

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 26, 2012

v

JAVON MARQUISE THOMAS,

Defendant-Appellant.

No. 302344
Ingham Circuit Court
LC No. 09-001523-FH

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

A jury convicted defendant Javon Marquise Thomas of first-degree home invasion, MCL 750.110a(2), and assault with a dangerous weapon (felonious assault), MCL 750.82. The trial court sentenced defendant to concurrent prison terms of 45 to 240 months for the home invasion and nine months to four years for the felonious assault. Defendant appeals as of right. We affirm.

I. PERTINENT FACTS

Defendant and Aleta Jones had a child together. When their relationship ended, no formal custody arrangement was in place. Defendant would simply call Aleta when he wanted to see his child. On November 25, 2009, Aleta and Carlos Jones, Aleta's fiancé at the time and now her husband, were packing in order to spend the night at Carlos' parents' house and celebrate Thanksgiving with his family. Defendant called Aleta to arrange a visit with his child, but Aleta told him that it would not be possible because the child was at Carlos' parents' house. Defendant got upset and began yelling. Carlos overheard defendant yelling at Aleta, so he took the telephone from Aleta and got on the telephone with defendant. Defendant and Carlos argued, and Carlos testified that defendant told him he was going to come over in ten minutes and kill him. Defendant immediately went to Aleta and Carlos's home but was asked to leave when he arrived. Defendant did not comply. Both Aleta and Carlos testified that, instead, defendant kicked his foot through glass panels in the front door and put his upper body through the broken part of the door to reach in and unlock the deadbolt. While Aleta was on the telephone with the police, defendant and Carlos struggled back and forth through the broken door. According to Aleta and Carlos, at some point defendant picked up a piece of glass and began swinging it at Carlos. Carlos sustained cuts to his knuckles and arms during the encounter, which he testified

required over 40 stitches. The fight ended when police sirens were heard; defendant ran down a street, where the police located and detained him.

II. RIGHT TO CONFRONTATION

Defendant first argues that his constitutional rights to confront the witnesses against him were violated when Aleta asserted her Fifth Amendment privilege against self-incrimination during cross-examination. Defendant insists that the trial court erred by failing to strike Aleta's testimony in its entirety. We disagree.

We review de novo whether a defendant's right to confront witnesses has been violated. *People v Benton*, 294 Mich App 191, 195; ___ NW2d ___ (2011). The Confrontation Clause guarantees defendant the right to confront the witnesses against him. See US Const, Am VI; Const 1963, art 1, § 20; *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010). The right to confront witnesses is generally satisfied by the ability to cross-examine. *People v Hill*, 282 Mich App 538, 540; 766 NW2d 17 (2009), vacated in part on other grounds 485 Mich 912 (2009). "If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). However, the right to confrontation is not unlimited. *Id.* "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985). "Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony." *Ho*, 231 Mich App at 190. "Sometimes, as in this case, the defendant's confrontation right may be restricted by a witness' invocation of his right against self-incrimination guaranteed by the fifth amendment." *United States v Zapata*, 871 F2d 616, 623 (CA 7, 1989). But when limiting the scope of a defendant's cross-examination of a witness who invokes the right against self-incrimination, courts must not "effectively . . . emasculate the right of cross-examination itself." *Fensterer*, 474 US at 19. "Distinctions must be made in the nature of the limitation." *People v Guy*, 121 Mich App 592, 610; 329 NW2d 435 (1982).

In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. * * * On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part. [*Id.* at 610-611 (quotation omitted); see also *Zapata*, 871 F2d at 624 ("Therefore, a court's resolution of this issue should focus on whether the unanswered questions

involved matters directly related to the scope of the direct examination or to collateral matters.”); *United States v Gullett*, 713 F2d 1203, 1209 (CA 6, 1983) (“If, however, the invocation of the privilege merely precludes inquiry into collateral matters which bear only on the general credibility of the witness, there is little danger of prejudice to the defendant, and, therefore, the witness’ direct testimony need not be stricken.”).]

When a witness refuses to answer questions on the basis of the privilege against self-incrimination, “striking the witness’s *entire* testimony is an extreme sanction.” *Zapata*, 871 F2d at 624.

Here, Aleta testified at trial that her child was not home during the confrontation and that she never saw defendant possessing a knife. However, in an ex parte motion regarding parenting time, Aleta submitted a sworn, notarized statement that said, “[O]n November 25, 2009, Javon Thomas broke in my home and assaulted my husband, Carlos Jones, with a glass from the front door he had broke and a knife [My son] has seen Javon broke [sic] in our home and stab his dad, Carlos Jones.” Defense counsel began to impeach Aleta with her sworn statement when the proceedings were halted so that Aleta could be informed of the penalties of perjury and her right against self-incrimination. The trial court then undertook to have counsel appointed for Aleta. When trial resumed the next day, Aleta asserted her privilege against self-incrimination with respect to the sworn statement. She verified, however, that she had, in fact, signed the document. The trial court permitted defense counsel to admit into evidence and read the pertinent, impeaching portion of Aleta’s sworn statement, wherein she claimed that her son witnessed the incident and that defendant had a knife. Defense counsel then continued to cross-examine Aleta on other matters.

We conclude that defendant’s constitutional right to confrontation was not violated when the trial court failed to strike all of Aleta’s testimony. Aleta’s assertion of her Fifth Amendment privilege did not preclude inquiry into the details of her direct testimony; indeed, defendant cross-examined Aleta about whether her child witnessed the assault and what object defendant used to assault Carlos (glass, a knife, or both). See *Guy*, 121 Mich App at 611. Moreover, Aleta’s limited assertion of her Fifth Amendment privilege did not deprive the defense “of the right to test the truth of [Aleta’s] direct testimony.” See *id.* Although defendant was not able to cross-examine Aleta in regard to the sworn statement, the jury did get to hear the pertinent portion of the statement, which was inconsistent with her trial testimony. The Confrontation Clause only guarantees the right to reasonable cross-examination, not what defendant would deem as the best cross-examination. *Ho*, 231 Mich App at 189; see also *Fensterer*, 474 US at 20. Under the circumstances, we find that defendant was effectively able to impeach Aleta despite her assertion of her Fifth Amendment privilege during part of the cross-examination. See *Guy*, 121 Mich App at 611. What inferences can be drawn from the evidence and the weight given to those inferences are questions left to the jury. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Because defendant retained the ability to impeach Aleta through her prior inconsistent statement, and did so by admitting as evidence and reading the statement to the jury,

striking Aleta's testimony in its entirety would have been improper.¹ See *Guy*, 121 Mich App at 611 (striking witness's testimony after invocation of Fifth Amendment privilege unnecessary where the defendant through cross-examination was permitted to establish that the witness had substantial reasons for bias and prejudice against the defendant); *Zapata*, 871 F2d at 624 (striking testimony in its entirety is extreme).

III. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that there was insufficient evidence to support his convictions. We disagree.

We review sufficiency-of-the-evidence issues de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *Id.* at 196. In proving a case, the prosecutor can use circumstantial evidence and the reasonable inferences arising from that evidence. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). What inferences can be drawn from the evidence and the weight given to those inferences are questions left to the jury. *Hardiman*, 466 Mich at 428. The jury is also responsible for determining questions of witness credibility. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). This Court should not interfere with the jury's role in determining credibility and weight of the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

First, defendant argues that there was insufficient evidence to support his home-invasion conviction because there was no evidence that he entered the Jones's home without permission or that he broke and entered the Jones's home.

The alternative elements of first-degree home invasion can be broken down as follows:

Element One: The defendant *either*:

¹ It is noteworthy that defendant does not argue that Aleta testified falsely about her son's absence from the home during the assault and defendant not having a knife. During closing argument at trial, defense counsel argued—consistent with Aleta's testimony—that the child was not home and that defendant did not have a knife. And, on appeal, defendant contends that Aleta testified truthfully at trial that her child was not at the home and that defendant was not seen with a knife. Thus, it would be anomalous to strike all of Aleta's testimony where defendant was able to impeach Aleta concerning matters that defendant argues Aleta testified truthfully about at trial. See generally *Guy*, 121 Mich App at 612 (“It would be anomalous to reverse a conviction on the ground the defendant had been unable to show that a witness was biased when defendant's argument to the jury was that the witness's testimony on the crucial facts of the existence of the offense was correct and should be relied upon by the jury to find the defendant not guilty.”).

1. breaks and enters a dwelling or
2. enters a dwelling without permission.

Element Two: The defendant *either*:

1. intends when entering to commit a felony, larceny, or assault in the dwelling or
2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault.

Element Three: While the defendant is entering, present in, or exiting the dwelling, *either*:

1. the defendant is armed with a dangerous weapon or
2. another person is lawfully present in the dwelling. [*People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010).]

In this case, only element one is in dispute, which can be established by proof that the defendant either breaks and enters a dwelling or enters a dwelling without permission. *Id.*

Viewed in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to conclude that the first element of first-degree home invasion was proven beyond a reasonable doubt because defendant broke into the home, entered the home, and did so without permission. Specifically, both Aleta and Carlos testified at trial that defendant did not have permission to enter the home. Indeed, defendant testified at trial that he had not been invited to the house and did not have permission to enter either the screened-in porch or the main door of the house. In addition, there was testimony that defendant kicked out the windows on the main door and put his body into the house while trying to unlock the door. Accordingly, we conclude that there was sufficient evidence to support defendant's home-invasion conviction.

Defendant also argues that there was insufficient evidence to prove that he had the requisite intent for felonious assault.²

² Defendant argues in his standard four brief that he was acting in self defense and, therefore, did not have the intent necessary for felonious assault. Defendant, however, does not develop a self-defense argument other than to say that he was involved in a "mutually combative situation" with Jones. A party cannot simply assert an error or announce a position and then leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (citations omitted). Therefore, this issue is abandoned, and we decline to address it. See *id.*

To establish that a defendant committed felonious assault, the prosecutor must prove the following elements: “(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). Because of the difficulty in proving intent, minimal circumstantial evidence is sufficient to prove an actor’s state of mind. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Intent can be inferred from the defendant’s verbal communications or the conduct used while committing the offense. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

In this case, Carlos testified that defendant told him on the telephone that he was going to come to the home in ten minutes and kill him; defendant arrived at the home within ten minutes. There was testimony that defendant broke through the front door of the home, grabbed a piece of glass, and swung the glass toward Carlos. Evidence at trial demonstrated that Carlos suffered lacerations to his arms. Although defendant argues that he was acting in self defense because Carlos started the fight, it is up to the jury to determine credibility, and we must view the evidence in a light most favorable to the prosecution. *Harrison*, 283 Mich App at 378; *Ericksen*, 288 Mich App at 195. Accordingly, viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to support defendant’s felonious-assault conviction because a rational trier of fact could find beyond a reasonable doubt that defendant intended to either injure Carlos or place him in reasonable apprehension of an immediate battery.

IV. WAIVED ISSUES

Defendant also argues that the trial court erred by allowing the jury to hear only a redacted version of Aleta’s 911 call. Moreover, defendant contends that he was denied a fair trial when a biased juror was seated on the jury. We conclude that defendant has waived these issues.

Waiver occurs when a defendant intentionally relinquishes a known right. *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007). If a defendant waives a right there can be no error claimed on appeal because the waiver extinguishes any error. *Id.* Here, defendant moved to have the 911 tape redacted, arguing that references by Aleta during the call about a PPO against defendant would be unfairly prejudicial; the trial court agreed and granted defendant’s motion. Defendant cannot now claim that it was error for the jury to only hear a redacted version of the call because defendant waived this argument by moving to have the tape redacted. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (“Counsel may not harbor error as an appellate parachute.”). With respect to the alleged biased juror, defense counsel did not object during voir dire to the juror being seated and stated that the defense was satisfied with the jury. Where defense counsel fails to challenge a juror for cause and expresses satisfaction with the jury as impaneled, defendant cannot later challenge the verdict based on the composition of the jury. *People v Johnson*, 245 Mich App 243, 253 n 3; 631 NW2d 1 (2001); see also *People v Hubbard*, 217 Mich App 459, 466; 552 NW2d 493 (1996) (“An expression of satisfaction with a jury made at the close of voir dire examination waives a party’s ability to challenge the composition of the jury thereafter impaneled and sworn.”). Therefore, this issue is also waived. See *Hubbard*, 217 Mich App at 466; *Dobek*, 274 Mich App at 65.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant raises ineffective-assistance-of-counsel claims on the basis of the above waived errors. Specifically, defendant argues that counsel was ineffective for failing to both have the entire 911 call played for the jury and challenge the selection of the “biased” juror. We find no merit in defendant’s arguments.

Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed to timely raise this issue in a motion for a new trial or *Ginther*³ hearing, our review is limited to errors apparent from the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009); *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998); MCR 7.211(C)(1); MCR 7.212(A). To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel’s performance “fell below an objective standard of reasonableness” under prevailing professional norms. *Strickland*, 466 US at 687-688. It is presumed that counsel rendered adequate assistance. *Id.* at 690. “Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to ‘affirmatively entertain the range of possible reasons’ that counsel may have had for proceeding as he or she did.” *People v Gioglio (On Remand)*, ___ Mich App ___; ___ NW2d ___ (2012), slip op at 5, quoting *Cullen v Pinholster*, 563 US ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011). We will not “insist that counsel confirm every aspect of the strategic basis for his or her actions.” *Id.*, citing *Harrington v Richter*, 562 US ___; 131 S Ct 770, 790; 178 L Ed 2d 624 (2011). “[A] reviewing court must conclude that the defendant’s trial counsel’s act or omission fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission.” *Id.*, citing *Pinholster*, 131 S Ct at 1407. Second, defendant must show that his counsel’s deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To do so, “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

With respect to the introduction of the redacted 911 call, we conclude that defendant has failed to establish that counsel’s performance was objectively unreasonable. See *id.* at 687-688. Having affirmatively entertained the range of possible reasons for counsel’s request that the jury only hear a redacted portion of the 911 call, we must conclude that counsel’s act fell within the range of reasonable professional conduct. See *Gioglio*, slip op at 5. The record establishes that defense counsel requested that the call be redacted because counsel did not want the jury to hear that defendant had a PPO taken out against him. Counsel was concerned that a reference to the PPO would unfairly prejudice defendant because it would permit the jury to infer that defendant committed a prior bad act. Counsel’s decision was a matter of trial strategy for which this Court

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

will not substitute its judgment. See *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Accordingly, defendant's ineffective-assistance-of-counsel claim on this basis fails.

With regard to the juror-selection complaint, we conclude that defendant has abandoned this issue because he has failed to present this Court with any argument—or even assert—that he was prejudiced by counsel's decision not to strike the juror. See *Kevorkian*, 248 Mich App at 389. But, notwithstanding defendant's abandonment of this issue, we conclude that defendant has failed to demonstrate that counsel's decision was unreasonable or that he suffered prejudice. See *Strickland*, 466 US at 687-688. A juror's promise to the trial court to remain impartial is enough to ensure a defendant's right to an impartial and unbiased jury. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). Jurors are presumptively impartial, and once a juror assures the trial court of an ability to remain impartial, the defendant must demonstrate that the juror is partial or biased. *Id.* Like many other decisions, juror selection is generally a matter of trial strategy. *Id.* at 259. In this case, the juror indicated during voir dire that he knew the prosecutor's father. Nevertheless, the juror assured the court that the relationship would not prejudice him for or against either party and that he could be fair and impartial. Moreover, when asked by the prosecutor whether his past relationship with the prosecutor's father would "affect [his] ability to sit . . . and listen to the testimony and decide the case based on the evidence," the juror responded, "Not at all." In light of the juror's assurances to the trial court and the prosecutor and the absence in the record of any indication that the juror was partial or biased, defendant has failed to demonstrate that the juror should have been disqualified. See *id.* at 256. Accordingly, defendant has not demonstrated unreasonable representation and prejudice to prevail on this ineffective-assistance-of-counsel claim.

Affirmed.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens