

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY R. ANNAS,

Defendant-Appellant.

UNPUBLISHED

August 31, 1999

No. 208846

Oakland Circuit Court

LC No. 96-144555 FH

Before: Hoekstra, P.J., and O’Connell and R.J. Danhof,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277. He appeals as of right and we affirm.

Defendant argues that the prosecutor committed misconduct by misleading the jury as to the proper burden of proof and by asking leading questions. Because these allegations of prosecutorial misconduct were not preserved by contemporaneous objection in the trial court, we review these claims only to the extent that a failure to do so would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). First, we reject defendant’s contention that the prosecutor misled the jury as to the burden of proof by saying: “This case comes down to whether or not you believe the story as the Defense would like you to believe it, or whether or not you believe the other witnesses.” Although a prosecutor may not attempt to shift the burden of proof to the defendant, “where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant.” *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Thus, the prosecutor’s argument in this case was not improper. Second, although our review of the record indicates that the prosecutor posed leading questions, which are disfavored under MRE 611(c)(1), defendant has failed to demonstrate that any of the evidence against him could not have been elicited through proper questioning had his counsel so insisted. Accordingly, we find no manifest injustice.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant next argues that his trial counsel was constitutionally ineffective in not objecting to the alleged prosecutorial misconduct outlined above, and in failing to employ certain trial tactics, such as rehabilitation of defendant after he was impeached by the prosecutor on cross-examination, and impeachment of certain testimony of the victims. This Court does not require trial counsel to make futile objections, *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989), nor do we second guess matters of reasonable trial strategy, *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Accordingly, defendant has not established that he was denied his constitutional right to the effective assistance of counsel.

Lastly, defendant claims that the trial court erred by denying his motion to have the jury instructed on the misdemeanor offense of assault and battery, MCL 750.81; MSA 28.276. Even assuming that the offenses of felonious assault and misdemeanor assault and battery are inherently related and that the defense's request for an instruction on the latter was supported by a rational view of the evidence, *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982), we would nonetheless find that the trial court's error in refusing to give the instruction was harmless error. The jury's rejection of the less serious charge of aggravated assault in favor of conviction on the primary charge of felonious assault reflects implicit findings beyond a reasonable doubt of specific intent to assault and use of a dangerous weapon—a dog chain. Accordingly, we conclude that the trial court's failure to give the lesser misdemeanor instruction resulted in no prejudice to defendant, and, therefore, was harmless. *People v Beach*, 429 Mich 450, 490-493; 418 NW2d 861 (1988).

Affirmed.

/s/ Peter D. O'Connell

/s/ Robert J. Danhof

I concur in result only.

/s/ Joel P. Hoekstra