STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2004
v	No. 246607 Oakland Circuit Court
PHILIP FALL MILLER, II, Defendant-Appellant.	LC No. 02-184827-FC

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

PER CURIAM.

Defendant appeals as of right from his jury conviction for assault with intent to commit great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 7½ to 40 years' imprisonment with credit for 370 days served. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. Defendant did not move for a new trial or for an evidentiary hearing in the trial court. Therefore, appellate review is limited to the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and questions of law are reviewed de novo. *Id.* To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant alleges that trial counsel's tactic of submitting a lesser offense to the jury was unreasonable. Although defendant complains that counsel did not consult him in the decision to do so, the record indicates that, on the contrary, defendant was consulted, understood the ramifications, and made the final decision. Defendant points to notes from the jury and the fact that the jury ultimately found him guilty of the lesser offense to show that counsel erred by failing to employ an "all or nothing" defense that would, presumably, have resulted in defendant being acquitted. However, defendant's contention is pure speculation; it is equally possible that defendant would have been convicted of the greater offense. Furthermore, "this 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*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a strategy ultimately failed does not make assistance of counsel ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant also alleges that trial counsel was ineffective for failing to call independent medical witnesses to establish whether the victim actually suffered certain injuries. However, counsel questioned the doctor who treated the victim in the emergency room and was able to make those inquiries. There is no evidence showing a reasonable probability that the outcome of the trial would have been different if counsel had presented its own doctor.

Finally, defendant alleges that counsel should have objected to a hypothetical question the prosecutor posed to the victim's treating physician regarding whether someone can die from strangulation by hand. Contrary to defendant's assertion that no medical evidence showed that the victim was choked, the victim's examining physician testified that the victim did sustain bruising to her lower neck. Also, the victim testified that defendant choked her, so the question was based on evidence in the record. Furthermore, under MRE 703, an expert witness may give an opinion on the basis of a hypothetical scenario. *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992). Because the question was proper, objection would have been futile. Therefore, counsel was not ineffective for failing to make that objection. *Ackerman*, *supra* at 455.

Defendant's second argument is that the prosecutor engaged in misconduct by mischaracterizing evidence and failing to call certain doctors listed on the prosecution's witness list. Because defendant did not object below to the alleged instances of prosecutorial misconduct, they are unpreserved. *Id.* at 448. "We review de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *Id.* However, unpreserved claims are reviewed for plain error affecting substantial rights, under which "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id*. at 448-449.

Being potential witnesses, the doctors were named on the prosecution's witness list pursuant to MCL 767.40a(1), which only requires a list of "all witnesses known to the prosecuting attorney who *might* be called at trial." MCL 767.40a(1) (emphasis added). Although subject to other rules of evidence or criminal procedure, MCR 6.416 grants each party the discretion to decide what witnesses to present. *People v Burwick*, 450 Mich 281, 291 n 13; 537 NW2d 813 (1995). Furthermore, defendant did produce a doctor – one of the doctors on the prosecutor's list – to provide defendant's desired testimony. Therefore, we find that defendant was not prejudiced by the prosecutor's decision not to call any other doctor on her witness list.

The prosecutor's statement that the victim had been struck as many as thirty times was inaccurate, as the victim testified that she was struck approximately twenty times. But the trial court instructed the jury that the lawyers' statements were not evidence and that it was to base its decision only on the evidence presented. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, despite the prosecutor's misstatement, "the judge's instruction that arguments of attorneys are not evidence dispelled any prejudice." *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). The remainder of the prosecutor's statements regarding the victim's injuries were supported by

evidence and testimony in the record. Accordingly, we do not find that the prosecutor's statements and conduct denied defendant a fair trial, and, therefore, reversal is not warranted.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra