STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2010
v	No. 291140 Grand Traverse Circuit Court
WAYNE ROBERT HUTTER, Defendant-Appellant.	LC No. 08-010656-FH

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), carrying a concealed weapon, MCL 750.227, assault with a dangerous weapon, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and malicious use of a telecommunications service, MCL 750.540e. The trial court sentenced defendant to concurrent sentences of 5 to 20 years for the home invasion conviction, 2 to 5 years for the carrying a concealed weapon conviction, and 2 to 4 years for the felonious assault conviction, to be served consecutively to a two-year sentence for the felony firearm conviction.[1] Defendant appeals as of right. Because we conclude that defendant was not denied effective assistance of counsel, his statement was not obtained in violation of his Fifth Amendment rights, and the trial court did not err in refusing to instruct the jury on intentionally pointing a firearm at another without malice, we affirm.

I. BASIC FACTS

Defendant's convictions arise from him entering the home of Christine Blackledge and pointing a firearm at her to force her to talk to him about her relationship with Dan Lahner. Blackledge and defendant had known each for 18 years, and they had periodically dated. According to Blackledge, during the summer of 2005, they were just "very, very good friends"; they were not engaged in a sexual relationship. On Labor Day weekend, Blackledge and

[1] Defendant's sentence for malicious use of a telecommunications service was limited to time served.

defendant sailed from Traverse City to Boyne City to visit Lahner. Early in the morning on September 1, 2008, defendant discovered Blackledge in the same bed as Lahner.[2]

On the afternoon of September 7, 2008, Blackledge returned to her Traverse City home after running errands. She called Lahner, and while speaking with him, she saw defendant standing in her kitchen doorway. Blackledge testified that she had not given defendant permission to enter her home, and she denied that she and defendant had a general practice of walking into each other's homes without knocking.

Defendant told Blackledge to get off the telephone. When she complied, defendant pulled out a gun and pointed it at her right between her eyes. Defendant told her that the gun was loaded and that they were going to talk. He backed Blackledge into her sunroom, where she sat on a couch and defendant straddled a chair. Defendant continued to point the gun at Blackledge's head; his finger remained on the trigger. Defendant screamed and yelled at Blackledge about Lahner. Blackledge thought she was going to die. Eventually, the telephone rang, and defendant calmed down and soon left. Blackledge immediately locked the front door and called Lahner and some friends who were coming over for supper. She then called 911.

Officer Kurt Bazner responded to Blackledge's home, while Sergeant James Bussell drove out to defendant's house. Bazner described Blackledge as "upset, visibly shaken," but she was able to methodically tell him what had happened. Bazner then spoke with Bussell, telling Bussell that it was "a good felonious assault." Bussell, accompanied by Deputy Ryan Salisbury, approached defendant's home to speak with defendant. He wanted to hear defendant's side of the story. Defendant, after being asked what happened in town, stated that he only pointed "it" at Blackledge for a second; he was only trying to scare her.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied effective assistance of counsel when trial counsel failed to investigate, interview, and call witnesses that could substantiate defendant's testimony that he and Blackledge entered each other's homes without knocking and when counsel failed to object to opinion testimony from two officers that defendant was guilty. Because defendant did not move for a *Ginther*[3] hearing or a new trial below, our review is limited to mistakes apparent on the record. *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). And although defendant attached four affidavits in support of his ineffective assistance claim to his appellate brief, the affidavits are not a part of the lower court record and, therefore, cannot be considered. *People v Seals*, 285 Mich App 1, 20-21; 776 NW2d 314 (2009).

To establish a claim for ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Payne*, 285 Mich App 181, 188-189; 774

[2] Blackledge testified that she and Lahner were only talking.

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

NW2d 714 (2009). Counsel is presumed to have provided effective assistance, and the defendant bears a heavy burden of proving otherwise. *Seals*, 285 Mich App at 17.

A. FAILURE TO INVESTIGATE AND CALL WITNESSES

Defendant argues that trial counsel was ineffective for failing to investigate and interview potential witnesses that could substantiate defendant's testimony that he and Blackledge always entered the other's house without knocking. Counsel has a duty to make a reasonable investigation. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). It is not apparent from the record that trial counsel failed to investigate and interview potential witnesses that could support defendant's testimony that he and Blackledge entered each other's houses without knocking. The record contains no description of what trial counsel did, or did not do, before trial. In addition, even if we were to consider the affidavits submitted with defendant's brief, we note that the four affidavits do not provide any factual support for defendant's claim that trial counsel failed to conduct a reasonable investigation. None of the affiants averred that trial counsel did not interview them before trial. Accordingly, defendant has failed to establish the factual predicate of his claim that trial counsel failed to conduct a reasonable investigation. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also claims that trial counsel failed to call witnesses at trial to support his testimony that he and Blackledge entered each other's homes without knocking. Decisions regarding whether to call witnesses involve matters of trial strategy. *Seals*, 285 Mich App at 21. We will not second-guess counsel on matters of trial strategy, nor will we assess counsel's performance with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Although "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation," *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984), as we have already stated, it is not apparent from the record that trial counsel failed to conduct less than a complete investigation. Accordingly, defendant has failed to overcome the presumption that counsel's decision not to call additional witnesses was sound trial strategy.

B. FAILURE TO OBJECT TO TESTIMONY

Defendant claims that trial counsel was ineffective when he failed to object to the introduction of inadmissible and highly prejudicial evidence. In particular, defendant maintains that trial counsel should have objected to the opinion testimony of Bazner and Bussell that defendant committed the charged crimes and that trial counsel compounded the problem when he elicited similar testimony from Bazner in cross-examination. We disagree.

It is improper for a witness to comment or to provide an opinion on the credibility of another witness. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Credibility determinations are for the jury. *Id.*

Defendant maintains that the following exchange between the prosecutor and Bazner resulted in the admission of inadmissible opinion testimony:

Q. Did you ask her [Blackledge] to tell you step by step what had happened?

A. Yes.

Q. Why did you do that?

A. To investigate the crime to see if it's actually what we like to term if it's a legitimate crime or not. Handling numerous domestics, some aren't a legitimate domestic, they seem to hit and miss on key issues or leave things out. She was methodical in what she told me happened.

Contrary to defendant's argument, a careful reading of this exchange reveals that Bazner did not provide an opinion on the credibility of Blackledge. Although Bazner testified that Blackledge was "methodical" in recounting what had occurred, he never stated that he found Blackledge to be credible. Any objection to Bazner's testimony would have been meritless. Counsel was not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also complains that in the following exchange the prosecutor elicited inadmissible opinion testimony from Bussell:

Q. This came out, Officer Bazner's called you on the phone, it was a good felonious assault?

A. Yeah, he may have used those words. You know, we get a lot of reports on things sometimes that may or may not be true, this appeared from what he told me on the phone this was a legitimate crime and there had actually been a felonious assault with a pistol, a firearm.

Although Bussell used the phrase "this was a legitimate crime," it is clear from the context of Bussell's testimony that Bussell was not providing the jury with an opinion of Blackledge's credibility. And, he subsequently testified that, even upon hearing that it was "a good felonious assault," he still needed to investigate. He needed to speak with defendant because there are "always two sides to every story." Consequently, any objection to Bussell's testimony would have been futile. Again, counsel was not ineffective for failing to make a futile objection. *Id*.

In addition, defendant maintains that trial counsel elicited opinion testimony from Bazner during cross-examination with the following questions:

Q. Officer, did you advise the sergeant that it was a good felonious assault at some point?

A. Yes, sir, I did.

Q. In your mind what does that mean to you?

A. That it was an actual crime that took place.

Q. That he should arrest him at that point?

A. I advised him that it was a good domestic, I did not advise him to arrest him.

This issue, whether trial counsel was ineffective for eliciting opinion testimony, was not raised in defendant's statement of questions presented and, therefore, it is not properly before us. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Nevertheless, we note that decisions regarding how to cross-examine a witness involve matters of trial strategy. *In re Ayres*, 239 Mich App at 23. We will not second-guess counsel on matters of trial strategy, nor will we use the benefit of hindsight to assess counsel's competence. *Horn*, 279 Mich App at 39. Defendant has not overcome the presumption that counsel's cross-examination of Bazner was sound trial strategy.[4]

III. SUPPRESSION OF DEFENDANT'S STATEMENT

Defendant next argues that the trial court erred in not suppressing his statement, given to Bussell outside of his home, that he "pointed it at her for a few seconds" to scare her. Specifically, relying on his version of the events, defendant asserts that his statement was obtained in violation of his Fifth Amendment rights because he was in police custody when Bussell questioned him. We disagree.

We review de novo a trial court's decision on a motion to suppress. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, we will not disturb a trial court's factual findings made at a *Walker*[5] hearing unless the findings are clearly erroneous. *Id.* A finding is clearly erroneous if we are left with a definite and firm conviction that the trial court made a mistake. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). We give deference to the trial court's assessment of the weight of the evidence and the credibility of the witnesses. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

The statement of an accused made during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) (quotation omitted). The totality of the circumstances must be examined, and the key question is whether the accused reasonably could have believed that he was not free to leave. *Id.* *Miranda*[6] warnings are not required if there is no custodial interrogation. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

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[4] It may be, as suggested by plaintiff on appeal, that trial counsel was trying to develop a further record on which to challenge the admissibility of defendant's statement to Bussell.

[5] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[6] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

A police officer may temporarily detain a person for the purpose of investigating criminal behavior even if there is no probable cause to support an arrest. *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). The police officer must have a reasonably articulable suspicion that the person has been, is, or is about to be engaged in criminal activity. *United States v Hensley*, 469 US 221, 227; 105 S Ct 675; 83 L Ed 2d 604 (1985). Articulable suspicion may be based on information obtained from another. *People v Chambers*, 195 Mich App 118, 122; 489 NW2d 168 (1992). In the course of an investigatory stop, a police officer, where he has reason to believe that he is dealing with an armed and dangerous person, may conduct a reasonable search for weapons. *People v Taylor*, 214 Mich App 167, 169; 542 NW2d 322 (1995). A person temporarily detained for an investigatory stop is not in "custody" for purposes of *Miranda*. See *Berkemer v McCarty*, 468 US 420, 440; 104 S Ct 3138; 82 L Ed 2d 317 (1984).

At the *Walker* hearing, Bussell testified that, after Blackledge's 911 call was received, he drove to defendant's house. He "staged" the house for approximately 35 to 40 minutes with Salisbury before he received a call from Bazner. Bazner informed him that defendant had held a pistol at Blackledge's face for 20 to 30 minutes. He also learned that defendant was intoxicated. Bussell and Salisbury then approached defendant's door. Bussell stated that he intended to "continue to investigate the crime"; he wanted to learn defendant's side of the story. At defendant's door, Bussell drew his weapon. But he holstered it when defendant approached the door, and he was able to see that defendant was not carrying a gun. When Bussell asked defendant to speak with him and Salisbury, defendant "leaned backwards" into the house. To prevent defendant from grabbing a gun, Bussell grabbed defendant's arm and pulled him outside.

Bussell and Salisbury, each holding defendant by an arm, escorted defendant approximately 20 feet, "if even that," to a detached garage. Bussell ordered defendant to place his hands on the garage. Defendant complied, and Bussell patted him down for weapons. No weapons were found, and defendant turned around. Bussell, standing approximately six feet from defendant, asked him what happened in town. Defendant replied that he "pointed it at her for a few seconds" and that he was only trying to scare her. Bussell then asked defendant the location of the gun. Defendant stated that it was in the center console of his car. With defendant's permission, Bussell retrieved the gun. After he asked defendant questions about other guns defendant owned, Bussell arrested defendant. Defendant was handcuffed and taken to jail. Several hours later, defendant was read his *Miranda* rights. According to Bussell, defendant, while at the garage, acted as if what had happened was not a big deal.

Defendant testified that Bussell handcuffed him after he was patted down. Only then did Bussell turn him around and ask him questions. Bussell did not ask defendant to tell him what happened; rather, Bussell screamed at defendant to tell him why he pointed a gun in Blackledge's face.

At the end of the *Walker* hearing, the trial court addressed the conflicting testimony of Bussell and defendant regarding whether, immediately after the pat down search, defendant was handcuffed, placed under arrest, and questioned in an accusatory manner. It found that Bussell testified "truthful[ly]" in the way the investigation was conducted. Its finding was based on "the way [Bussell] testified" and that Bussell, as a sergeant of many years, "would be more neutral in his approach to a situation which he had not yet heard the other side of the story." Having reviewed the testimony of Bussell and defendant, we find no basis upon which to conclude that

the trial court clearly erred in finding that the questioning of defendant occurred as testified to by Bussell. *Tierney*, 266 Mich App at 708; *Manning*, 243 Mich App at 620.

Further, on de novo review, we conclude that defendant's statement to Bussell that he pointed the gun at Blackledge for a few seconds to scare her was given during a lawful investigatory stop and, therefore, not subject to the constitutional restrictions asserted by defendant. Bussell testified that he detained defendant to investigate criminal behavior. Based on the information he received from Bazner, Bussell had a reasonably articulable suspicion that defendant engaged in criminal behavior. In addition, the pat down search of defendant was reasonable. Bussell, because Bazner informed him that defendant had pointed a gun at Blackledge's face for 20 to 30 minutes, had a reasonable basis to believe that defendant may be armed and dangerous. Further, we find that Bussell's question to defendant to explain what had happened in town was a reasonable question to ask in furtherance of investigating the incident, did not accuse defendant of any criminal behavior, and was consistent with conducting an investigatory stop. Because defendant made the statement during an investigatory stop, he was not in "custody" and, therefore, the statement was not obtained in violation of his Fifth Amendment rights. The trial court did not err in denying defendant's motion to suppress.

IV. JURY INSTRUCTIONS

Defendant argues that the trial court erred when it refused to instruct the jury on intentionally pointing a firearm at another without malice, MCL 750.233, as a lesser offense of felonious assault. We disagree.

We review de novo a trial court's decision on a request for a jury instruction on a lesser offense. *People v Walls*, 265 Mich App 642, 644; 697 NW2d 535 (2005).

A trial court may instruct a jury on a necessarily included lesser offense, but not on a cognate offense. *People v Brown*, 267 Mich App 141, 146; 703 NW2d 230 (2005). The elements of a necessarily included lesser offense are contained within the greater offense; "it is impossible to commit the greater without first having committed the lesser." *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001) (quotation omitted). An instruction on a necessarily included lesser offense is proper "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

The misdemeanor offense of intentionally pointing a firearm at another without malice cannot be committed without the use of a firearm. MCL 750.233(1) provides:

> A person who intentionally but without malice points or aims a firearm at or toward another person is guilty of a misdemeanor by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

However, one can commit felonious assault without the use of a firearm. "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Dangerous weapons, for purposes of felonious

assault, include guns, revolvers, pistols, knives, iron bars, clubs, and brass knuckles. See MCL 750.82.

Because felonious assault can be committed without the use of a firearm, it is possible to commit felonious assault without committing the offense of intentionally pointing a firearm at another without malice. Accordingly, intentionally pointing a firearm at another without malice is not a necessarily included lesser offense of felonious assault. The trial court did not err in refusing to instruct the jury on intentionally pointing a firearm at another without malice.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray