

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BAKER, JR.,

Defendant-Appellant.

UNPUBLISHED

April 2, 2009

No. 282118

Oakland Circuit Court

LC No. 2007-212712-FC

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, discharging a firearm from a motor vehicle, MCL 750.234a, carrying a concealed weapon in a motor vehicle (CCW), MCL 750.227(2), third-degree fleeing or eluding a police officer, MCL 257.602a(3), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ The trial court sentenced defendant to concurrent prison terms of 51 to 120 months for the assault conviction, two to four years for the discharge of a firearm conviction, and three to five years each for the CCW and fleeing or eluding convictions, and a consecutive two-year term of imprisonment for the felony-firearm convictions. Defendant appeals as of right, and we affirm.

I. Basic Facts

The victim testified that at about 2:00 a.m. on December 13, 2006, he slowly merged from M-39 onto the M-10 entrance ramp in an older model BMW, unable to proceed at a higher rate of speed because a semi truck was traveling slowly in front of him. A gold Chevrolet Malibu driven by defendant approached the victim at a high rate of speed. Near the location where the entrance ramp opened onto M-10, the victim pulled his car over at least partially onto a gravel shoulder to facilitate defendant's passage around him. According to the victim, defendant "dart[ed] out into the three lane traffic."

¹ The jury acquitted defendant of an additional charge of felonious assault (against a police officer), MCL 750.82.

The victim recounted that as he began proceeding down the freeway, defendant slowed down and positioned his car directly next to the victim's, even though there was no other traffic on the freeway. When the victim accelerated or decelerated, defendant did the same and remained parallel to the victim's car. The victim testified that as defendant was traveling parallel to him, defendant lowered the front, passenger-side window, causing the victim to become fearful. The victim accelerated, then heard a gunshot and ducked, and shortly thereafter the victim detected the distinct odor of gunshot residue. The victim pulled to the side of the road, called 911, and provided defendant's license plate number. During the emergency call, which was played for the jury, the victim stated that someone had shot at him. The victim testified that defendant then drove away at a high rate of speed, but that he remained on the phone following defendant until he exited at Telegraph Road. Immediately after exiting the freeway, the victim saw a police officer and reported that defendant had just shot at him. Subsequent inspection of the victim's car revealed damage consistent with a bullet ricochet on the driver's side corner panel, directly below the driver's side passenger window.

According to police testimony, officers pursued defendant with their lights and sirens activated. At one point, defendant stopped and put his hands outside the window, but then placed them back inside while nudging his car forward. An officer instructed defendant over a public address system to turn off his car. Defendant did not comply, and instead coasted through an intersection, sped away, and continued for a couple of miles, reaching speeds of 100 miles an hour. When defendant's speed decreased, an officer made contact with defendant's vehicle, causing it to spin onto a median. The officer's vehicle stalled and he got out of his patrol car. Defendant then drove toward the officer who, in turn, fired his weapon at defendant. As defendant continued to flee, an officer intentionally rammed defendant's car and eventually it crashed into a cement pillar. Officers pulled defendant from the car and defendant struggled as they attempted to handcuff him.² The police seized from defendant's car a semiautomatic .22-caliber handgun, with one round in the chamber and three in the magazine.

Defendant testified that after entering the freeway, the victim purposefully slowed down and accelerated next to him, and angled into his lane of travel to block him from passing. Defendant admitted that he lowered his driver's-side window, and conceded that he picked up the gun from the passenger-side floorboard and fired one shot straight into the air, out of the driver's-side window. Defendant testified that the gun belonged to a friend. Defendant asserted that he fired the weapon because he felt scared and simply intended to move the victim out of his way. Defendant denied shooting at the victim or intending to harm him. Defendant admitted that he initially lied to the police by stating that he did not fire a weapon on the freeway.

II. Sufficiency of the Evidence

Defendant contends that the evidence did not suffice to sustain his conviction for assault with intent to do great bodily harm less than murder because the prosecutor did not prove beyond a reasonable doubt that he had the requisite intent. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in the

² Videotape of the pursuit and apprehension of defendant was played for the jury.

light most favorable to the prosecution 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role to determine the weight of evidence or the credibility of witnesses. *Id.* at 514-515. It remains for the trier of fact to decide what inferences fairly arise from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A reviewing court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The intent to cause great bodily harm less than murder may reasonably be inferred from facts in evidence, including the defendant's actions; because an actor's state of mind is difficult to prove, only minimal circumstantial evidence is required. *Id.*; *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

The prosecutor presented evidence that immediately before the shooting defendant taunted the victim by driving parallel to his car, even though the freeway was clear of other cars. When the victim accelerated or decelerated, defendant did the same. As defendant maintained a parallel position with the victim's car, defendant lowered his passenger-side window and picked up a loaded weapon from the passenger-side floorboard. The victim testified that he heard a gunshot and could smell gunpowder, and fresh damage had appeared on the victim's car consistent with a bullet ricochet on the driver's-side corner panel, directly below the driver's-side passenger window. Defendant thereafter fled, and led the police on a high-speed chase. Viewed in the light most favorable to the prosecution, the evidence that defendant aimed a semiautomatic weapon and fired it toward the victim sufficed for a rational trier of fact to find beyond a reasonable doubt that defendant assaulted the victim with the specific intent to do great bodily harm less than murder.

Although defendant theorizes that alternate inferences arose from evidence or that the jury could have reached different conclusions, it was the jury's prerogative to evaluate the evidence, and the prosecutor need not disprove every possible theory consistent with innocence. *Nowack, supra* at 400; *Wolfe, supra* at 533. We conclude that ample evidence supported defendant's conviction of assault with intent to do great bodily harm less than murder.

III. Great Weight of the Evidence

Defendant alternatively maintains that his conviction of assault with intent to do great bodily harm less than murder contravened the great weight of the evidence. This Court reviews for an abuse of discretion a trial court's decision denying a motion for a new trial. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), overruled in part on other grounds in *People v Miller*, 482 Mich 539, 561 n 26; 759 NW2d 850 (2008).

In evaluating whether a verdict goes against the great weight of the evidence, the question is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576

NW2d 129 (1998); *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008). A court may vacate a verdict only when it “does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.” *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

For the reasons discussed in part II of this opinion, the jury’s verdict does not contravene the great weight of the evidence. The evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice would result if this Court permitted the verdict to stand. *Lemmon*, *supra* at 627.

IV. Charging Discretion

Defendant further avers that the prosecution abused its discretion by originally charging him with assault with intent to commit murder because no evidence tended to show an intent to kill. Because defendant did not raise this issue in the trial court, we review the claim only for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). “[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.” *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor abuses his discretion only if “a choice is made for reasons that are ‘unconstitutional, illegal, or ultra vires.’” *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996).

To sustain a conviction for assault with intent to commit murder, the prosecution must establish beyond a reasonable doubt that the defendant committed “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also MCL 750.83. An intent to kill may be inferred from facts in evidence, including the use of a dangerous weapon. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974).

In this case, the evidence established that defendant was armed with a semiautomatic gun, that he lowered his window while driving to position himself parallel to the victim, that he intentionally discharged the gun at the victim’s car, and that a bullet ricochet mark was observed on the driver’s side of the victim’s vehicle, directly below the driver’s-side passenger window. These facts give rise to a reasonable inference that defendant had the intent to kill the victim when he fired the gun at the victim’s car from close range. Defendant offers no information or evidence suggesting that the prosecution charged him for an unconstitutional, illegal, or illegitimate reason. Consequently, we find no basis to conclude that the prosecution abused its power in charging defendant with assault with intent to commit murder.

V. Effective Assistance of Counsel

Defendant additionally complains that he was denied the effective assistance of counsel at trial. Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, the defendant must show that counsel’s performance fell below an objective standard of reasonableness, and the existence of a reasonable probability

that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A defendant must also overcome the presumption that the challenged action or inaction amounted to sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. Failing to Follow Trial Strategy

Defendant argues that defense counsel was ineffective because, instead of adhering to the defense strategy of arguing that he lacked culpability given that he merely shot his gun into the air, counsel instead attempted to develop the theory that defendant had not actually fired the gun. To illustrate, defendant points to defense counsel's cross-examination of the victim and an evidence technician about whether the gun was fired or operable. But the line of questions highlighted by defendant did not contradict the original defense theory. In response to defense counsel's questions, the victim testified that he did not see defendant fire the gun, did not see defendant aiming the gun at him, and never saw a gun. Defense counsel apparently intended these inquiries to attack the victim's credibility, and they introduced nothing inconsistent with the defense theory that defendant did not shoot at the victim. With regard to the evidence technician, defense counsel's questions about whether he originally tested the gun were intended to test the thoroughness of the police investigation. We conclude that defendant has not overcome the presumption of sound trial strategy given to defense counsel's decisions about what questions to ask and what evidence to present. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also claims that defense counsel "failed to signal the jury" during voir dire that defendant discharged the weapon without any intent to injure or kill, and that defendant's "failures of judgment led him to flee and elude the police and then lie to [an officer]." The purpose of voir dire is to expose potential juror bias so that a defendant may be tried by a fair and impartial jury. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). Therefore, defense counsel was not ineffective for failing to advance arguments about the case during voir dire. Counsel instead properly discussed and questioned the prospective jurors regarding their understanding of the concepts of specific intent and burden of proof.

Defense counsel's questions, remarks, and arguments throughout the trial make plain that he consistently and vigorously promoted the primary defense theory, i.e., that defendant fired a weapon without intending to harm anyone. In opening statement, defense counsel stated that no evidence showed that defendant shot at anyone or had the requisite intent for assault with intent to commit murder. During the victim's testimony, defense counsel vigorously challenged the pivotal issue of credibility. During defendant's testimony, counsel elicited that he shot the gun into the air out of fear without intending to harm anyone. Thereafter, in closing argument, defense counsel argued at length that the victim's testimony lacked consistency and credibility, and that the evidence proved that defendant shot the gun into the air, did not aim at anyone, and had no intent to harm anyone. Indeed, defense counsel's first point was that the "main focus goes to the specific intent." Nothing in the record suggests that defense counsel's presentation of the case qualified as unreasonable or prejudicial to defendant. Counsel's decisions about how to present and argue the evidence fell within the realm of trial strategy. "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." *Rockey, supra* at 76-77. "The fact that

defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

B. Failing to Properly Negotiate a Plea

Defendant contends that the prosecution and defense counsel agreed that he could plead guilty of felonious assault for the incident involving the victim if he passed a polygraph examination. According to defendant, a private polygraph was arranged for the day before trial, but he did not pass because the examiner did not ask him questions about his firing of the weapon in a particular manner. Defendant now suggests that his counsel was ineffective for failing to inform the examiner of the proper "focus of the questions" before the examination.

Defendant has not provided any witness affidavits or cited any other record evidence disclosing the plea offer or the circumstances of the polygraph examination. Furthermore, defendant does not identify any significant or substantial irregularity with the polygraph examination that would have required defense counsel to take action. Additionally, defendant has not supplied evidence to establish that he would have passed a polygraph examination under different circumstances. Consequently, defendant has not established a reasonable probability that the result of the proceeding would have differed but for counsel's error. *Frazier, supra* at 243. We thus reject this claim of ineffective assistance of counsel.

VI. Sentence

Defendant lastly argues that even though the trial court imposed a sentence within the sentencing guidelines range, he is entitled to resentencing because his sentence of 51 to 120 months for assault with intent to do great bodily harm less than murder qualifies as disproportionate to the offense and the offender. This Court must affirm a sentence within the sentencing guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Defendant's sentence falls within the guidelines range of 29 to 57 months. Because defendant does not assert a scoring error or claim that the trial court relied on inaccurate information, we must uphold his sentence.

Affirmed.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly