STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 263621 Wayne Circuit Court
RONALD KIRK BROWN, Defendant-Appellant.	LC No. 04-012918-01

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(1)(a), two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction, 35 to 70 years for each of the assault convictions, and two to five years for the felon-in-possession conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the November 2004 drive-by-shooting at a house on Glenfield Street in Detroit, which resulted in the death of seven-year old Deva White. Denise Brown and Ahkweem Destouche were also present in the home at the time of the shooting, but they were not injured.

Defendant first argues that he was prejudiced by evidence suggesting that he attempted to prevent his children from testifying against him at trial. Because defendant did not object to this evidence at trial, this issue is unpreserved. Therefore, this Court reviews the issue for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003). Reversal is warranted only if plain error results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity, or public reputation of the judicial proceedings, independent of the defendant's innocence. *Id.*

Shortly after the shooting, defendant's children each told police that they heard defendant implicate himself in the shooting. After defendant was arrested, he made telephone calls from the county jail to the children's mother, during which they discussed that the only way for defendant to avoid conviction was to have his children recant, or to have them refuse to testify by

"tak[ing] the fifth." Defendant's jailhouse phone calls were recorded and the recordings were played for the jury at trial.

On appeal, defendant now complains that it was improper for the prosecutor to question a police officer regarding his unsuccessful efforts to locate defendant's children for defendant's preliminary examination, and to question the children's mother regarding her repeated failure to bring the children to court, as well as her decision to remove the children from school and leave their residence before the preliminary examination.

Evidence of a defendant's attempt to induce witnesses not to testify properly may be considered because it shows consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); *People v Falkner*, 36 Mich App 101, 108; 193 NW2d 178 (1971), rev'd on other grounds 389 Mich 682 (1973). Here, the challenged evidence was relevant to the prosecution's theory that defendant attempted to prevent his children from testifying against him. As such, this evidence was probative of defendant's consciousness of guilt. Additionally, it was relevant to explain differences between the children's testimony at trial and their earlier statements to police. Accordingly, there was no plain error arising from the admission of this evidence.

Next, defendant argues that he was denied a fair trial because testimony from his daughter, Latonia Brown, that her brother told her that defendant made statements implicating himself in the shootings, constituted double hearsay. Because defendant did not object to this testimony at trial, our review is again limited to plain error affecting defendant's substantial rights. *Ackerman*, *supra*. Latonia was asked at trial whether she told police that she heard defendant make incriminating statements the night of the shooting. Contrary to her statement to police, Latonia testified that she did not hear defendant make any incriminating statements but was only told of them by her brother. This testimony was reiterated on two separate occasions by defense counsel during cross-examination. Even if this testimony was hearsay, defendant has not shown a plain error resulting from its admission. Indeed, defendant used this testimony to his advantage, to establish that Latonia did not have personal knowledge of any statements defendant may have made. Further, Latonia's brother testified at trial that defendant made a statement incriminating himself in the shootings. Thus, any testimony offered by Latonia that her brother told her of such statements was cumulative. Additionally, given the evidence against defendant, including the children's earlier statements to police, that a gun linked to defendant fired a bullet that was recovered near the house, and that defendant had gunshot residue on his person and on his clothing shortly after the shooting, any error in admitting this cumulative statement by Latonia was harmless. Thus, defendant cannot establish that this testimony affected his substantial rights. We therefore reject this claim of error.

Defendant next argues that the evidence was insufficient to support his convictions for assault with intent to commit murder. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

"The elements of assault with intent to commit murder are: '(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). "The intent to kill may be proven by inference from any facts in evidence." *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999), quoting *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). "A person may have that state of mind without directing it any particular victim." *Id.* "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent to kill is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

In this case, the evidence indicated that defendant's family and the victims' family became involved in a dispute that led to a serious injury to defendant's daughter. Shortly afterward, someone fired several gunshots into the victims' house. There was evidence that, after the shooting, defendant stated, "I had to shoot that mother f***ing house up. They don't know who they are f***ing with." The police also determined that a gun linked to defendant fired a bullet that was recovered near the house. And, defendant had gunshot residue on his person and on his clothing shortly after the shooting. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant was responsible for the shooting and that he intended to kill the occupants of the house.

Finally, defendant argues that he was deprived of the effective assistance of counsel at trial. We disagree.

"A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 600. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, i.e., a probability sufficient to undermine confidence in the outcome. *Id.*

Defendant argues that trial counsel was ineffective for failing to object to the evidentiary matters previously discussed in this opinion. Because the evidence relating to defendant's attempts to preclude his children from testifying against him was properly admitted, any objection to that evidence necessarily would have lacked merit. Counsel is not ineffective for failing to advocate a meritless position or to make a futile objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Likewise, because defendant cannot establish any prejudice to him resulting from the allegedly erroneous admission of Latonia's testimony that she did not hear defendant make incriminating statements, but rather, was told of them by her brother, defendant cannot establish that he was prejudiced by any failure to object to the admission of that testimony.

Defendant also argues that counsel was ineffective for failing to request lesser-offense instructions to the assault with intent to commit murder charges. However, defendant has not overcome the presumption that counsel's decision in this regard was a matter of trial strategy, intended to force the jury to make an all-or-nothing decision, given that the victims of these offenses, Brown and Destouche, were not injured during the shooting. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003); *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). Further, while the jury was not instructed as to lesser-included offenses of assault with intent to commit murder in connection with defendant's assault on Brown and Destouche, the jury was instructed as to lesser-included offenses of murder in connection with Deva White's death. That the jury convicted defendant of first-degree murder for White's death indicates that they necessarily concluded that defendant fired shots into the occupied house with the intent to kill. Therefore, defendant cannot establish that there is a reasonable probability that that the jury would have determined that he lacked such intent in connection with his assault on Brown and Destouche. Consequently, defendant is unable to establish any prejudice resulting from counsel's decision not to request lesser-included instructions for the assault with intent to commit murder charges. See, *People v Cornell*, 466 Mich 335, 365, n 19; 646 NW2d 127 (2002); *People v Wilson*, 265 Mich App 386, 396; 695 NW2d 351 (2005). Thus, defendant has not shown that he was deprived of the effective assistance of counsel.

We affirm.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra