

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY W. McGEE,

Defendant-Appellant.

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UNPUBLISHED

July 17, 2001

No. 219568

Wayne Circuit Court

LC No. 98-006664

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of felonious assault, MCL 750.82, one count of assault with intent to commit murder, MCL 750.83, and one count of possession of a firearm at the time of commission of a felony, MCL 750.227b. He was sentenced to 1 to 4 years' imprisonment for the first count of felonious assault, 2 to 4 years' imprisonment each for the second and third counts of felonious assault, 17½ to 30 years' imprisonment for assault with intent to commit murder, and 2 years' imprisonment for felony-firearm possession. The felony-firearm sentence was to be served before and consecutive to the assault sentences. We affirm.

Defendant first asserts that the trial court's failure to give certain jury instructions constituted error requiring reversal. He argues that the trial court should have instructed the jurors that in order to convict him under an aiding and abetting theory, they had to find he either had the requisite specific intent to commit the offense himself, or assisted the principal with knowledge that the principal had that specific intent. This issue was not raised by defendant below, therefore it is not preserved for appeal. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, even where a party did not object to an error at trial, the error may be reviewed by this Court if it amounted to plain error or a defect that affected substantial rights. *Id.*

To find plain error, three requirements must be met: (1) the error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights. *Id.* To fulfill the third requirement, the defendant must persuade this Court that prejudice resulted from the error, i.e., the error must have been outcome determinative. If the three requirements are met, this Court must exercise its discretion, reversing a trial court's decision only where an innocent person was convicted or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764.

We review jury instructions by reading them together as a whole, not piecemeal. *Lansing v Hartsuff*, 213 Mich App 338, 348; 539 NW2d 781 (1995). The record of jury instructions in this case shows the trial court instructed the jury that either defendant or someone else had to have the requisite intent, and that if defendant himself did not directly commit the crime, he must have intended to help the other person do so. These instructions were sufficient to provide the essentials of specific intent for the jury. There was no error.

Second, defendant asserts there was insufficient evidence to convict him of assault with intent to commit murder. When reviewing a challenge to the sufficiency of evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt. *People v Mackle*, 241 Mich App 583, 597; 617 NW2d 339 (2000).

The elements of assault with intent to commit murder, which must be proved beyond a reasonable doubt, are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The testimony at trial, viewed in the light most favorable to the prosecution, shows the jury could rationally have found that the essential elements of this crime were proved beyond a reasonable doubt.

Defendant next argues that his defense counsel was ineffective. He did not move for a new trial, so we review the facts on the record for apparent mistakes. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). 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 that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). This Court will not evaluate the performance of defense counsel using hindsight, nor will it substitute its own judgment on matters of strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

In support of his claim that trial counsel was ineffective, defendant points to four acts or failures to act by counsel: (1) counsel failed to request an instruction on assault with intent to do great bodily harm; (2) counsel failed to subpoena the medical records of a witness to determine if he had actually been shot by defendant; (3) counsel failed to object to the testimony of a witness regarding defendant shooting at and hitting him, which defendant termed "prior bad acts" evidence; and (4) counsel failed to object when the prosecutor called another witness by his nickname, "Poorman," which improperly appealed to the sympathy of the jury. Claims (2) and (4) are not properly before this Court, MCR 7.212(C)(5); therefore, we decline to review them.

The jury in this case was given instructions on the lesser included offense of felonious assault, yet it found defendant guilty on one count of the charged offense, assault with intent to commit murder. Counsel either chose not to request an instruction on assault with intent to do great bodily harm, or failed to do so. If the decision was a strategic one, i.e., counsel was hoping that the large differential in severity between the two offenses would force the jury to choose felonious assault, we will not second guess it. *Rice, supra* at 445. If counsel simply failed to request the instruction, this nevertheless does not show that counsel's performance fell below an objective standard of reasonableness or that the result would have been different. *People v*

*Murray*, 234 Mich App 46, 65-66; 593 NW2d 690 (1999). There was ample evidence to convict defendant of assault with intent to commit murder. The fact that the jury was offered the same choice of verdicts for each of the four complainants and chose the more serious verdict for one complainant indicates that it placed real weight on the testimony showing that defendant intended to murder this victim. Defendant did not carry the heavy burden required to show ineffective assistance of counsel for failure to request the jury instruction on assault with intent to do great bodily harm. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant argued that the entire testimony of one complainant was prior acts testimony, and therefore inadmissible and irrelevant. In fact, the testimony was not prior acts testimony under MRE 404(b); it was about events that were part and parcel with the events for which defendant was charged. Defense counsel's failure or refusal to object to this testimony was not evidence of ineffective assistance.

Finally, defendant asserts that the cumulative effect of the errors at trial deprived him of the right to a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). However, on those issues that defendant asserted error by the trial court, our analysis revealed no error. There are no grounds to support defendant's argument that the cumulative effect of the minor errors at trial denied him the right to a fair trial.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Gary R. McDonald  
/s/ Kathleen Jansen