

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MURVIN JENNINGS,

Defendant-Appellant.

UNPUBLISHED
November 9, 2001

No. 221714
Wayne Circuit Court
Criminal Division
LC No. 98-010224

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two concurrent terms of three to ten years' imprisonment for the assault convictions and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his trial attorney was ineffective for (1) waiving the production of Ronald Williams as a witness, (2) failing to call Tracey Martin as an alibi witness, and (3) failing to take steps to produce Maurice Moore as a witness. Because defendant did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973) in the trial court, this Court's review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

In order for this Court to reverse defendant's convictions due to the ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish prejudice, defendant must show that there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The decision whether to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). “[T]his 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 Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Failure to call witnesses will only constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *Id.* A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

Tracey Martin and Maurice Moore were listed on defendant’s witness list. Tracey was also listed as an alibi witness. However, there is nothing in the record before us to explain why she was not called to testify. The record indicates that Tracey was with her mother on the day of the shooting and her mother testified at trial that defendant was present with them all day. Tracey’s testimony would have been cumulative to her mother’s testimony. Defense counsel’s reason for not calling Tracey is unknown, and we will not assess counsel’s trial strategy with the benefit of hindsight. *Rice (On Remand)*, *supra* at 445. The record does not establish that the lack of Tracey’s testimony deprived defendant of a substantial defense. Accordingly, defendant has not overcome the presumption that counsel engaged in sound trial strategy in deciding not to call Tracey to testify.

Defense counsel’s decision not to call Maurice Moore as a witness may likewise have been a matter of trial strategy. Further, there is no record regarding the substance of Moore’s purported testimony. Thus, defendant has not shown that counsel was ineffective for not calling Moore.

Nor is it apparent from the record that counsel was ineffective for waiving the production of Ronald Williams, or waiving a due diligence hearing with regard to Williams’ nonproduction. Because there is no indication in the record that the police did not exercise due diligence in attempting to locate Williams, defendant has not shown that he was prejudiced by his attorney’s failure to request a due diligence hearing.

Next, defendant argues that the trial court erred in permitting the prosecutor to question witnesses about drug use and drug dealing by members of the Parizon family. Some of these questions referred to defendant’s involvement in drug-related activities. The decision whether to admit or exclude evidence is within the trial court’s discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

Relevant evidence is generally admissible. MRE 402; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). Evidence is relevant if it tends to make the existence of a fact at issue more or less probable than it would be without the evidence. MRE 401; *Campbell*, *supra*. Under MRE 403, relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but “refers to the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *Pickens*, *supra* at 337, quoting *People v Goree*, 132 Mich App 693,

702-703; 349 NW2d 220 (1984). See also *People v Vasher*, 449 Mich 494, 501-502; 537 NW2d 168 (1995).

The evidence about drug use and drug dealing was properly admitted in this case. The charged assaults occurred while the two officers were investigating drug trafficking activity. The prosecution's evidence established that defendant was involved in selling drugs, which was a possible motive for chasing the informant and shooting at the officers' car. Therefore, drug activity was central in this case. In light of the underlying facts, evidence of drug dealing was relevant and the trial court did not abuse its discretion in admitting the evidence.

Moreover, it appears that the prosecutor initially questioned members of the Parizon family about drug dealing and drug use because of Peter Parizon's close relationship with defendant and Peter's past conviction for a drug offense. Once again, that evidence was relevant to show that defendant may have been selling drugs and, therefore, was the person responsible for this shooting. Defendant has failed to show that the trial court abused its discretion in allowing this evidence.

Defendant also argues that the prosecutor engaged in misconduct in his closing argument when he referred to defendant as the "dopeman" and placed much of the blame for the poor condition of the neighborhood on defendant. He also claims that the prosecutor improperly argued that two witnesses, Bennie Lloyd and Peter Parizon, worked for defendant selling drugs. Defense counsel did not object to the challenged remarks at trial. "Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). "Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Aldrich*, *supra* at 110, citing *Carines*, *supra* at 763-764; *Schutte*, *supra* at 720.

A prosecutor may not intentionally inject inflammatory comments with no apparent justification except to arouse the jurors' prejudice. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). Civic duty arguments are considered improper where jurors are asked to decide the case based upon their fears or prejudices or other issues broader than the defendant's guilt or innocence. *Id.* at 282-285.

Viewed in context, the challenged remarks were based on the evidence and reasonable inferences arising therefrom. As noted previously, there was a significant amount of testimony about defendant's involvement with drugs. The prosecutor referred to this evidence to argue that defendant was a drug dealer and, as a result, had a motive to shoot at the officers' car when the informant's attempted drug purchase was unsuccessful. Further, the testimony indicated that the crime occurred in an area with a drug problem and, therefore, the prosecutor's statements that defendant was dealing drugs in the area and was responsible, at least partially, for the condition of the neighborhood, was supported by the evidence.

We disagree with defendant that the prosecutor urged the jurors to decide this case based upon their civic duty. Although the prosecutor made a comment about the recall of the mayor and the police department's efforts to clean up the neighborhood, the comment did not involve a request to decide this case based upon a civic duty. The prosecutor's remark, "We're going to

Haiti in a hand basket if that's our values," was a comment directed at Bennie Lloyd's testimony that, although he admitted to selling drugs, he felt he was victimized by the police department. The prosecutor's remarks were all based on reasonable inferences that could be drawn from the evidence presented at trial. Accordingly, defendant has not shown misconduct. *Bahoda, supra* at 282.

Defendant also argues that his attorney was ineffective for not objecting to the prosecutor's remarks. Because the remarks were based upon the evidence and reasonable inferences that could be drawn from the evidence, defendant has not shown that counsel was deficient for failing to object.

Lastly, defendant argues that the evidence was insufficient to support his two convictions of assault with intent to do great bodily harm. An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but on whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id.* at 515.

To prove the crime of assault with intent to cause great bodily harm, the prosecution was required to show (1) an assault with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). Assault with intent to do great bodily harm is a specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The intent to harm may be inferred from the defendant's actions. *Id.* The fact that a bullet may miss the victim does not negate the intent element because no physical injury is required to establish the elements of assault with intent to cause great bodily harm. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992).

Defendant apparently concedes that the evidence was sufficient to support at least one count of assault with intent to cause great bodily harm. He argues that the evidence did not show that he possessed the intent to injure both victims. Thus, resolution of this issue depends on whether a single gunshot fired at two individuals may support two counts of assault.

In *People v Lovett*, 90 Mich App 169, 171-174; 283 NW2d 357 (1979), our Court addressed the issue of whether one or two counts of assault could be charged where a defendant fired a single shot at an individual, whom the bullet missed but struck another individual standing across the street. In that case, the defendant admitted to shooting at the intended victim, but without intent to kill him. *Id.* at 172. The defendant claimed that he could only be convicted of one count of assault because he committed a single act with the specific intent to injure only one person. This Court stated:

While all charges arising out of a single transaction must be tried at one time, a person, by a single act, can violate more than one criminal statute and thus be found guilty of multiple offenses.

Where crimes against persons are involved we believe a separate interest of society has been invaded with each victim and that, therefore, where two

persons are assaulted, there are two separate offenses. [*Lovett, supra* at 174 (citations omitted).]

Here, the evidence indicated that defendant fired a single shot into the car where the two officers were sitting. The fact that defendant did not strike either of the men, but only came close to hitting them, does not negate the intent to cause great bodily harm. Moreover, as *Lovett* makes clear, a single criminal act can result in multiple convictions for assault where there is more than one victim, as occurred in this case. Thus, there was sufficient evidence to convict defendant on both counts of assault. See also *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992).

Affirmed.

/s/ Brian K. Zahra

/s/ Michael R. Smolenski

/s/ Michael J. Talbot