

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABDULLAH MUHAMMAD-YUSAF
JOHNSON,

Defendant-Appellant.

UNPUBLISHED

January 15, 2009

No. 277715

Wayne Circuit Court

LC No. 06-013355-01

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Because defendant has not established error on appeal, we affirm.

Defendant was tried jointly with codefendant Raashid Johnson, who was tried by the trial court and acquitted of felonious assault, MCL 750.82, felon in possession of a firearm, and felony-firearm. The prosecution's theory at trial was that the victim, Michael Golston, became involved in an argument with defendant's sister over a gas bill, and was shot and robbed by defendant and defendant's brother Raashid. The defense theory was that Golston never saw who shot him and that, while defendant admittedly was present at the time of the incident, a third man, David Johnson, was the person who shot the victim. David Johnson testified at trial and claimed that he shot Golston because he thought Golston was attempting to get a weapon.

I. Assault with Intent to Commit Murder

Defendant first argues that the circuit court erred when it granted the prosecution's motion to amend the information to reinstate an original charge of assault with intent to commit murder after the district court bound him over on the lesser offense of assault with intent to do great bodily harm less than murder, MCL 750.84.

A trial court's decision to grant a motion to amend the information to reinstate a charge is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008).

A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(H); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). Once a preliminary examination is held and the defendant is bound over on any charge, the circuit court obtains jurisdiction over the defendant. *People v Goecke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998). “Jurisdiction having vested in the circuit court, the only legal obstacle to amending the information to reinstitute an erroneously dismissed charge is that amendment would unduly prejudice the defendant because of ‘unfair surprise, inadequate notice, or insufficient opportunity to defend.’” *Id.* at 462 (citation omitted). [*Unger, supra* at 221.]

In this case, defendant was not unduly prejudiced because of unfair surprise, lack of notice, or an insufficient opportunity to defend. Instead, the issue is whether the circuit court abused its discretion by reinstating the original charge of assault with intent to commit murder.

A district court’s bindover decision is reviewed by an appellate court for an abuse of discretion. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). To bind a defendant over for trial, the district court must find that a felony was committed and that there is probable cause to believe that the defendant committed the crime. MCL 766.13; *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). A circuit court, when reviewing a bindover decision, may only reverse where it appears on the record that the district judge abused his discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

Probable cause to bind a defendant over for trial exists “where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged.” *Orzame, supra* at 558. There must be some evidence from which to infer each element of the crime, but the prosecution is not required to prove each element beyond a reasonable doubt. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). If there is credible evidence offered to both support and negate an element of the crime, a factual question exists that should be left to the jury. *Id.*

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 have made the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The intent to kill may be proven by inference from any facts in evidence. *Id.* Assault with intent to do great bodily harm less than murder consists of (1) an assault 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), amended 453 Mich 1204 (1996).

The district court refused to bind defendant over for trial on assault with intent to commit murder because it did not believe that defendant acted with an intent to kill. However, Golston’s testimony about the circumstances under which he was threatened and then shot with a gun, including the seriousness of his injury, was sufficient to provide probable cause to believe that defendant shot Golston with an actual intent to kill. To the extent that other evidence raised a question of fact concerning defendant’s intent, those factual issues were required to be resolved by a jury, not the district court. *Reigle, supra* at 37. Because there was probable cause to

support the higher charge of assault with intent to commit murder, the circuit court did not err in amending the information to reinstate that charge. Furthermore, because there was sufficient evidence of assault with intent to commit murder presented at trial, the decision to bind defendant over for trial, even if erroneous, was harmless. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

II. Motion for a New Trial

Defendant next argues that the trial court erred in denying his motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. We review the trial court's decision for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A trial court abuses its discretion when its decision falls outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

“Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). “[U]nless it can be said that directly contradictory testimony was so far impeached that it ‘was deprived of all probative value or that the jury could not believe it,’ or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury’s determination.” *Id.* at 645-646 (citation omitted). [*Musser, supra* at 219.]

Defendant principally argues that the jury's verdict is against the great weight of the evidence because it is inconsistent with the trial court's verdict acquitting codefendant Raashid Johnson. However, we do not view the verdicts as irreconcilably inconsistent. There was no suggestion at trial that Raashid Johnson was the shooter, and there was testimony indicating that he was not even present when Golston was shot. Instead, the issue to be decided at trial was whether Raashid Johnson subsequently threatened Golston with a gun. Even without David Johnson's testimony, Officer Gary Bickley testified at trial that when Golston gave his statement to the police, he did not mention that Raashid had pointed a gun at him. From this testimony, the court could have found that there was a reasonable doubt about Raashid's participation or role in the offense.

In contrast, Golston testified that he was certain about defendant's identity as the shooter. According to Golston, defendant was the only person in the apartment when he was shot. Golston explained that although he was turned away from defendant when he was shot, he was still able to see defendant shoot him and he had no doubt that defendant was the person who shot him. Although David Johnson testified at trial that he shot Golston, the jury had reason to discredit that testimony because David Johnson was awaiting trial on a charge of murder in an unrelated case. David Johnson's contradictory testimony did not so far impeach Golston's testimony that it was deprived of all probative value or that the jury could not believe it. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

III. Defendant's Standard 4 Brief

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4.

Defendant first argues that the trial court erred in denying his motion for a new trial on the ground that the jury's verdict was inconsistent with the evidence. Defendant again relies on the fact that the trial court acquitted Raashid Johnson, whereas he was convicted by his jury, and on the fact that David Johnson admitted responsibility for shooting Golston. As discussed previously, however, differing evidence was presented concerning the respective roles of defendant and Raashid Johnson. Further, the jury had reason to question David Johnson's motive for testifying, and it was free to discredit his testimony. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for a new trial. In addition, the record does not support defendant's claim that the trial court applied an incorrect standard in evaluating defendant's motion.

