be required in cases involving extensive egregious media reporting, a barrage of inflammatory publicity leading to a pattern of deep and bitter prejudice against the defendant, and a carnival-like atmosphere surrounding the proceedings." *Unger*, 278 Mich App at 255 (citation and quotation marks omitted). "The totality of the circumstances, including the content of news accounts and the voir dire examination transcript, should be evaluated on appeal in deciding whether a defendant was deprived of a fair and impartial trial due to local prejudice." *Harvey*, 167 Mich App at 742. Pretrial publicity, standing alone, is insufficient to justify a change of venue. *People v Jendrzejewski*, 455 Mich 495, 517; 566 NW2d 530 (1997).

We conclude there is insufficient evidence to establish a "'pattern of deep and bitter prejudice' in the community to impeach the fairness of the seated jury." *Jendrzejewski*, 455 Mich at 520, quoting *Irvin v Dowd*, 366 US 717, 727; 81 S Ct 1639; 6 L Ed 2d 751 (1961). The trial court took special precautions to screen jurors individually to determine if any potential juror had been exposed to media coverage of defendant's case. Only five potential jurors indicated they had been, but none of these individuals served on the jury. After impaneling the jury, the trial court denied defendant's motion for a change of venue. It is proper for "a trial court to defer determination on a request for a change of venue until an attempt has been made to select a jury in the county where the crime occurred." *People v Collins*, 43 Mich App 259, 262; 204 NW2d 290 (1972).

Defendant raises a number of additional issues in his standard 4 brief on appeal. First, he argues he was denied his right to testify in his own defense. We find defendant waived this issue because his trial counsel informed the trial court: "Mr. Williams has indicated that he does not wish to testify," and defendant expressed no contrary view. Waiver is "'the intentional relinquishment or abandonment of a known right.'" *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011), quoting *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation omitted; quotation omitted). A party who waives his right may not seek appellate review because the waiver has extinguished any error. *Carter*, 462 Mich at 215. "While the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel." *Id.* at 218. Because defendant waived this issue, any error has been extinguished.

Defendant next argues his trial counsel was ineffective in advising him not to testify and failing to inform him of his right to testify. Because no *Ginther*[1] hearing was held, "review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To prove ineffective assistance of counsel, defendant must demonstrate: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged error, rendering the result fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant must establish the "factual predicate" for his claim that counsel's conduct fell below objective reasonableness. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

"A defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *Id*. The decision to testify or not to testify is a strategic one "best left to an accused and his counsel." *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). Nothing in the record supports defendant's allegations on appeal that counsel advised him not to testify and failed to inform him of that right. Because the burden is on defendant to establish "the factual predicate for his claim of ineffective assistance of counsel," *Hoag*, 460 Mich at 6, defendant's claim fails.

Defendant next argues the trial court erred in refusing to give an instruction on assault with a dangerous weapon (felonious assault), MCL 750.82, as a necessarily lesser included offense of assault with intent to murder. We disagree. A defendant is only entitled to an instruction on a lesser offense where "the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). A defendant is not entitled to an instruction on cognate lesser offenses. *Id.* n 5; MCL 768.32(1). Cognate lesser offenses are those that "share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *Mendoza*, 468 Mich at 532 n 4. Because felonious assault is a cognate lesser offense of assault with intent to murder, *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006), defendant was not entitled to an instruction on felonious assault.

Defendant next argues both a number of instances of prosecutorial misconduct and that his trial counsel was ineffective in failing to object to the misconduct. Because defendant failed to object to the alleged instances of misconduct; therefore, the unpreserved claims of misconduct are reviewed for plain error. *Unger*, 278 Mich App at 235. To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* The burden is on defendant to demonstrate prejudice. *Id.*

Defendant first argues the prosecutor argued facts not supported by the evidence. Although a prosecutor may not argue facts unsupported by evidence or mischaracterize the evidence, a prosecutor may argue all reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Also, prosecutors are accorded "great latitude" with respect to their arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant alleges the following comment by the prosecutor during closing argument was improper: "[W]hen he leveled that gun at that car that David Clark was in, and basically, kept firing until he ran out of bullets, what was in his heart and mind?" Contrary to defendant's assertion that this statement was not supported by the evidence, numerous witnesses heard between four and six shots fired and several identified the gun defendant fired as a revolver. The challenged remark was a reasonable inference from the evidence supporting the prosecutor's

theory of the case, that defendant rapidly fired a revolver, to prove defendant's intent to kill. *Watson*, 245 Mich App at 588. We also disagree the prosecutor's comment that defendant must have noticed that Clark had children in his backseat was improper. This was a proper argument regarding defendant's state of mind. The prosecutor was free to argue from the evidence that Clark could not have reasonably provoked defendant because Clark said nothing to defendant and he had four children in his vehicle at the time. Defendant has failed to demonstrate plain error.

We additionally find no merit in defendant's argument that the prosecutor's comments during closing argument somehow shifted the burden of proof. There is nothing in the record to support this claim. Further, the jury was instructed defendant must be acquitted unless they found him "guilty beyond a reasonable doubt." The trial court's instructing the jury regarding the presumption of innocence and the burden of proof negated any prejudice that may have ensued from the prosecutor's remarks. *People v Rodriguez*, 251 Mich App 10, 30-31; 650 NW2d 96 (2002). The jury is presumed to follow its instructions. *Unger*, 278 Mich App at 235. Consequently, defendant has failed to demonstrate plain error on this ground. Similarly, we find no merit in defendant's argument that the prosecutor committed misconduct by commenting on his parole release before trial. There is no indication that any juror was aware of these comments. Defendant has failed to establish any plain error affecting substantial rights. *Carines*, 460 Mich at 763. Defendant also argues the cumulative effect of the prosecutorial misconduct warrants reversal, even if the individual errors do not. Because we find no error, there is no error to accumulate, so defendant's argument fails. See *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002). Finally, where no prosecutorial misconduct occurred, defendant's trial counsel was not ineffective for failing to make futile objections. *Odom*, 276 Mich App at 416.

Defendant next argues his sentence essentially amounts to a life sentence without the possibility of parole and, therefore, constitutes cruel and unusual punishment. Defendant failed to preserve this issue by raising it before the trial court at sentencing; consequently, defendant must demonstrate plain error affecting his substantial rights. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Defendant also contends his trial counsel was ineffective in failing to object to his sentence on this ground. The Michigan constitution prohibits "cruel or unusual" punishment, Const 1963, art 1, § 16, while the United States constitution prohibits "cruel and unusual" punishment, US Const, Am VIII. Consequently, Michigan's constitution affords greater protection than the federal constitution so that if a punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000). Defendant was sentenced within the recommended minimum sentence range under the legislative guidelines and does not challenge the scoring of the guidelines. MCL 769.34(10) generally requires that "a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, this limitation on review is not applicable to claims of constitutional error." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). But a sentence within the guidelines range is presumed to be proportionate and a proportionate sentence is not cruel or unusual punishment. *Id.* at 323. "[T]o overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Given his lengthy criminal history, defendant has

failed to demonstrate unusual circumstances that would render his presumptively proportionate sentence disproportionate. See *Powell*, 278 Mich App at 324. And, "because a proportionate sentence is not cruel or unusual, defendant has not established a constitutional violation." *Id.* Because defendant's cruel and/or unusual punishment lacks merit, his trial counsel was not ineffective in failing to make a futile objection. *Odom*, 276 Mich App at 416.

Defendant next argues his trial counsel was ineffective on a number of additional grounds. Because no *Ginther* hearing was held, "review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *Mack*, 265 Mich App at 125. Defendant argues his trial counsel was ineffective in failing to request an instruction—apparently CJI2d 7.23—regarding past violence by Clark. Generally, trial counsel's decision regarding what instructions to request is deemed to be a matter of trial strategy. See *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). We "will not second-guess matters of trial strategy." *Id.* CJI2d 7.23 is used to show that a defendant may have "honestly and reasonably feared" for his safety. Because t defendant presented no evidence of self-defense at trial there was no basis for counsel to request CJI2d 7.23. Defendant cannot demonstrate his counsel's performance was ineffective on this basis. See *People v Truong*, 218 Mich App 325, 341; 553 NW2d 692 (1996).

Defendant also argues his trial counsel improperly admitted defendant's guilt to the jury without defendant's approval. Defendant's claim in this regard is based both on his trial counsel's stipulation that defendant had a prior felony conviction, and his trial counsel acknowledging during closing argument that defendant fired the gun in the context of arguing defendant did not have the intent to kill. Defendant's contention regarding the stipulation to his prior felony is without merit. Defendant's trial counsel first attempted to sever the charge of felon in possession of a fire from the other charges, arguing prejudice. The trial court denied the motion. Counsel's stipulation was part of a strategy to safeguard defendant against unfair prejudice. See *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998). The stipulation prevented the prosecutor from presenting the details of the prior conviction. Defense counsel has wide discretion as to matters of trial strategy, *Odom*, 276 Mich App at 415, and it was clearly a reasonable trial strategy to stipulate to the admission of the prior conviction.

With respect to counsel's argument admitting defendant fired the gun, we conclude counsel was attempting to argue, in essence, that defendant could, at most, be convicted of voluntary manslaughter. Although this trial strategy did not work, this Court does not "second-guess" matters of trial strategy with the "benefit of hindsight." *Odom*, 276 Mich App at 415. "The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel." *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). We "will not second-guess counsel's trial tactic of admitting guilt of a lesser offense." *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Given the overwhelming evidence that defendant fired a gun at Clark's van, defendant cannot demonstrate his trial counsel was ineffective in acknowledging this fact and arguing for a lesser charge.

Defendant has failed to provide any factual basis for his arguments that his trial counsel should have impeached witnesses with prior convictions, obtained exculpatory material from the prosecutor and should have conducted discovery to uncover prior inconsistent statements. Because defendant's claim of ineffective assistance is "limited to mistakes that are apparent on

the record," *Mack*, 265 Mich App at 125, and defendant has failed to establish the factual predicate for these claims of ineffective assistance of counsel, *Hoag*, 460 Mich at 6, these arguments fail. We also find defendant has failed to articulate any factual basis beyond what is addressed above in support of his claim that his trial counsel failed to subject the prosecution's case to any meaningful adversarial testing. Instead, "defendant merely presents a list of complaints, but does not identify the bases for his claims." *Powell*, 278 Mich App at 325. We find no merit in defendant's claim his trial counsel failed to subject the prosecution's case to adversarial testing where defendant has failed to identify any favorable evidence that should have been utilized, and his trial counsel filed motions on his behalf, made objections, cross-examined witnesses, and gave a closing argument.

Defendant next argues his appellate counsel was ineffective in failing to address certain issues. Defendant fails to articulate what issues his appellate counsel should have addressed. The same standards applicable to claims of ineffective assistance of trial counsel apply to claims of ineffective assistance of appellate counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). "[D]efendant must show that his appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal." *Id.* Defendant cannot show ineffective assistance simply because counsel only raised a single issue on appeal. "Appellate counsel may legitimately winnow out weaker arguments in order to focus on those arguments that are more likely to prevail." *Id*. at 186-187. We find that "defendant has failed to overcome the presumption that his appellate counsel's decision constituted sound strategy." *Id*. at 187.

Finally, defendant's argument that the cumulative effect of errors requires reversal must fail because we have found no error. See *LeBlanc*, 465 Mich at 591-592 n 12.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello