

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO MAURICE GAITHER,

Defendant-Appellant.

UNPUBLISHED

December 10, 2002

No. 230886

Berrien Circuit Court

LC No. 00-401646-FC

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant, Antonio Gaither, a/k/a Tony Horn, was convicted, following a jury trial, of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant, a fourth habitual offender, MCL 769.12, was sentenced to 396 to 1,200 months' imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant first argues that he was deprived of the effective assistance of counsel in numerous respects. Our review is limited to errors apparent on the record because no *Ginther*¹ hearing was held. *People v Walter Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To prevail on his claim of ineffective assistance of counsel, defendant must affirmatively show that his counsel's performance fell below an objective standard of reasonableness and that, but for the alleged errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant contends that counsel was ineffective for failing to fully investigate and present facts pertinent to his defense. Specifically, he argues that counsel failed to request certain discovery with respect to the recovered bullet casings and failed to request, or determine

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

whether, fingerprint testing was conducted. Further, he argues that counsel should have requested testing on a weapon similar to that described at trial. These issues are abandoned. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). And, we note that defendant has not affirmatively demonstrated that, but for the alleged errors, the outcome of his trial would have been different. *Stanaway, supra*.

Defendant also argues that counsel was ineffective for failing to move to exclude testimony about the shooting of Wesley Smith by Charles Jennings. We disagree. The prosecutor inquired about the Smith shooting in an attempt to establish a motive for the shooting in this case. While the prosecutor had no obligation to prove motive, evidence of motive is relevant to establishing the intent to commit murder. *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). The intent to murder is an essential element of assault with intent to commit murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences drawn from that evidence may constitute satisfactory proof of that element. *Id.* Thus, the prosecutor’s attempt to use circumstantial evidence to show a possible motive was appropriate. Defense counsel was not required to make a meritless motion to try and preclude the prosecutor’s evidence of possible motive. *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998).

Defendant additionally alleges that counsel was ineffective for failing to object to the prosecutor’s elicitation and use of the street names or nicknames of witnesses. Defense counsel is not required to make frivolous or meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Without the evidence of the different nicknames or street names used by the witnesses, the jury would have been unable to fully comprehend the testimony at trial. For example, defendant was also known as Tony Horn. The victim identified the shooter as Tony Horn. Without information that Tony Horn and defendant were the same person, the jury would have been unable to determine the issues before it. Other witnesses were also referred to by names other than their legal names. Admission of aliases is admissible to establish identity. See, e.g., *People v Phillips*, 217 Mich App 489, 491-492; 552 NW2d 487 (1996). Any objection to the elicitation or use of street names at trial would have been frivolous.

We also disagree with the suggestion that defense counsel was ineffective for failing to object to argument and innuendo about defendant’s relationship with a gang. We do so because the record does not support defendant’s claim that the prosecutor engaged in such conduct. During the cross-examination of prosecution witness Gregory Traylor, defense counsel questioned whether Traylor was in a gang. When defendant testified, the jury posed a similar question to him, asking if he was in a gang. Defense counsel later asked defendant on redirect whether he was a gang member. The prosecutor never inquired about whether defendant was affiliated with a gang. While the prosecutor asked several questions about whether defendant socialized with, or knew, particular people, these questions were part and parcel of the prosecutor’s attempt to prove motive and did not imply a gang shooting theory. Further, the prosecutor never argued or implied during closing argument that gangs were involved. While the prosecutor noted that the victim and defendant each had their own circle of friends, this was a proper comment on the evidence that was presented to the jury. Prosecutors are free to argue the

evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). It was defense counsel who raised the issue of gangs at trial and who argued about gangs during closing argument.

Finally, defendant complains that counsel was ineffective for calling Theresa Sipe as an alibi witness. A decision with respect to what evidence to present is a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). This Court will generally not second-guess matters that are presumed to be sound trial strategy. *People v Charles Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). Rather, defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Defendant has not done so in this case.

II

Defendant next raises numerous issues of prosecutorial misconduct. Several of the issues are abandoned because defendant has failed to explain or rationalize his positions with respect to them. *Kelly, supra*. Accordingly, we do not consider them herein.

Defendant also raises several unpreserved allegations of prosecutorial misconduct. Specifically, he claims that the prosecutor improperly vouched for the credibility of the victim during opening statement; that the prosecutor should not have raised the issue of Smith's shooting; that the prosecutor engaged in misconduct when he improperly implied that defendant was in a gang and that the victim's shooting was gang related; that the prosecutor improperly vouched for the victim's credibility during closing argument; that the prosecutor improperly argued that a person on his deathbed would not fabricate information about who shot him; and that the prosecutor improperly denigrated defendant's alibi and expressed a personal opinion about it. Unpreserved issues of prosecutorial misconduct are reviewed only for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). To avoid forfeiture of an issue under the plain error rule, a defendant must demonstrate the existence of a plain error, which affected his substantial rights, i.e., affected the outcome of the lower court proceedings. *Carines, supra* at 763-764. We have reviewed the challenged conduct and are not persuaded that appellate relief is warranted with regard to any of the unpreserved issues. The prosecutor's conduct either conformed with applicable standards of conduct or did not constitute plain error requiring reversal. Defendant also has not demonstrated that any prejudice stemming from the challenged conduct affected the outcome of his trial. *Id.*

III

Defendant argues that the trial court improperly instructed the jury using CJI2d 4.4, the flight instruction. This issue is preserved. We review jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Even somewhat imperfect jury instructions do not create error if they fairly present the issues for trial and sufficiently protect the defendant's rights. *Id.*

It is "well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The term "flight"

encompasses fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). In this case, there was evidence that defendant fled the scene of the crime. The victim testified that defendant ran away after the shooting. This evidence supported the flight instruction. More importantly, there was evidence that defendant concealed his location from the police after learning that they were looking for him in connection with the shooting. This evidence also supported the instruction.

In addition, the standard instruction adequately protected defendant's rights. Defendant's theory was that his failure to turn himself over to the police did not evidence consciousness of guilt but was due to his innocent desire to hire counsel and be represented at the time of his arrest. The neutral "flight" instruction given by the trial court informed the jury that a person may run or hide for innocent reasons or because of a consciousness of guilt. Defendant maintained that he had an innocent reason and he presented that reason to the jury. The jury was properly left to determine whether the flight evidence showed a consciousness of guilt or an innocent reason.

We disagree that the jury instruction impinged on defendant's constitutional right to consult an attorney. The jury was unequivocally instructed during trial that defendant had a constitutional right to consult with an attorney. The flight instruction, given before deliberation, did not state, imply or infer that the jury could consider defendant's consultation with an attorney as consciousness of guilt. The instruction apprised the jury of the applicable law and fairly presented the issues to be tried.

IV

Defendant next argues that trial court abused its discretion when it allowed the jury to submit questions to the witnesses and when it failed to allow a mid-trial voir dire of the jurors.

The issue whether the trial court abused its discretion when it allowed jurors to submit questions to the witnesses is not preserved. No objection to the procedure was raised at trial. Moreover, the issue has no merit. "The practice of permitting questions to witnesses propounded by jurors is within the sound discretion of the trial court." *People v Wesley*, 148 Mich App 758, 760-761; 384 NW2d 783 (1986), citing *People v Heard*, 388 Mich 182; 200 NW2d 73 (1972). Whether a question from a juror will be permitted is committed to the sound discretion of the trial court and juror questions are not limited to questions designed only to clarify otherwise confusing testimony. *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982). If a question is competent and does not indicate any prejudice, the trial court does not abuse its discretion in allowing the question to be asked. *Id.* In this case, the trial court's decision to allow jurors to submit questions, subject to the court's approval, was not an abuse of discretion. Defendant has failed to demonstrate plain error requiring reversal. *Carines, supra*.

Defendant further argues that some of the submitted questions evidenced juror bias or prejudice and thus, further voir dire was necessary. The issue is preserved because defendant moved to conduct additional voir dire during trial and the trial court ruled on the motion. We have reviewed the questions that defendant believes warranted further voir dire. The questions

were submitted to the trial court while defendant was testifying. Two of the questions evidenced that the jurors might have misconceptions about the law. The trial court issued adequate cautionary instructions to address those misconceptions. The remaining questions were questions that a naturally curious juror may wish to have answered. They do not, however, evidence bias or prejudice and, in fact, two of the questions were addressed by defendant on the second day of trial. Relief is not warranted on appeal because defendant has not demonstrated that any of the jurors were unable to act impartially or were properly excusable for cause. *People v Washington*, 251 Mich App 520, 530; 650 NW2d 708 (2002).

V

Defendant argues that his sentence is disproportionate and that he is entitled to resentencing. Defendant was sentenced under the Legislative sentencing guidelines, which apply to offenses committed after January 1, 1999. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). MCL 769.34(10) provides, in pertinent part:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant has not alleged that there was an error in the scoring of the guidelines or that inaccurate information was relied upon in determining his sentence. Because defendant's minimum sentence was within the properly scored guidelines range of 125 to 450 months, we are required to affirm. MCL 769.34(10).

Defendant's argument that MCL 769.34(10) is unconstitutional is not properly presented to this Court because it is not raised in the statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Further, the constitutional argument presented by defendant has been rejected. *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127 (2001); *People v Babcock*, 244 Mich App 64, 68; 624 NW2d 479 (2000).

VI

Finally, defendant argues that there was insufficient evidence to sustain his conviction and that his conviction is against the great weight of the evidence. Neither argument has merit.

When reviewing the sufficiency of the evidence in a criminal case, the reviewing court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citation omitted). The elements of assault with intent to commit murder are (1) an assault, (2) with actual intent to kill, (3) which, if successful, would make the killing murder. *McRunels, supra*. Motive is not an element of the crime and, therefore, the prosecutor was not required to prove it. *Herndon, supra* at 416.

The victim's testimony alone, viewed in a light most favorable to the prosecution, was sufficient to enable a rational jury to determine that the essential elements were proved beyond a reasonable doubt. See *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990) (a victim's testimony alone may be sufficient). The victim testified that defendant pointed the weapon at him and shot him in the stomach two times. After the victim was on the ground pretending to be dead, defendant shot the victim several more times from behind. The victim sustained five gunshot wounds. The circumstances surrounding the shooting support the intent to kill. See *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996).

Defendant also argues that the verdict is against the great weight of the evidence. While initial determination of this issue is generally a matter for the trial court, the trial court was not presented with this issue in this case. Neither the trial court nor this Court, however, may make credibility determinations when deciding whether a verdict is against the great weight of the evidence. *Ayres, supra* at 23-24; *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Defendant's argument with respect to the great weight of the evidence is essentially an attack on the jury's decision that the prosecution's case was more credible than defendant's alibi defense. This is an insufficient ground to support a finding that the verdict was against the great weight of the evidence. Defendant needed to show that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.* He has failed to do so. We further reject defendant's argument that this Court improperly denied his motion for a remand on the issue of the great weight of the evidence. The trial court could not have, on remand, overturned the verdict on the grounds asserted by defendant. A remand was therefore unnecessary.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot