

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENSON WRIGHT, a/k/a LAMONT CURRY,

Defendant-Appellant.

UNPUBLISHED

March 30, 2001

No. 218920

Wayne Circuit Court

LC No. 98-004952

Before: Markey, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was charged with eight counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of arson of a dwelling house, MCL 750.72; MSA 28.267. Following a jury trial, defendant was convicted of eight counts of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and one count of arson of a dwelling house, MCL 750.72; MSA 28.267. He was sentenced to six to ten years' imprisonment on each of the eight assault convictions and to an enhanced term of fifteen to forty years' imprisonment, the latter sentence reflecting defendant's status as a third habitual offender, MCL 769.11; MSA 28.1083. Defendant appeals by right. We affirm.

Defendant argues that there was insufficient evidence presented at trial on the intent element to support his convictions for assault with intent to commit great bodily harm. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997), this Court held that "[a]ssault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." This Court further held that this offense is a "specific intent crime." *Id.* Intent may be inferred from all the facts and circumstances. *People v Daniels*, 163 Mich App 703, 706, 708; 415 NW2d 282 (1987). Furthermore, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecution proved the requisite intent beyond a reasonable doubt where it showed that defendant called the victim's house and threatened her, and then threw a firebomb into the house. Moreover, because the prosecution did produce sufficient evidence to support the finding that defendant intended to commit great bodily harm to the complainant, there was sufficient evidence to support the seven other assault convictions because the doctrine of transferred intent applies to this situation. See *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). Before a defendant can be convicted under the doctrine of transferred intent, it must be shown that "he had the intention to cause great bodily harm to someone" and "[i]t is only necessary that the state of mind exist, not that it be directed at a particular person." *Id.* Thus, given the evidence at trial, the specific intent element of the crime was satisfied for each of the eight charges.

Next, defendant argues that the court improperly admitted "other acts" evidence regarding a previous assault on the complainant and defendant's drug-dealing activities. Defendant did not preserve this issue by objecting to the evidence at trial. In order to avoid forfeiture of an unpreserved issue on appeal, an appellant must show: (1) that an error occurred, (2) that the error was plain, i.e., clear or obvious, and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Once an appellant has satisfied these three requirements, an appellate court must "exercise its discretion in deciding whether to reverse." *Id.* Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). In other words, assuming that plain error occurred, the defendant must still demonstrate prejudice, i.e., that the alleged plain error affected the outcome of the proceedings. *Carines*, *supra*.

Assuming without deciding that the trial court improperly admitted the challenged evidence under MRE 404(b), we conclude that the error was not outcome determinative because the evidence was admissible without regard to MRE 404(b). Defendant's involvement in drug dealing and his prior assault of the complainant were so connected to the fire bombing for which defendant was charged, that evidence of these "other acts" was admissible for the purpose of providing the jury with the "complete story," i.e., that defendant became angry when the complainant refused to continue to sell drugs for defendant, and when the prior assault did not persuade the complainant to return to selling drugs for defendant, defendant decided to punish her by fire bombing her home. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

Defendant also argues that during closing argument, the prosecutor improperly remarked regarding facts that were not in evidence and that severely prejudiced defendant. We disagree. Because defendant failed to object below to the prosecutor's remarks he now challenges, we review only for plain error affecting substantial rights. *Carines*, *supra*.

Reviewing the pertinent portions of the record and evaluating the challenged remarks in context, *People Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), we find that the remark concerning defendant's need for someone to sell drugs for him before Christmas was based on

reasonable inferences arising from the evidence as they related to the prosecution's theory of the case. The prosecutor's remarks regarding what time defendant called the complainant may indeed be a misstatement of the evidence presented. Nonetheless, we conclude that any prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra*. Ultimately, the test is whether defendant was denied a fair trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). We conclude that defendant was not denied a fair trial in light of the strength of the evidence against him.

Defendant raises several claims of ineffective assistance of counsel. These claims have no merit. A claim of ineffective assistance of counsel raises a constitutional claim. *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999). Appellate courts address constitutional issues under a de novo standard of review. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999). Because defendant failed to create a factual record to support his claims, our review is limited to mistakes apparent in the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Furthermore, judicial scrutiny of trial counsel's performance must be "highly deferential." *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 674 (1984). The defendant must overcome the presumption that the challenged action or omission could conceivably be considered sound trial strategy under the circumstances. *Id.* This Court will not second-guess counsel's trial tactics. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Defendant argues that his counsel was ineffective for failing to request a cautionary instruction regarding the other acts evidence, i.e., the previous assault and defendant's drug-dealing activities. We disagree.

In this case, both the prosecution and defendant introduced evidence regarding defendant's drug-dealing activities and use; the prosecution introduced evidence regarding the previous assault. Upon request, the trial court must provide a limiting instruction regarding the use of the bad acts evidence regardless of whether the evidence was introduced by the prosecutor or the defendant. *People v Starr*, 457 Mich 490, 498; 577 NW2d 673 (1998). In *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999), the defendant argued as defendant does here, that counsel was ineffective for failing to request the limiting instruction. Therein, this Court explained:

Here, defendant has not overcome the presumption [that the assistance of his counsel was sound trial strategy.] Despite defendant's contention that the instruction could only have helped him, it may have been defense counsel's strategy to downplay defendant's prior conduct and the underlying purpose for offering such evidence—motive. Regardless, this Court will not second-guess

counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Moreover, in light of the overwhelming evidence of defendant's guilt in this case, we conclude that the outcome would not have been different even if defense counsel had requested the instruction. Accordingly, defendant was not denied effective assistance of counsel. [*Rice, supra.*]

Precisely the same conclusion must be drawn in this case. Counsel may well have determined that it was better strategically not to draw further attention to defendant's previous conduct. Moreover, the evidence against defendant was overwhelming. Accordingly, defendant was not denied effective assistance of counsel on this basis.

Defendant next argues that his counsel's failure to request an evidentiary hearing, the purpose of which would be to establish that his convictions were secured by perjured testimony. Defendant does not indicate what evidence should have been produced, and because this Court's review is limited to the record, it is impossible to determine to what evidence defendant alludes or to determine what conversations occurred between counsel and defendant. Therefore, defendant's failure to support his claim is fatal to that claim. *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902; 554 NW2d 899 (1996).

Furthermore, defendant asserts that counsel failed to inform defendant that he was charged as an habitual offender, so that he was unable to make an informed choice regarding going to trial or accepting a plea bargain. We find nothing in the record to show that trial counsel failed to properly explain to defendant all the possible consequences of either accepting the offer or going to trial. Moreover, the court file documents that defendant was charged at the outset as an habitual offender. Therefore, defendant's unsupported allegations, without more, are not sufficient to establish an ineffective assistance claim on this basis.

Next, defendant argues that counsel should have objected to "alleged mischaracterization of time and perjured testimony." We assume that the "alleged mischaracterization of time" defendant posits is the prosecutor's remark, discussed above, that defendant called the complainant at "11:30." As observed above, the remark did not unfairly prejudice defendant and, therefore, cannot sustain a claim of ineffective assistance of counsel.

Although defendant also claims that counsel should have objected to "perjured testimony," defendant does not identify the alleged perjured testimony. As already noted, a failure to support a claim of ineffective assistance of counsel is fatal to that claim. *Hyland, supra.*

Finally, defendant argues that the prosecutor solicited perjured testimony and then repeated the testimony in her closing remarks. Defendant's claim fails. He has made no showing that perjured testimony was given or that the prosecutor knowingly used false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998). To the extent that defendant now contends that the complainant's testimony was false, we point out that

issues of credibility are left to the trial court to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

We affirm.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Brian K. Zahra