STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2004
v	No. 240354 Wayne Circuit Court
MICHAEL D. LEWIS, Defendant-Appellant.	LC No. 01-008119

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for assault with intent to do great bodily harm less than murder,[1] MCL 750.84. Defendant was sentenced to ten months to ten years' imprisonment for the assault with intent to do great bodily harm conviction. We affirm.

On July 6, 2001, Kenneth Griffor picked up defendant, who was walking, and gave him a ride home. Defendant invited Griffor in and the two had some alcohol drinks. Griffor claims that, while he was at defendant's house, defendant attacked him and cut him several times with a knife, and that he did not provoke this contact or threaten defendant. Defendant testified that Griffor had left his home, that he had went to sleep, and woke to Griffor "swinging" at him. Defendant further testified that he grabbed a knife that was near and was using it to push Griffor away. Griffor testified that after being stabbed, he ran out the door. Defendant phoned 911 reporting that an intruder was in his home.

When the police responded, they found Griffor on the road injured and bleeding. Sergeant Michael Graham, of the Woodhaven Police Department testified that, upon arriving at defendant's residence, he viewed blood drops on defendant's front porch. Detective Robert Toth, of the Woodhaven Police Department, testified that the police got a search warrant and began to search defendant's home for possible evidence. Blood spots were found on the porch

[1] The trial court found defendant not guilty of assault with intent to commit murder, MCL 750.83, but guilty of the lesser charge of assault with intent to do great bodily harm less than murder.

and throughout the house. Detective Toth testified that a knife was found under the bed rolled up in a blue rug, and that the knife had blood and fatty tissue on it.

Defendant's first issue on appeal is that the trial erred by admitting photographs of Griffor's injuries that portrayed the injuries as more graphic than they were at the time the injuries were sustained. We disagree.

Defense counsel did not object and basically stipulated to entry of the photographs into evidence. A party may not seek appellate relief based upon an evidentiary error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1), *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). A criminal defendant may obtain relief based on an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). A decision on a close evidentiary question rarely can constitute plain error. *Gonzalez, supra* at 217.

Defendant argues that the photographs should not have been admitted because they were not relevant as the they were not taken at the time the incident in question occurred, but, instead, "days or hours" afterward. Defendant further argues that the photographs revealed black stitches on the cuts that magnified them, and the pictures mischaracterized the size of the wounds making the injuries look more serious than they were.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402, *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *Gonzalez, supra* at 218. The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern relevance and materiality. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996); *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001). The challenged photographs were clearly relevant to the extent of the injuries and how the injuries occurred, as defendant contended the cuts were not deep because he was only using the knife to defend himself by pushing Griffor away. Clearly, photographs of the injuries are relevant to whether the injuries occurred via stabbing or pushing away, as the types of wounds could make defendant's self-defense argument less probable than it would be without the evidence. In addition, the photograph could make Griffor's version of the events more probable or less probable. Further, the extent of the injuries was relevant to defendant's intentions for purposes of the crime; i.e., whether he intended to murder or do great bodily harm. Thus, the photographs were relevant.

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403, *People v Sabin*

(After Remand), 463 Mich 43, 58; 614 NW2d 888 (2000). Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). A decision whether to admit evidence is within the discretion of the trial court and the prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility and effect of the evidence. See *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

This is not a case where the photographs were presented to a jury that may be unduly prejudiced, but, rather, this is a bench trial. The trial court is aware of the law and is not likely to give evidence improper weight, as a jury might. Regardless, the photographs were highly probative to both the prosecution's case and to counter the defense. The prosecution was trying to argue that the photographs evidence an attack by defendant, while defendant argued that they evidence self-defense as the wounds were not deep and support that he was pushing Griffor away with the knife. The probative value of the pictures was not substantially outweighed by the chance of prejudice, especially when the trial court was the fact finder.[2] There was no plain error affecting defendant's substantial rights with regard to admission of the challenged photographs.

Defendant's second issue on appeal is that he was denied the effective assistance of counsel. We disagree.

When reviewing defendant's claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id*. at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant contends that trial counsel admittedly failed to receive important evidence from the prosecution, failed to move before the trial court to have the evidence produced and,

[2] Even if there was error any error was harmless. Because unlike a jury, a judge acting as the factfinder possesses an understanding of the law that allows him to ignore evidentiary errors and decide a case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

thus, was not prepared for trial. Basically, defendant is arguing that his trial counsel was ineffective based on a failure to properly prepare and failure to investigate. Specifically, defendant argues that defense counsel had not reviewed pertinent pieces of evidence prior to trial including photographs and the content of the 911 calls made by defendant, nor did trial counsel file discovery motions to obtain this information. In addition, plaintiff's standard 11 brief asserts that trial counsel failed to obtain and use Griffor's prior statements during cross-examination and failed to investigate and present a defense on the possible use of a second weapon.

Defendant first contends that his trial counsel failed to properly prepare or investigate. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant, *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988), remanded on other grounds 436 Mich 866; 460 NW2d 226 (1990), on remand 188 Mich App 80; 469 NW2d 22 (1991), or by showing a failure to meet a minimum level of competence, *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980). "[I]n order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant." *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998) citing *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Trial counsel's failure to view all of the photographs prior to trial did not constitute ineffective assistance of counsel. Trial counsel had plenty of time to review the photographs at trial, and there is no showing on this record that if defense counsel had reviewed the photographs prior to trial the result of the proceedings would have been different. *Bell*, *supra* at 695. Thus, defendant has failed to establish that he received ineffective assistance of counsel.

With regard to the recordings of the 911 calls, we conclude that trial counsel's failure to obtain the 911 recordings before trial did not cause the requisite prejudice, i.e., defendant has not shown that the result of the proceedings would have been different absent these alleged deficiencies. *Bell*, *supra* at 695; *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Defendant's trial counsel did get an opportunity to review what was contained on the 911 tapes and found nothing exculpative. Regardless, there was no deficiency that resulted in prejudice to defendant and, thus, defendant has failed to establish that he received ineffective assistance of counsel.

To the extent defendant raises further issues regarding discovery, he fails to state what a discovery motion would have produced, and further fails to state how he was prejudiced by the failure to properly file the discovery motion. Appellant nay not announce his position and leave it to this Court to discover and rationalize the basis for his claims, *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999), nor may he give issues cursory treatment with little or no citation to supporting authority. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Although defendant's trial counsel did not obtain the photographs or a recording of the 911 call prior to trial, he did obtain the information at trial, and had plenty of time to prepare. When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must

show prejudice resulting from the lack of preparation. *Caballero, supra* at 640. Assuming trial counsel was not properly prepared, defendant has failed to show prejudice resulting from trial counsel's lack of preparation.

In a standard 11 brief, defendant raises various other ineffective assistance of counsel issues. With regard to defendant's claim that defense counsel inadequately cross-examined Griffor, decisions as to what questions to ask a witness are presumed to be matters of trial strategy, *Rockey*, *supra* at 76, and the failure to present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* The trial court was familiar with the record. Defendant's trial counsel adequately cross-examined Griffor, and was trying to establish the Griffor was drunk and did not remember exactly what went on. That a strategy does not work does not render its use ineffective assistance of counsel. *Kevorkian, supra* at 414-415. Defense counsel need not ask every question and explore every possibility to be effective. There is nothing on the record that supports defendant's assertion that defense counsel was unprepared to cross-examine Griffor. To the contrary, the record shows that defense counsel was intimately familiar with the case, was not surprised by Griffor's testimony, and adequately cross-examined him. Defense counsel may have made a strategic decision not to question Griffor regarding the prior statement because, even if the statements differed slightly, all statements were that defendant attacked Griffor, unprovoked, with a knife. Decisions concerning what questions to ask are presumed to be matters of trial strategy. *Rockey*, *supra* at 76. This Court will not substitute its judgment on trial strategy, nor will it assess counsel's performance with the benefit of hindsight. *Id*. at 76-77.

Defendant's also appears to raise an argument that counsel was ineffective for failing to investigate a fork as a possible second weapon. We cannot ascertain from defendant's standard 11 brief what exactly he is arguing or how it affected his defense. But, regardless, there is no showing that trial counsel's failure to investigate a fork as a potential second weapon fell below an objective standard of reasonableness under prevailing professional norms, nor is there a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell*, *supra* at 695.

Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc*, *supra* at 579.

Defendant's third issue on appeal is that there was insufficient evidence to convict him of assault with intent to do great bodily harm less than murder. We disagree.

In reviewing the sufficiency of the evidence in a bench trial, we view the evidence, de novo, in the 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 Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). It is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to

be accorded to the inferences. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The trial court's factual findings are reviewed for clear error, and a finding of fact is considered "clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

To convict defendant of assault with intent to do great bodily harm less than murder, the prosecution needed to establish the following beyond a reasonable doubt: "(1) an assault, i.e., 'an attempt or offer with force and violence to do [a] corporal hurt to another' coupled 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) quoting *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922). 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). A defendant's intent may be inferred from his conduct, and from all the facts and circumstances surrounding the crime. *Id.*; *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995).

Viewing the evidence, de novo, in the light most favorable to the prosecution, we believe that a rational finder of fact could conclude that defendant assaulted Griffor with the requisite intent. See *Johnson, supra* at 723. It is undisputed that Griffor was stabbed. Griffor identified defendant as the individual who stabbed him and defendant does not dispute that he stabbed Griffor, but claims that it was self-defense and that because of intoxication he could not have the requisite intent. Griffor testified that defendant came at him, unprovoked, stabbing him with a knife. The police found defendant who had been stabbed, and found blood throughout defendant's house. With regard to self-defense and how the stabbing occurred, defendant only raises issues of credibility, which is for the trier of fact. See *Hardiman, supra* at 428. There is sufficient evidence, from Griffor's testimony alone, that defendant assaulted him with the force of a knife.

Intent to do great bodily harm can be inferred from the fact that defendant used a dangerous weapon. *People v Crane*, 27 Mich App 201, 204; 183 NW2d 307 (1970). Defendant used a knife, which can be considered a dangerous weapon. With regard to defendant's claim of intoxication, the trial court, reviewing the evidence, found that defendant was not intoxicated to the point that he could not establish the specific intent to commit a crime.[3] The trial court based this finding on the fact that defendant called the police, attempted to hide the weapon, and because his history of alcoholism indicated a higher capacity for alcohol. There was evidence, when viewed in a light most favorable to the prosecution, supporting that defendant was not so intoxicated that he could not establish the specific intent to commit a crime and it could be inferred from the evidence that defendant intended to do great bodily harm. As such, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to convict defendant of assault with intent to do great bodily harm less than murder.

[3] We note that the defense of intoxication, for the most part, is now precluded by MCL 768.37; however, that statute became effective after the events in the case at bar.

Defendant's final issue on appeal, raised in his standard 11 brief, is that the search of his home was illegal because it was conducted with an improper warrant. Generally, this Court's review is limited to the record of the trial court. MCR 7.210 *et seq.*; see also *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), affirmed in part, reversed in part on other grounds 462 Mich 415 (2000). A review of the record reveals no information on the search warrant. Defendant argues " I know for a fact the police searched my home for drugs[4] an act for which there was no probable cause. . . . Then there is the possibility they may have been looking for two weapons." Although defendant argues that there was some problem with the search warrant, he fails to state his claims with any degree of specificity. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). On this record, we find no error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen

[4] We note that there is nothing in the record regarding drugs. Further, defendant was not charged with any drug related crime.