STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2004
v	No. 247547 Wayne Circuit Court
MORRIS RILEY, Defendant-Appellant.	LC No. 02-013821-01

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

On October 25, 2002, Germaine Hayes went pick up her daughter Barbara Friedman at her 690 Ross Street, Plymouth, Michigan home.[1] When Hayes arrived defendant was at the home. Hayes did not want defendant in the home, so she left and went to the police station to have defendant removed. Subsequently, Hayes returned to the home without the aid of police, at which time defendant was no longer there so she locked all of the doors. Hayes explained that while she was doing dishes defendant grabbed her from behind, put a knife to her throat stating, "I'm going to get you," and dragged her toward the basement stairs. Hayes further explained that defendant pushed her down onto the floor and was hovering over her with a knife when Friedman showed up and interrupted. After being helped up by Friedman, Hayes explained that she went running out the door over to the neighbors, even though defendant tried stopping her, where she called the police. Hayes had cuts on her arms and hands that were bleeding, and had injured her foot. When the police arrived on the scene, defendant was still present at the 690 Ross Street home, and was arrested. In a written statement, defendant acknowledged that he put the knife to Hayes' throat and said, "I'm going to get you," but provided that it was only "to scare her." In addition, defendant's statement provided that he grabbed Hayes and they fell down the stairs, which was how her hand was cut.

[1] Apparently, Hayes and Friedman were coowners of the home, but only Friedman lived in the home.

Defendant's first issue on appeal is that the trial court deprived him of a fair trial when it instructed the jury that it could find him guilty of assault with a dangerous weapon (hereinafter "felonious assault") as an alternative to assault with intent to do great bodily harm. Defendant has waived his right to seek appellate review of this issue.

The prosecution requested to amend the information to reflect that felonious assault was to be an alternative to assault with intent to do great bodily harm less than murder. When the trial court asked defense counsel if the motion was agreeable, defense counsel answered, "Yes, you honor." Then, prior to jury instructions the trial court stated that the jury would be considering assault with intent to do great bodily harm less than murder or in the alternative felonious assault, and asked if it was agreeable. Defense counsel responded "Yes, your honor." Lastly, at the close of jury instructions the trial court asked counsel if they were satisfied with the instructions and defense counsel responded "Yes, Judge." Defense counsel expressed his affirmative approval of the challenged instruction on three different occasions. "By expressly approving the instructions, defendant has waived this issue on appeal." *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). A defendant who waives his or her right under a rule may not seek appellate review of a claimed deprivation of that right because the waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Consequently, any error in this regard has been extinguished.[2]

Defendant's second issue on appeal is that there was insufficient evidence to support a conviction for assault with intent to do great bodily harm. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

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).

Defendant contends that the evidence did not support that he had the requisite specific intent. But, as noted, the requisite intent can be inferred from the circumstances of the incident. *Parcha, supra* at 239; *Lugo, supra* at 709-710. Given the difficulty of proving state of mind, minimal circumstantial evidence is sufficient to prove that an actor had the requisite intent. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). It is not disputed that Hayes

[2] This issue will be addressed further, *infra*, in regard to defendant's ineffective assistance of counsel claim.

was injured. Hayes testified that defendant put a knife to her neck and said "I'm going to get you," and then took her to the basement, threw her on the floor and hovered over her with a knife; at which time defendant was interrupted by Friedman. There was evidence that Hayes had injuries from the knife and from the fall. An inference could be made from the evidence that defendant used a knife to threaten Hayes, that he attempted to move her to the basement to harm her, and that defendant intended to do great bodily harm in assaulting Hayes. Intent to do great bodily harm can be inferred from the fact that defendant used a dangerous weapon. See *People v Crane*, 27 Mich App 201, 204; 183 NW2d 307 (1970). Defendant used a knife, which can be considered a dangerous weapon. It is the province of the trier of fact, not this Court, to determine what inferences may be fairly drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (1998). Upon review de novo, we find that the evidence, viewed in a light most favorable prosecution, supports that defendant assaulted Hayes and intended to do great bodily harm. See *Hunter, supra* at 6.

Defendant's final issue on appeal is that he was denied his right to effective assistance of counsel. We disagree. Defendant raises various ineffective assistance of counsel claims on appeal, none of which are meritorious.

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 and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *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).

Defendant contends that defense counsel was ineffective in that he elicited damaging testimony from Hayes on cross-examination and failed to object to her non-responsive answers or motion to strike the challenged testimony as prejudicial. On cross-examination, defense counsel asked Hayes why she was afraid of defendant, and Hayes responded "A very nice Livonia policeman told me that he was very bad." Subsequently, Hayes stated, "I said I'm going to the police station because there was a young, nice policeman there that told me any time I was afraid to go [to the 690 Ross Street home because of defendant] he would go with me." Defense counsel further elicited from Hayes that there was no specific reasons for why she should be scared of defendant, and that the police disregarded her when she went to get the police to come to the house with her. Defendant acknowledges that Hayes' statements were "non-responsive" in his brief on appeal, thus, the contention is not that defense counsel improperly elicited the statements, but, rather, failed to object and have them stricken as prejudicial. "Certainly there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). It could very well have been trial

strategy for defense counsel to move on rather than draw attention to the statements. In addition, defense counsel done an effective job of eliciting from Hayes that the police would not go with her, which could indicate the police did not support Hayes' claim that a police officer would go to the house with her. "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy." *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). The failure to object and have testimony stricken can be considered trial strategy and, therefore, it is an inappropriate basis for claiming ineffective assistance of counsel**.** See, generally, *id.* at 444-445. Defense counsel may have determined that an objection and request for instruction would have highlighted the evidence and, accordingly, he may have decided not to request such an instruction. Such a strategy would not be unsound. See *Id*. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445. Defendant has not overcome this presumption that his counsel was effective, and, as such, defendant has failed to show that counsel's decision to not object to the complainant's statements was objectively unreasonable; nor has defendant shown a reasonable probability that, but for counsel's alleged error, the result of the trial would have been different. See *Bell, supra* at 695; *Toma, supra* at 302.

Defendant next argues that defense counsel was ineffective in that he questioned Hayes about suffering cuts on her arms when the prosecution had not questioned her regarding the cuts. Once again, defense counsel's decision to cross-examine Hayes regarding her injuries is an issue of trial strategy, for which defendant has not overcome the strong presumption that this was sound trial strategy. *Rice, supra* at 444. Defense counsel cross-examined Hayes regarding the cuts knowing that defendant's written statement was being admitted, wherein defendant acknowledges that he had cut Hayes; and being aware that the neighbor and the police officers at the scene were going to testify that Hayes was bleeding. Defense counsel may have raised the issue first in an attempt to display to the jury that there was nothing to hide because the injury may have been from Hayes grabbing the knife. It is not unsound trial strategy for defense counsel to place information regarding Hayes' cuts in front of the jury on counsel's own initiative, rather than wait for the prosecution to present the evidence, because this gave defense counsel an opportunity to raise doubts as to how the cuts occurred on Hayes' hand; i.e., defense counsel indicated that it was from Hayes grabbing the knife, which would support that the defendant did not intend to injure Hayes. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. See *id*. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant has not overcome the presumption that he received effective assistance of counsel, and, as such, defendant has failed to show that counsel's decision to raise the issue of Hayes' injuries was objectively unreasonable; nor has defendant shown a reasonable probability that, but for counsel's alleged error, the result of the trial would have been different. See *Bell, supra* at 695; *Toma, supra* at 302.

Defendant also argues that defense counsel was ineffective in failing to seek a mistrial or "some remedy" when Officer Anthony Angelosanto testified that he had previous contact with defendant when he was dispatched for an assault and battery. Defense counsel objected and the trial court instructed the jury to disregard the testimony. The trial court asked the jury if it could disregard the testimony and it responded, "Yes." Again, it may have been trial strategy for

defendant not to request a mistrial as it would have further highlighted the brief statements made, when it is likely a motion for mistrial would have been futile. Regardless, defendant has not shown that but for the alleged error the result would be different, because any error was cured by defense counsel's objection and the trial court's prompt direction for the jury to disregard the statement. "Jurors are presumed to have followed a court's instructions until the contrary is clearly shown." *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994); see also *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Nothing has been presented supporting that the jury did not follow the trial court's instruction.

Lastly, defendant contends that defense counsel was ineffective based on his failure to object to the trial court's instruction to the jury with regard to felonious assault being an alterative to assault with intent to do great bodily harm less than murder. It may have been trial strategy for defense counsel to allow this lesser offense hoping the jury might convict defendant on lesser offense rather than the higher offense. That a strategy does not work does not render its use ineffective assistance of counsel. *Kevorkian, supra* at 414-415. Nonetheless, any error was harmless and an objection to the instruction would not have changed the outcome of the proceedings because defendant was convicted of the greater offense of assault with intent to do great bodily harm less than murder and not felonious assault. See, generally, *People v Cornell*, 466 Mich 335, 361-367; 646 NW2d 127 (2002); *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1995).[3] Therefore, defendant has not shown that but for counsel's alleged error, the result of the proceedings would have been different. See *Bell, supra* at 695; *Toma, supra* at 302.

Based on the record, upon review de novo 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.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

[3]In *Cornell, supra* at 353-354, our Supreme Court held that only instructions on necessarily included lesser offenses, not cognate lesser offenses, are to be given under MCL 768.32(1). A necessarily included lesser offense is one where it is impossible to commit the greater offense without first having committed the lesser. *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003). We note that felonious assault is not necessarily included offense of assault with intent to commit great bodily harm because assault with intent to commit great bodily harm, MCL 750.84, can be committed without the commission of felonious assault because felonious assault requires the use of a weapon, MCL 750.82.