STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL LEE AMBROSE,

Defendant-Appellant.

UNPUBLISHED
September 5, 1997

No. 189253
Saginaw Circuit Court
LC No. 95-010247-FH

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423. Thereafter, he pleaded guilty to habitual offender second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to enhanced prison terms of thirty-six to seventy-two months for the felonious assault conviction and forty to ninety months for the carrying a dangerous weapon with unlawful intent conviction. The incident resulting in these convictions occurred while defendant was a prisoner at the Saginaw Correctional Facility. The sentences were imposed consecutively to the sentence that defendant was already serving. Defendant appeals by right. We affirm.

Defendant argues that he was denied a fair and impartial trial as a result of improper prosecutorial comments. We disagree. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Because defendant did not object to these remarks below, appellate review is precluded unless a curative instruction could not have removed any prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Nantelle,* 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Specifically, defendant contends that the prosecutor misstated the law when he remarked that the jury's findings of fact could not be overturned under any circumstance. While it is true that a jury's factual finding as to the ultimate issue may be overturned by the trial court upon a motion for new trial,

see *People v Herbert*, 444 Mich 466, 474-477, we do not see how defendant could have been prejudiced by a remark that, if anything, urged the jury to increase the care with which it reached its verdict. Accordingly, our decision not to review the issue further will not result in a miscarriage of justice. *Nantelle, supra* at 86-87.

Defendant also contends that the prosecutor improperly vouched for the credibility of his witnesses. A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988). However, a prosecutor is permitted to argue the evidence and reasonable inferences arising from the evidence. *Bahoda, supra* at 282. A prosecutor may also argue, upon the facts presented, that a witness is lying or not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Because the challenged remarks in this case were based on the prosecutor's argument that defendant's version of the incident did not correspond with the testimony of the other trial witnesses, we hold that they constituted proper argument based on the evidence presented at trial. *Bahoda, supra* at 282.

The remaining issues on appeal were raised by defendant in a supplemental brief filed in propria persona. First, defendant argues that his constitutional right to represent himself was violated when the trial court refused to appoint counsel to act in an advisory capacity and to assist defendant in proceeding in propria persona at trial. We disagree. A criminal defendant has either a right to counsel or a right to proceed in propria persona, but not both. *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). Accordingly, there was no error.

Defendant also makes several allegations of ineffective assistance of counsel. To properly advance a claim of ineffective assistance of counsel, a defendant must make a testimonial record at the trial court level in an evidentiary hearing or in connection with a motion for a new trial. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). Because defendant failed to do so in this case, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In doing so, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland, supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In order to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland, supra* at 694; *Stanaway, supra* at 687-688.

Defendant first claims he was denied effective assistance of counsel when defense counsel failed to investigate, interview, and call his cellmate, Kenyama Hampton, as a defense witness. We disagree. The decision whether to call a witness is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call a witness deprived him of a substantial defense that would have affected the outcome of the proceeding. *Id.* Nothing in the record supports defendant's assertion that defense counsel failed to investigate the possibility of calling Hampton as a witness or that the failure to call Hampton deprived defendant of a substantial defense. Therefore, defendant has failed to overcome the presumption that defense counsel's representation constituted sound trial strategy. *Strickland*, *supra* at 690-691.

Defendant's next claim of ineffective assistance of counsel is difficult to discern. At trial, Michael Norman, a Department of Corrections officer, testified that he saw defendant stab the complainant in the back with a pair of scissors. Subsequently, the complainant testified that he had filed a grievance regarding the incident in which he sought to expose the fact that Norman was lying when he stated that he had witnessed the incident. On appeal, defendant apparently argues that the complainant's trial testimony should have prompted defense counsel to challenge the prosecution for presenting false testimony (Norman's) and for breaching its duty to reveal exculpatory information (the fact that the complainant filed a grievance). We disagree. Because the record does not reveal (1) the exculpatory nature of the information regarding the complainant's grievance, (2) the extent of the prosecution's knowledge of the information prior to trial, or (3) the extent of defendant's knowledge of the information prior to trial, defendant cannot demonstrate that defense counsel's performance in failing to challenge the prosecution was deficient or that it prejudiced the defense. *Strickland*, *supra* at 687; *Pickens*, *supra* at 302-303.

Defendant also claims he was denied effective assistance of counsel when defense counsel failed to object to the delay in conducting his preliminary investigation. We disagree. A preliminary examination must be scheduled for a day not exceeding fourteen days after a defendant's arraignment. MCL 766.4; MSA 28.922. In this case, the record indicates that defendant's preliminary hearing was held fifteen days after his arraignment. However, because the mistake was not one but for which defendant would have had a reasonably likely chance of acquittal, defendant was not prejudiced by defense counsel's failure to object to the scheduling of defendant's preliminary examination. See *People v Cavitt*, 189 Mich App 31, 32; 471 NW2d 630 (1991).

Defendant next claims he was denied effective assistance of counsel when defense counsel failed to raise a claim of self-defense. We disagree. In order for the jury to have found that defendant acted in self-defense, it would have had to find that defendant intentionally stabbed the complainant, but that his actions were justified by the circumstances. See *People v Heflin*, 434 Mich 482, 503, 515; 456 NW2d 10 (1990). At trial, defendant testified that he did not stab the complainant and defense counsel argued that the evidence did not support a finding that defendant had stabbed the complainant. Thus, a theory of self-defense would have been wholly inconsistent with defense counsel's apparent trial strategy. Moreover, because both Norman and the complainant testified that defendant stabbed the complainant in the back when the complainant was not even aware of defendant's presence, a claim of

self-defense would have faced significant evidentiary problems. See *Heflin*, *supra* at 502-503. Accordingly, we hold that defendant cannot overcome the presumption that defense counsel's decision to forgo a claim of self-defense was sound trial strategy. Cf. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant also asserts that he was denied effective assistance of counsel when defense counsel failed to request an instruction on the offense of misdemeanor assault and battery, MCL 750.81; MSA 28.276. We disagree.

Among the conditions that must be satisfied before a defendant is entitled to an instruction on a lesser included misdemeanor is the requirement that the requested misdemeanor be supported by a rational view of the evidence adduced at trial. *People v Stephens*, 416 Mich 252, 262; 330 NW2d 675 (1982). In order to satisfy this condition, the evidence of the differentiating elements must be factually disputed to the extent that a jury could rationally reject the existence of the greater offense and accept the existence of the lesser misdemeanor offense. *People v Steele*, 429 Mich 13, 20-21; 412 NW2d 206 (1987). Felonious assault is distinguished from misdemeanor assault and battery by the requirements that the defendant (1) use a dangerous weapon and (2) possess the specific intent to injure or to place the victim in reasonable apprehension of immediate battery. Compare *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996) with *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). See also *People v Acosta*, 143 Mich App 95, 103; 371 NW2d 484 (1985).

The evidence in this case presented two options. According to the prosecution witnesses, defendant stabbed the complainant in the back with a pair of scissors. On the other hand, defendant maintained that he did not stab the complainant at all. Upon this evidence, there is no rational way in which the jury could find that defendant assaulted the complainant without using a dangerous weapon and without specific intent to injure. Cf. *Acosta*, *supra* at 103. Thus, defendant was not entitled to an instruction on misdemeanor assault and battery. *Stephens*, *supra* at 262. Defense counsel's failure to request an instruction inapplicable to the facts did not constitute ineffective assistance of counsel. See *People v Truong (After Remand)*, 218 Mich App 325, 341; 553 NW2d 692 (1996).

Finally, defendant argues that the imposition of the Department of Corrections sanction in conjunction with this criminal proceeding constituted a double jeopardy violation. Because there is no indication in the record that defendant was subjected to Department of Corrections sanctions, we find no merit to defendant's argument.

Affirmed.

/s/ Henry W. Saad
/s/ Janet T. Neff
/s/ Maureen Pulte Reilly