STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN NEIL SAYLOR,

Defendant-Appellant.

UNPUBLISHED
December 9, 2021

No. 351945
Genesee Circuit Court
LC No. 18-043399-FC

Before: SWARTZLE, P.J., and SAWYER and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right after a jury convicted him of assault with intent to commit great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a), failure to stop at the scene of an accident resulting in serious impairment or death, MCL 257.617(2), and reckless driving causing serious impairment of a body function, MCL 257.626(3). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve 152 months to 35 years' imprisonment. We affirm.

I. BACKGROUND

On Saturday, May 26, 2018, Larry Amos hosted a Memorial Day party at his home. Defendant attended and imbibed. Defendant was asked to leave with his family, but returned to the party. Later, defendant again became argumentative with other attendees, and, again, was asked to leave. Corey Naracon, Amos's son-in-law, accompanied defendant away from the party and to defendant's truck. Cassandra Naracon, Corey's daughter, testified that Corey stated, "we're good," and defendant sarcastically responded in an angry, annoyed tone, "we're all right." Jered VanConant, Cassandra's boyfriend, also testified that Corey said, "we're good," and defendant, who seemed unhappy, loudly responded, "we're good." Another witness, however, testified that Corey threatened defendant, stating "just leave or I'm gonna knock you out;" however, Corey added: "I don't want nothing wrong between us. We've known each other, you guys for years."

Regardless, defendant got into his truck and Corey began to walk back to the party. Numerous witnesses testified that defendant quickly accelerated, swerved toward Corey, and

struck him with the truck. Defendant did not slow down and kept driving. Corey suffered multiple injuries. A videotape of the incident was admitted as an exhibit and played for the jury.

II. ANALYSIS

A. FAILURE TO ADDRESS DEFENDANT'S REQUEST THAT COUNSEL WITHDRAW

1. STANDARD OF REVIEW

This issue was not preserved in this case. Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763 (citation omitted).

2. DISCUSSION

Defendant argues that a new trial must be ordered because he was not permitted to have his counsel of choice as the trial court failed to address his motion that counsel withdraw. We disagree.

The constitutional right to counsel includes the right of a defendant, who does not require appointed counsel, to choose his own retained counsel. US Const, Am VI; Const 1963, art 1, § 13; *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). The right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 US at 146. "A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied." *Id.* at 150 (emphasis in original). Additionally, an erroneous deprivation of a defendant's right to retained counsel of his choice is a structural error requiring reversal. *Id.* at 148-149.

Although defendants have the right to counsel of their choice if they retain one, indigent defendants only have the right to *effective* appointed counsel. *Aceval*, 282 Mich App at 386-387. Thus, counsel appointed for an indigent defendant need not be of the defendant's choosing, and a defendant may not obtain counsel of his choice by requesting substitute counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). " 'Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.' " *Id*., quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991) (citations omitted). "When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (quotation marks and citation omitted).

In this case, defendant was represented by court-appointed counsel. Defendant attaches a hearing transcript from a probation-violation in a different case to his appellate brief as evidence

that he requested new counsel in this case.[1] During the hearing in the other case, the trial court stated that it was in receipt of a letter from defendant that pertained to this case. The trial court adjourned the probation violation proceedings until after the pretrial in the instant case, which it had just received, and said that it would "take up the issue you raised in your letter at" the pretrial. There is no discussion of the letter's contents or the issue defendant raised.

The record is then bereft of any indication that defendant sought new counsel in that letter or at a pretrial or trial proceeding. Post-trial, however, defendant moved pro se to set aside the jury's verdict and for a new trial. In that motion, defendant asked that his court-appointed trial counsel be dismissed. Defendant wrote:

> 1) Defendant . . . had filed [a] motion to dismiss [c]ounsel in this case.
>
> 2) Your [H]onor filed [an] information on approx[imately] [the] 13th day of July 2018.
>
> 3) Motion clearly states:
>
> > A) [Defendant] did not know attorney's name.
> >
> > B) [Defendant] had no conversation nor [a]ttorney[-]client [r]elationship for a [b]reakdown [t]o happen.
> >
> > C) [Defendant] has [n]o [c]onfidence [in] this [p]erson[']s ability [t]o represent my best interests in the proceedings.

After defendant's post-conviction pro se motion was filed, court-appointed trial counsel filed her own motion to withdraw. The trial court ordered substitute counsel appointed for defendant before he was sentenced.

Defendant now contends that a new trial is required because the trial court never addressed the letter mentioned during the separate probation-violation case in this case. However, without evidence of what this letter contained, we cannot conclude there was any plain error warranting relief.

Defendant suggests that his post-verdict motion reflects the content of his initial letter. Notably, in that motion, defendant does not allege a breakdown in the attorney-client relationship. In fact, defendant claims not to have known the attorney's name[2] and states that he had not even had a conversation with the attorney. As such, it appears that defendant's claim was one of attorney disinterest. But no circuit-court proceedings related to this case had occurred when defendant presented his initial letter and defendant had not expressed any concern about counsel during his preliminary examination in the district court. Therefore, whatever disinterest or

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[1] We take judicial notice of the transcript in the other case. MRE 201.

[2] The district court's petition and order for court appointed attorney does not contain an attorney's name, but defendant was represented by the same attorney until he was convicted.

communication issue defendant perceived to exist either dissipated or was resolved, and, indeed, defendant did not ask for counsel to be replaced until after he was convicted. Under these circumstances, defendant has not shown plain error that affected his substantial rights and he is not entitled to any relief.

B. OTHER-ACTS EVIDENCE

1. STANDARD OF REVIEW

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013) (citation omitted). But when "the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003) (citation omitted).

2. DISCUSSION

Defendant argues that the trial court abused its discretion in admitting evidence of prior bad acts because those acts were substantially more prejudicial than probative. We disagree.

The other-acts evidence offered in this case involved two incidents from New Year's Eve in 2013. Defendant used his truck to cause damage to a residential yard and porch before driving away. The homeowner had two sons, Derrick Nelson and Eric Metcalf. Nelson, who also resided in the home, believed that the truck's driver, whom he did not know, was trying to run him over. Both the homeowner and Nelson reported that the truck's driver was in a dispute with the homeowner's relative. Metcalf and two other men also arrived, reporting that hours earlier, while they were at a gas station, a red Chevy four-wheel drive pickup almost hit Metcalf several times and also almost struck one of his passenger's once. The police apprehended defendant, who was intoxicated and driving the damaged truck.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), our Supreme Court provided the following standard for the admission of other-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice;

fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

Defendant does not dispute that the 2013 other-acts evidence was admitted for a proper purpose, namely to prove his intent, a lack of mistake or accident, and a plan, system, or scheme in committing an act. Defendant also does not dispute that the evidence was relevant and further does not dispute that the trial court provided an appropriate limiting instruction. In fact, defendant does not even argue that the trial court abused its discretion in determining that the probative value of the other-acts evidence was not substantially outweighed by its prejudicial effect when it initially ruled the other-acts evidence was admissible.

Instead, defendant argues that the trial court was required to sua sponte "reevaluate" its decision to admit the other-acts evidence after the trial court determined that Nelson was unavailable to testify due to his inability to recall the event, meaning that Nelson's preliminary examination testimony in the 2013 case was read to the jury. MRE 804(a)(3) and (b)(1). In defendant's view, this changed the prejudice calculus. Because the jury was not informed of Nelson's lack of memory, it "was left with the impression that [defendant] was likely to impulsively use his vehicle to assault even an individual he had no prior contact with and who he didn't know." Stated otherwise, "Nelson's testimony indicated that [defendant] was even capable of using his vehicle to randomly assault people [and] [t]his could not but help to create an impression with the jury that [defendant] was an extremely dangerous individual that deserved to be convicted."

Defendant misapprehends the other-acts evidence. As already mentioned, defendant purportedly had a dispute with a relative of the homeowner involved in the 2013 case. While it is true that Nelson did not know defendant, he was not a random individual due to his mother's relationship with the person involved in the dispute with defendant. In any event, the other-acts evidence was highly probative on the material trial issues of defendant's intent, lack of accident or mistake, and his plan, system, or scheme when he drove his truck into Corey and left the scene. The probative value of this other-acts evidence was not substantially outweighed by its prejudicial effect. MRE 403. And, even if we assume that the trial court had somehow abused its discretion in admitting the other-acts evidence, its error was not outcome determinative. *People v Denson*, 500 Mich 385, 397; 902 NW2d 306 (2017). The untainted evidence presented at trial included a videotape and the testimony of numerous witnesses who described how an agitated, angry, and intoxicated defendant recklessly operated his truck, swerved to strike Corey, and fled.

C. UNAVAILABLE WITNESS

1. STANDARD OF REVIEW

A trial court's decision to admit or preclude evidence is reviewed for an abuse of discretion. *Mardlin*, 487 Mich at 614. "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *Musser*, 494 Mich at 348 (citation omitted). But when "the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo." *McDaniel*, 469 Mich at 412.

2. DISCUSSION

At trial, Nelson was called outside of the jury's presence regarding the 2013 New Year's Eve incident. Nelson testified that he was high, hated court, was shaking in his boots, wanted to go home, and had no memory of the 2013 incident due to his marijuana use. After the court determined that Nelson would be excused, defense counsel indicated that she might "possibly want to call him." The trial court inquired whether counsel planned to call Nelson to say that he did not recall his prior testimony in front of the jury. Counsel confirmed that was precisely what she wanted to do, opining that if Nelson did not recall the incident, it was not what the prosecution was making it out to be as Nelson would certainly recall someone trying to run him over. Nelson then interjected that he had been shot at before and he did not remember that event either. Nelson remained adamant that he could not make himself remember the 2013 incident, did not want to remember it, and even reading the preliminary examination transcript did not help his memory.

The court determined that Nelson was unavailable due to his lack of memory as a result of his marijuana consumption, the passage of time, and his desire to put the 2013 matter behind him. Defense counsel repeated her desire to call Nelson to testify regarding his lack of memory. The court ruled that Nelson was unavailable for all purposes unless trial counsel provided him with legal authority to support her contention. The court added that Nelson was also incompetent to testify because "he is admittedly stoned out of his mind." See MRE 601.

Defendant does not challenge the trial court's determinations that Nelson was incompetent to testify and unavailable; rather, defendant continues to argue that the trial court was required to inform the jury that Nelson was unavailable *because* of his lack of memory. We disagree.

In general, a declarant's out-of-court statement is hearsay, MRE 801(c), and inadmissible, MRE 802. But there is an exception to the hearsay rule when a witness is unavailable due to "a lack of memory of the subject matter of the declarant's statement." MRE 804(a)(3). See also *People v Duncan*, 494 Mich 713; 835 NW2d 399 (2013). When this occurs, former testimony at a prior hearing, such as a preliminary examination, may be offered. See MRE 804(b)(1).

In support of his position that the trial court erred by failing to require Nelson to appear for the sole purpose of testifying regarding his memory loss, defendant cites a single unpublished decision, *People v Person*, unpublished per curiam opinion of the Court of Appeals, issued November 19, 2009 (Docket No. 286057). Although this Court's unpublished decisions are not precedentially binding, MCR 7.215(C)(1), we may find their analysis and application persuasive. *People v Johnson*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351308, rel'd April 8, 2021). In *Person*, the defendant asserted that the trial court erred by admitting portions of a witness's preliminary examination testimony at trial under MRE 804. *Person*, unpub op at 5. The witness was able to remember some events, but not others, and the trial court permitted a portion of her preliminary examination testimony to be read to the jury for those portions that she could not remember. *Id*. The defendant challenged this on appeal; however, the issue raised was *not* whether the jury should have been made aware that the witness's unavailability was due to her inability to remember. Instead, the defendant argued "that there was an inadequate effort to attempt to refresh [the witness]'s memory before allowing the prior testimony to be entered." *Id*. at 6. Because *Person* addressed a situation in which a witness remembered *some* events but not others, defendant extrapolates that, because a witness was deemed unavailable for some purposes,

but not *all* purposes, this means that Nelson was required to testify that he could not remember the December 2013 incident. We find no support for this position in *Person* or the rules of evidence themselves. To the contrary, MRE 104(a) provides that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . ." And a court, not a jury, determines whether a witness is unavailable. *Duncan*, 494 Mich at 730. Accordingly, defendant has not demonstrated that the trial court erred. Moreover, even if defendant could demonstrate that the trial court erred, its error was not outcome determinative given the untainted evidence presented.

D. SUFFICIENCY OF THE EVIDENCE

1. STANDARD OF REVIEW

This Court reviews de novo challenges to the sufficiency of evidence in a jury trial. *People v Gaines*, 306 Mich App 289, 296; 856 NW2d 222 (2014). To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, this Court views "the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013) (citation and quotation marks omitted). "The standard of review is deferential: a reviewing court is required to 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).

2. DISCUSSION

Defendant contends that there was insufficient evidence to support a finding that he caused serious impairment of a body function and that he had the specific intent to commit AWIGBH. We disagree.

The elements of the reckless driving causing death or serious impairment of a body function are: (1) defendant drove a motor vehicle in willful or wanton disregard for the safety of persons or property on a highway or other place open to the public or generally accessible to motor vehicles and (2) defendant's operation of the vehicle was the cause of such an injury to another. MCL 257.626(3); see also M Crim JI 15.14a. The elements of failure to stop at the scene of an accident resulting in serious impairment of a body function are that (1) the defendant drove a motor vehicle, (2) that was involved in an accident on public or private property open to public travel, (3) the defendant knew or had reason to know that he had been involved in an accident, (4) that accident resulted in a serious impairment of a person's body function, and (5) defendant failed to immediately stop his vehicle at the scene to provide assistance or give information required by law. MCL 257.617(1) and (2); see also M Crim JI 15.13a.

Relevant to this appeal, both offenses require that there be a "serious impairment of a body function." MCL 257.617(2) and MCL 257.626(3). Because this is the only element of these crimes that defendant disputes, it is the only one we will address.

The Motor Vehicle Code, MCL 257.1 *et seq.*, defines the term serious impairment of a body function:

> "Serious impairment of a body function" includes, but is not limited to, 1 or more of the following:
>
> (a) Loss of a limb or loss of use of a limb.
>
> (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
>
> (c) Loss of an eye or ear or loss of use of an eye or ear.
>
> (d) Loss or substantial impairment of a bodily function.
>
> (e) Serious visible disfigurement.
>
> (f) A comatose state that lasts for more than 3 days.
>
> (g) Measurable brain or mental impairment.
>
> (h) A skull fracture or other serious bone fracture.
>
> (i) Subdural hemorrhage or subdural hematoma.
>
> (j) Loss of an organ. [MCL 257.58c.]

Regarding the loss of the use of a limb, this Court has recognized:

> The statute here does not specify the length of time such a loss must be suffered. On the one hand, it does not require that the loss of use be long-lasting or permanent. On the other, it does not specify that any lost use, for no matter how short a time, is sufficient. [*People v Thomas*, 263 Mich App 70, 77; 687 NW2d 598 (2004).]

And, in light of the statute's plain language, this Court has also recognized that "the listing of injuries . . . is not exhaustive." *Id*. at 75-76. To determine whether a non-enumerated injury qualifies, this Court applies "the *ejusdem generis* canon of statutory construction," and considers the non-enumerated injury's "similarity to" the statutorily-listed injuries. Again, "[a]n injury need not be long-lasting to be considered a 'serious impairment.' " *Id*. at 76.

At issue in *Thomas* was whether a police officer's left knee sprain was a serious impairment of body function. *Id*. at 72. The officer's treating physician described the injury as "severe." *Id*. "The officer was unable to walk without crutches for several weeks and missed approximately 2-1/2 months of work," even though "the leg injury . . . completely healed" thereafter. *Id*. This Court affirmed the trial court's decision "that the injury to the officer's left leg constituted a 'serious impairment of body function' under the statute." *Id*. at 77. This Court reasoned:

> The officer lost the use of that limb almost completely for several weeks while he was on crutches and, to a more limited extent, during the several months that he was unable to return to work. This impairment was certainly less extreme than

> what would have been the case had the officer been rendered comatose. But it was far more long-lasting than the three days that would have been sufficient had a comatose state resulted. We conclude that this lesser impairment, itself within the statutory list, suffered for a much greater time than required for a more serious injury within the list, is properly considered as falling within the "serious impairment" category. [*Id.*]

In this case, the evidence adequately supports the jury's determination that Corey suffered a serious impairment of a body function. The trauma critical care surgeon who treated Corey testified that he arrived as a level-two trauma. The physician described Corey's injuries as "a scalp laceration," "a right[-]side fibular fracture, a tibial plateau fracture," "a grade one splenic laceration," and "a closed head injury or a concussion." Corey's most significant injury was "a significantly comminuted[3] Schatzker 6 tibial plateau fracture with complete disassociation of the diaphysis from the metaphysis." The surgeon explained that Corey "had a fracture of the tibia and the fibula just below the knee. The plateau is where the femur sits on the bone, so at the knee joint." When asked if it was a serious injury and fracture, the surgeon described it as "a relatively unstable fracture," that "can cause further issues down the line if not treated quickly to reduce the fracture."

The surgeon described how this injury was treated with "an external fixator." Basically, medical personnel "put[] a rod on the outside of [Corey's] leg to stabilize the fracture so it doesn't move and allow the bone to heal on its own." With the fixator attached, Corey could not "actually bend his leg." Moreover, although this rod did not *typically* impede an individual's ability to walk or to do other "normal activities," a wheelchair might be required. X-rays, admitted at trial, depicted both the fractures and the placement of the rod for the jury.

"Depending on the extent of the fracture," the doctor opined that recovery "could take anywhere from six weeks up to two or three months." In Corey's case, the rod was removed approximately three months later.

Cassandra testified that Corey was hospitalized for about four to six days. Corey "had a broken leg for the whole time" and "laid in bed . . . until he passed away."[4] Cassandra further testified that the "apparatus" on Corey's leg prevented him from walking or using a wheelchair, resulting in him lying "in bed the whole time unless he had a doctor's appointment." Although Corey had been active before the hit-and-run, Cassandra testified that he was not "very active" afterward.

On appeal, defendant contends that Corey's fractures were not serious because he would recover and his ability to walk would not be impeded. Defendant also suggests that Corey's inability to fully recover was attributable to his failure to participate in physical therapy and his pre-existing heart condition.

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[3] A comminuted fracture is when the bone breaks into several pieces.

[4] While hospitalized, the doctors discovered Corey had heart issues that later caused his death.

But our duty is to view the evidence in the light most favorable to the prosecution. *Smith-Anthony*, 494 Mich at 676. Viewed in this manner, the evidence presented during trial amply supported a finding by a rational jury that Corey suffered a serious impairment of body function. After defendant struck Corey with the truck, Corey's leg was fractured and he suffered the loss of that limb, albeit temporarily, for three months. This was sufficient under MCL 257.58c(a). *Thomas*, 263 Mich App at 77. Likewise, given the doctor's testimony, the hospital x-rays, Corey's medical records, and Cassandra's testimony, a rational jury could conclude that Corey suffered a "serious bone fracture." MCL 257.58c(h). Because there was sufficient evidence that Corey's leg injury constituted a serious impairment of body function, defendant is not entitled to any relief.

Defendant next argues that there was insufficient evidence that he intended to commit great bodily harm when he struck Corey with his truck. In order to prove AWIGBH, the prosecution must show: "(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 Blevins*, 314 Mich App 339, 357; 886 NW2d 456 (2016) (quotation marks and citation omitted). Stated otherwise, AWIGBH requires a defendant to act with the specific intent to cause great bodily harm less than murder. *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014). "This Court has defined the intent to do great bodily harm as an intent to do serious injury of an aggravated nature." *Id*. (quotation marks and citation omitted). But "[b]ecause of the difficulty in proving an actor's intent, only minimal circumstantial evidence is necessary to show that a defendant had the requisite intent." *Id*. at 629.

In this case, Cassandra testified that defendant had been drinking, that defendant had quarreled with those at the party, that defendant was asked to leave, that defendant left, and that defendant subsequently returned before being asked to leave again. Cassandra saw defendant walk away from the house with Corey and she overheard defendant arguing with Corey. A police officer testified that Amos, the homeowner, informed him that defendant made threats against Corey. Cassandra observed defendant get into his truck, accelerate aggressively, swerve toward and hit Corey, and not slow down. Other eyewitnesses corroborated her testimony and the jury viewed a video of the incident. As just discussed, Corey suffered numerous injuries, including fractures in his leg. The nature of the incident itself, i.e., using a truck to strike a pedestrian and failing to stop, further provided circumstantial evidence of defendant's specific intent to not only injure but to "do serious injury of an aggravated nature." *Blevins*, 314 Mich App at 357 (quotation marks and citation omitted). Accordingly, the evidence was sufficient to support defendant's conviction for AWIGBH.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW

Because defendant failed to preserve this issue for appellate review, "our review is limited to mistakes apparent from the record." *People v Thorne*, 322 Mich App 340, 347; 912 NW2d 560 (2017).

2. DISCUSSION

Defendant has failed to meet his heavy burden of showing that his trial counsel was ineffective for failing to object to witness testimony that improperly opined on defendant's guilt—a question for the jury alone to decide.

To establish ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

Examination of counsel's actions must be "highly deferential" and without the benefit of hindsight. *Id*. at 689. There is a "strong presumption" that counsel's actions arose from "sound trial strategy," *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012), and this Court will not "substitute [its] judgment for that of counsel on matters of trial strategy . . . ." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). This Court has recognized that "declining to raise objections . . . can often be consistent with sound trial strategy." *Id*. at 242. Moreover, trial counsel is not ineffective for failing to raise a meritless or futile objection. See *People v Putman*, 309 Mich App 240, 245; 870 NW2d 593 (2015).

Although "a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense," *People v Fomby*, 300 Mich App 46, 53; 831 NW2d 887 (2013) (quotation marks and citation omitted), MRE 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." And, under MRE 701, a witness, who is not testifying as an expert, may testify "in the form of an opinion" if it is "rationally based on the witness's perception," "helpful to . . . determining a fact in issue," and "not based on scientific, technical, or other specialized knowledge within the scope of [MRE] 702."

Relevant to this issue, VanConant left the witness box to better view the videotape of the incident. The prosecutor asked VanConant several questions about the individuals depicted in the videotape, including Corey, whose clothing VanConant identified. The following exchange then occurred:

> *Q [the prosecutor]*. Okay. Watching that, is—and you can go back to your seat. Watching that is there anything else that you remember seeing at that time? Seeing or feeling?
>
> *A [VanConant]*. No, ma'am.
>
> *Q*. At the time, did it appear to you that it was an accident?
>
> *A*. No ma'am.

On appeal, defendant argues that trial counsel was ineffective for failing to object to the prosecutor's last question. Defendant relies on *People v Bragdon*, 142 Mich App 197, 199; 369

NW2d 208 (1985) (quotation marks omitted), where the prosecutor asked the defendant, "So you're guilty of the crime?" We held that the prosecutor asking that question constituted error requiring reversal. See *id*. at 199-200.

In contrast, the prosecutor in this case did not ask VanConant if defendant was guilty. The prosecutor asked VanConant whether defendant's conduct appeared to be accidental based on VanConant's personal observations during the incident. This question was permissible under MRE 701 and MRE 704, and trial counsel did not perform deficiently by failing to make a futile objection. *Putman*, 309 Mich App at 245. Nor can defendant establish prejudice. The videotape of the incident was provided to the jury to decide for itself whether defendant's actions appeared intentional or accidental. This was not a close case where VanConant's testimony may have tipped the scales in favor of conviction; rather, the evidence against defendant was overwhelming and he is not entitled to any relief on his ineffective-assistance-counsel claim.

Affirmed.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Anica Letica