Defendant also argues that the district court erred in binding him over for trial on the charges of assault with intent to do great bodily harm, armed robbery, and felon in possession of a firearm. Because defendant did not preserve this issue by filing a motion to quash, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). Golston's testimony that defendant shot him, and that defendant then ordered Golston to empty his pockets after which Golston gave defendant between \$350 and \$375, was sufficient to establish probable cause to believe that defendant assaulted Golston with at least an intent to do great bodily harm, that defendant participated in an armed robbery, and that defendant possessed a firearm during the commission of a felony. See *People v Bobby Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007) (armed robbery), *Bailey, supra* (assault with intent to do great bodily harm),¹ and *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (felony-firearm). Thus, there was no plain error in binding defendant over on those charges. Defendant's reliance on the corpus delicti rule is misplaced. Because the prosecution did not rely on any confession from defendant at either the preliminary examination or at trial, the corpus delicti rule is not applicable. *People v Schumacher*, 276 Mich App 165, 180-181; 740 NW2d 534 (2007).

The record also does not support defendant's argument that the circuit court's ruling was based on an error of fact because the court erroneously believed that Golston was shot after he lied down on the floor. The circuit court stated:

THE COURT: This Court, having reviewed the preliminary examination transcript, finds that Judge Coleman did abuse his discretion in binding the Defendant over on assault with intent to do great bodily harm less than murder, instead of assault with intent to murder.

¹ The prosecution was not required to present medical testimony or records to corroborate Golston's testimony. See *People v Newby*, 66 Mich App 400, 404-405; 239 NW2d 387 (1976).

There was testimony that the Defendant ordered the complainant to lie down, pointed the gun in his body at his back, and then, shot him in the back. There is a question of fact as to assault with intent to murder. And therefore, this Court is granting the Defendant's – the People's request to amend the information. [Emphasis added.]

Defendant correctly observes that Golston testified that although he was ordered to get down on the floor, he just stood there instead and then was shot. However, nothing in the trial court's ruling supports defendant's claim that the trial court misconstrued the facts and errantly believed that Golston was shot *while* on the floor. The trial court did not state that Golston was actually lying on the floor when he was shot; it only stated that defendant had ordered him to get down on the floor. Thus, the trial court's ruling was not based on an error of fact.

Next, defendant argues that he was denied the effective assistance of counsel in several respects. This Court granted defendant's motion to remand for a *Ginther*² hearing, limited to defense counsel's (1) failure to interview defense witness David Johnson, and (2) failure to call Eddy Stanley as a defense witness. To the extent that defendant now raises additional arguments that were not raised in the trial court, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact in relation to an ineffective assistance of counsel claim are reviewed for clear error, and whether those findings establish a claim of ineffective assistance of counsel is reviewed de novo as a questions of law. *Id.* To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first argues that defense counsel was ineffective for failing to move to dismiss the charges against him before trial, and for not objecting to the trial court's reliance on incorrect facts when granting the prosecution's motion to amend the information.

In substance, defendant argues that defense counsel was ineffective for not moving to quash the information with respect to the charges of assault with intent to do great bodily harm, armed robbery, and felony-firearm. As previously discussed, however, the evidence at the preliminary examination was sufficient to establish probable cause to believe that defendant committed each of these offenses. Accordingly, defense counsel was not ineffective for failing

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

to file a motion to quash. An attorney is not required to file a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Furthermore, as previously discussed, there is no indication that the trial court's decision to grant the prosecution's motion to amend the information was based on a mistaken belief that Golston was shot while lying on the floor. Because there was no error, defense counsel was not ineffective for failing to challenge the circuit court's decision on this basis.

Defendant also argues that defense counsel was ineffective for failing to fully investigate the case and timely interview David Johnson. To the extent that defense counsel erred by failing to interview David Johnson sooner, defendant was not prejudiced because counsel was able to interview Johnson before he testified and the defense that David Johnson was the shooter was presented at trial. Contrary to what defendant argues, the defense did not initially proceed with some other alternative theory at trial. Defense counsel reserved his opening statement. Later, when defense counsel gave his opening statement, he advanced the theory that an unidentified third person shot Golston. That theory was not inconsistent with David Johnson's subsequent testimony that he shot Golston. Thus, defendant was not prejudiced by any delay by defense counsel in ascertaining David Johnson's whereabouts and then interviewing him for trial.

Defendant also argues that defense counsel was ineffective for allowing David Johnson to testify that he had met defendant after defendant was released from prison. However, defendant had previously stipulated that he had a prior felony conviction for purposes of the felon-in-possession charge. Because the jury was already aware that defendant was a convicted felon, defendant was not prejudiced by defense counsel's failure to object to David Johnson's brief reference to defendant's imprisonment.

Defendant alternatively argues that testimony about his incarceration was inadmissible under MRE 404(b). Even if this evidence was improper, however, its admission was harmless in light of the defense stipulation that defendant was a convicted felon. Accordingly, reversal is not required. *People v Larry Smith*, 456 Mich 543, 554-555; 581 NW2d 654 (1998).

Defendant also argues that the prosecutor engaged in misconduct by referring to him as "evil" in her closing argument. The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

A prosecutor is afforded great latitude in closing argument. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003); see also *Bahoda*, *supra* at 282. While prosecutors must refrain from making prejudicial remarks, *id.* at 283, they may use "hard language" when it is supported by the evidence, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Finally, any prejudice with respect to the prosecutor's reference to defendant as "evil" was cured when the trial court, upon defense counsel's objection, promptly instructed the jury

that the attorney's statements are not evidence. Accordingly, the prosecutor's remark did not deny defendant a fair trial.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio