STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE EUGENE DELL,

Defendant-Appellant.

UNPUBLISHED
June 2, 1998

No. 193826
St. Clair Circuit Court
LC No. 95-001361 FC

Before: Gribbs, P.J., and McDonald and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted murder, MCL 750.91; MSA 28.286, and placing explosives with intent to destroy causing injury to a person, MCL 750.207; MSA 28.404. He was sentenced to concurrent prison terms of forty to eighty years for the attempted murder conviction and life without parole for the explosives conviction. He appeals as of right, and we affirm.

Defendant argues that the trial court erroneously interfered with his right to confront the evidence against him and introduce evidence on his behalf. More specifically, defendant complains that the court improperly sustained the prosecution's objections during defense counsel's cross-examination of witnesses and refused to allow defendant to introduce a receipt from a hardware store. Having reviewed defendant's arguments, we are not persuaded that the trial court's rulings were an abuse of discretion, nor that the court's adherence to the rules of evidence violated defendant's right of confrontation.

Defendant contends that evidence concerning his various prior acts and statements should not have been admitted because the probative value was outweighed by the prejudicial effect. We disagree.

> In this context [MRE 403], prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis,

> commonly, though not always, an emotional one. [*People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).]

The evidence concerning marital discord, which helps to establish motive, was highly relevant and not unfairly prejudicial. See *People v Fisher*, 449 Mich 441, 451-453; 537 NW2d 577 (1995). Defendant's knowledge and experience using explosives was relevant to prove he made the explosive device. We do not believe that the admission of this evidence would "move the tribunal to decide the case on an improper basis." *Vasher, supra*. Evidence concerning other packages containing explosive devices indicated that the other devices were made and mailed by the same person that made and mailed the package that injured the victim. Although the evidence was very damaging to defendant's case because fingerprint evidence linked him to two of these packages, we do not believe that the evidence was unfairly prejudicial. In summary, we find no violation of MRE 403 because the probative value of the contested evidence was not substantially outweighed by the danger of unfair prejudice.

Defendant next argues that his statement to postal inspector Ramirez should have been suppressed because it was taken in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We disagree.

Ramirez had some difficulty remembering the exact words defendant said. According to Ramirez' report, the statement was "I love my wife. I didn't want to hurt her." It is undisputed that the statement at issue was made after defendant's arrest and before he was read his *Miranda* rights. After a *Walker*[1] hearing, the trial court concluded that the testimony of Ramirez and Special Agent Evans was credible and that the only inquiries made of defendant were "strictly identification, the procedure, and an attempt to explain the procedure and inform the accused of the particular charges that he was being arrested for." Our independent review of the record does not disclose that this finding was clearly erroneous. *People v McElhaney*, 215 Mich App 269, 277; 545 NW2d 269 (1996). The court further concluded that the statement "was not responsive to any kind of question being asked or any insinuation to speak out on in [sic] relationship to this matter." Essentially, the court determined that the statement was not the product of interrogation, which "refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). We agree with this determination and therefore find no error in the denial of defendant's motion to suppress.

Defendant also contends that the evidence was insufficient to establish that he was the perpetrator of the crimes. To determine whether sufficient evidence has been presented, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516, 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The prosecutor presented ample evidence of defendant's motive and his knowledge and experience with explosives. In addition, the evidence indicated that defendant's fingerprints were found inside two other packages containing explosive devices that were nearly identical to the device that injured the victim. Contrary to defendant's assertions, we conclude that the prosecutor produced sufficient evidence establishing that it was defendant who committed the crimes.

In a related argument, defendant asserts that the trial court abused its discretion by denying his motion for a new trial on grounds that the verdict was against the great weight of the evidence. A trial court "may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; ___ NW2d ___ (1998). The evidence in this case supports the verdict, and the court's denial of the motion for new trial was not an abuse of discretion. *Id*. at 648, n 27.

Defendant contends that he was denied effective assistance of counsel and that the trial court abused its discretion by denying him an evidentiary hearing and new trial. We disagree.

Defendant filed the motion for new trial, which included the ineffective assistance of counsel claim, on December 11, 1996. The brief and exhibits in support of the motion were not filed or given to the prosecution until March 3, 1997, the day of the hearing. The trial court acknowledged on the record that it had not had the opportunity to read the brief that had just been filed. The court rejected defendant's ineffective assistance of counsel claim, noting that it "would rate counsel's performance in representation of his client extremely high, but it was a case in which the evidence that was properly admitted was just extremely overwhelming." Another panel of this Court later rejected defendant's motion to remand for a *Ginther*[2] hearing "for failure to show that the issues should be further decided by the trial court before decision by this Court." *People v Dell*, unpublished order of the Court of Appeals, issued May 2, 1997 (Docket No. 193826).

In light of this Court's earlier order denying defendant's motion to remand, we decline defendant's invitation to revisit the issue whether a *Ginther* hearing should have been held. In order to establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303, 521 NW2d 797 (1994). Having reviewed the trial court record, we conclude that each of the numerous grounds asserted by defendant for the ineffective assistance of counsel claim fails to satisfy one or both of these prongs. Therefore, defendant is not entitled to relief on the basis of this claim.

Defendant raises two issues that concern the relationship between attempted murder and assault with intent to murder, MCL 750.83; MSA 28.278. First, he argues that the trial court erred in denying his motion to dismiss the attempted murder charge because the evidence established an assault upon the victim. We disagree.

The relevant statutes are as follows:

> Any person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, or <u>by any means not constituting the crime of assault with intent to murder</u>, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years. [MCL 750.91; MSA 28.286. Emphasis added.]

> Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years. [MCL 750.83; MSA 28.278.]

Defendant claims that the victim's testimony established an assault. The victim testified that she opened the flap of the box and saw red and white wires. She thought it was dynamite in the box. She started to turn and an enormous ball of fire came out of the box and hit her.

Even if we accept defendant's argument that an assault was suggested by the victim's testimony, we do not agree with him that the court was required to dismiss the attempted murder charge.

> An attempt consists of: "(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of a crime, while the attempt itself consists of some direct movement toward commission of the crime that would lead immediately to the completion of the crime. [*People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).]

In this case, the trier of fact could have determined that an attempted murder was established when defendant mailed the device and thereby placed it beyond his control so that it would be delivered to the victim. Compare *People v Smith*, 58 Mich App 284, 286-289; 227 NW2d 319 (1975), rev'd on other grounds 398 Mich 450; 247 NW2d 866 (1976). Defendant asserts that because of the subsequent events, an assault with intent to murder was established, taking the acts out of the scope of the attempted murder statute. However, the trier of fact could have found that the attempted murder charge was complete before those events and thus was established "by means not constituting the crime of assault with intent to murder." Accordingly, the trial court was not required to dismiss the attempted murder charge.

In a related argument, defendant contends that the trial court erred by refusing to instruct the jury on assault with intent to murder. According to defendant, assault with intent to murder is a cognate lesser offense that was supported by the evidence in this case.

> Cognate lesser included offenses "are related and hence 'cognate' in the sense that they share several elements, and are of the same class or category, but may contain some elements not found in the higher offense." [*People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996), quoting *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975).

Statutory authorization for the finder of fact to convict a defendant of a lesser degree of a charged offense is found in MCL 768.32(1); MSA 28.1055(1), which provides:

> Except as provided in subsection (2) [concerning certain controlled substance offenses], upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

Assault with intent to murder is not a cognate lesser included offense of attempted murder because the former is not "lesser" or "inferior" in any way to the latter. Assault with intent to murder is not "lesser" in the sense of the penalty; the offenses have the identical punishment..[3] Nor is assault with intent to murder "lesser" in the sense that of requiring "less than all facts, less serious injury or risk of harm, less culpable mental state, or an attempt.'" *People v Torres (On Remand)*, 222 Mich App 411, 418; 564 NW2d 149 (1997), quoting *Johnson v State*, 828 SW2d 511, 515-516 (Tex App, 1992). Professor Perkins explains the relationship between an assault with intent to commit an act and an attempt to commit the act as follows:

> Hence an assault with intent to commit a particular crime is, in general, the same as an attempt to commit that crime except for two additional requirements,--(1) a greater degree of proximity, and (2) actual present ability to commit a battery (the latter being limited chiefly to states in which this has been added by the statutory definition of assault). It follows that an assault with intent to commit a certain crime generally includes an attempt to commit that crime, but an attempt to commit the crime does not include an assault with intent to commit it. [Perkins, Criminal Law (2d ed), pp 578-579.]

Because assault with intent to murder is not a lesser included cognate offense, the trial court did not err by refusing to instruct on that offense.

Defendant raises three issues that specifically concern the second count in the information. First, he argues that the trial court erred in denying defendant's motion to dismiss the explosives charge because the information referred to an intent to injure his wife and not to damage a building. MCL 750.207; MSA 28.404 states in pertinent part:

> Any person who places in, upon, under, against or near to any building, car, vessel or structure, gunpowder or any other explosive substance, with intent to destroy, throw down or injure the whole or any part thereof, which substance upon explosion shall cause injury to any person, shall be guilty of a felony . . . .

Before it was amended during trial, the second count of the information charged defendant as follows:

> Defendant(s) 01 EXPLOSIVES-RESULT PERSONAL INJURY
>
> did cause to be placed in, upon , against, or near a certain building, car, vessel, or structure, to wit: one story, factory type building[,] a certain explosive substance, to wit:

> black powder and compressed ether, with intent to destroy, throw down or injure said Charlene Dell, said explosive substance causing injury to Charlene Mae Dell; contrary to MCL 750.207; MSA 28.404. [Emphasis added.]

Although the original information was defective because it did not refer to an intent to destroy, throw down or injure a building, car, vessel or structure, the trial court properly allowed the prosecution to amend the information. MCL 767.76; MSA 28.1016. Considering that the statutory citation, the heading and the language other than the first reference to the victim were accurate, we find no "'unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend . . . .'" *People v Fortson*, 202 Mich App 13, 16; 507 NW2d 763 (1993), quoting *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993).

Defendant's second issue concerning the explosives charge is that there was insufficient evidence that defendant intended to injure the building, as opposed to a person, and therefore, the trial court should have dismissed the charge. When the court denied the motion, the court explained that a jury could determine that defendant had a "dual specific intent" to kill his wife and to destroy the office building of ANR. Viewing the evidence in the light most favorable to the prosecution, we agree with the trial court that defendant's intent to injure the ANR building can be inferred under these circumstances.

His third issue concerning the explosives charge is that he should not have been bound over on that charge because the evidence of intent to injure was inadequate at the preliminary examination and because the information erroneously referred to an intent to injure Charlene Dell instead of a building. Defendant did not move to quash the information in the trial court, and therefore has failed to preserve this issue for appeal. *People v Fleming*, 185 Mich App 270, 273; 460 NW2d 602 (1990).

Next, defendant contends that the court's failure to order individual, sequestered voir dire and change venue was prejudicial error in light of the "overwhelming and pervasive pretrial publicity" and the personal relationship between the prosecutor, the judge and the jury panel. A review of the voir dire shows the dissimilarities between this case and *People v Tyburski*, 445 Mich 606, 646; 518 NW2d 441 (1994), a case cited by defendant. Of the jurors who decided this case, three had been exposed to media coverage of the crime around when it occurred, nearly a year before trial, and a fourth read about the crime in the newspaper and "just very vaguely" remembered it. The other jurors had not heard of the case. Only two prospective jurors, both excused by the court, indicated that they had a "position" concerning the case. The court distributed a questionnaire, asked its own preliminary questions concerning relationships with the parties and exposure to publicity, and gave the attorneys an unlimited opportunity to ask questions to the potential jurors. There is no right to individual, sequestered voir dire or to any other specific procedure for voir dire. *People v Sawyer*, 215 Mich App 183, 191; 545 NW2d 6 (1996). "There is simply a right to a jury whose fairness and impartiality are assured by procedures generally within the discretion of the trial court." *Id*. In this case, there is "no basis to conclude that there was any impediment to discovery of possible bias and prejudice." *People v Jendrzejewski*, 455 Mich 495, 511; 566 NW2d 530 (1997). Because the record does not suggest community prejudice, we also reject defendant's assertion that the court abused its discretion by not changing venue sua sponte. *Id*. at 499-509. Finally, the record does not suggest that there were

personal relationships between the prosecutor, judge and panel that may have interfered with defendant's right to a fair trial.

Defendant complains that the court abused its discretion by admitting as evidence three photographs that showed the victim's injuries because any arguable probative value was heavily outweighed by the danger of unfair prejudice. We agree with the trial court that intent to murder was a key element in the case and that photographs showing the effect of defendant's acts were probative of defendant's intent. The prejudicial effect did not substantially outweigh this probative value. MRE 403. We find no abuse of discretion. *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995).

Having reviewed defendant's numerous allegations of prosecutorial misconduct, none of which are supported by citations to the record, we conclude that defendant was not denied a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

Although defendant had no prior criminal record, we find no abuse of discretion in the court's sentencing defendant to forty to eighty years for attempted murder. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Because a term of life imprisonment is mandatory for defendant's explosives conviction, defendant's claim of excessiveness as to that count need not be reviewed.

Finally, the trial court did not abuse its discretion by denying defendant's motion for a new trial on the grounds of newly-discovered evidence. The evidence proffered by defendant is not such as to render a different result probable on retrial. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

Affirmed.

/s/ Roman S. Gribbs
/s/ Gary R. McDonald
/s/ Michael J. Talbot

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

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

[3] In the context of determining whether an offense was a necessarily included lesser offense, this Court has stated that "under MCL 768.329(1); MSA 28.1055(1), an offense may be inferior to another even if the penalties for both offenses are identical." *People v Torres (On Remand)*, 222 Mich App 411, 419; 564 NW2d 149 (1997).