STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 299285 Livingston Circuit Court
LEO ANTHONY MIKOLOWSKI, Defendant-Appellant.	LC No. 08-017791-FH

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals, and, for the reasons set forth below, we affirm.

This case arises out of an incident that occurred during the early morning hours of November 16, 2008, outside the Shark Club, a bar and restaurant in Howell, Michigan. Defendant and his two nephews travelled to Howell to go hunting and were staying at the Kensington Inn, a hotel next to the club. A confrontation arose between defendant's group and the victim, Tirrell Dixon, and Dixon's two companions when Shark Club personnel expelled defendant's group from the club. The dispute continued into the parking lot. Defendant went to his hotel room and returned with a loaded shotgun. Additional discourse ensued. The incident ended without injury but resulted in the above convictions. [1]

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that insufficient evidence supported his felonious assault conviction. Sufficiency of the evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of

[1] Defendant was also charged with, but acquitted of, ethnic intimidation, MCL 750.157b.

the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Felonious assault, MCL 750.82, has three elements: "(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). An assault is "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998) (internal quotations omitted). Engaging in "threatening conduct designed to put another in reasonable apprehension of an immediate battery" is sufficient to meet the third, *mens rea*, element. *Id.* at 240-241. It is undisputed that defendant had a dangerous weapon. Defendant takes issue with whether an assault occurred and whether he had the requisite intent.

Defendant argues that there was insufficient evidence to establish that Dixon reasonably apprehended an *immediate* battery, which is necessary to prove an assault in this case. According to defendant, the evidence establishes that Dixon and his friends may have feared that the confrontation might escalate further and ultimately result in the use of the weapon, but it was clear under the circumstances that he was only using the gun as a defensive deterrent while he attempted to get his nephews away from the scene. We disagree. Dixon laughed at and made a comment to defendant as defendant was escorted from a bar. Defendant replied to Dixon, "f*** you n*****. Come on out here n*****." Dixon followed defendant into the parking lot. Defendant immediately left, went to his hotel next door, grabbed and loaded a shotgun, and returned to the parking lot. Defendant stood 10 to 15 feet from Dixon with his shotgun diagonally across his chest and his hand near the trigger. Defendant told Dixon "f*** you n***** and get the f*** out of our face." Dixon testified that he was "shocked" and "felt threatened" because "you don't bring a gun to a verbal confrontation if you don't plan on usin' it." Dixon testified that he thought defendant would use the gun. When viewed in a light most favorable to the prosecution, a rational jury could reasonably conclude beyond a reasonable doubt that Dixon reasonably apprehended an immediate battery. See *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980) (defendant merely displaying a knife implied a threat of violence).

Defendant also argues that there was insufficient evidence to prove the requisite intent, namely that he intended to place Dixon in reasonable apprehension of an immediate battery. A defendant's intent is difficult to prove, so "minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all of the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). As soon as Dixon followed defendant into the parking lot, defendant immediately went to his hotel room, loaded his shotgun, and returned with it. Defendant stood with his hand near the trigger. Defendant testified that he got the gun to protect himself and his nephews. When viewed in a light most favorable to the prosecution, a rational jury could reasonably conclude beyond a reasonable doubt that defendant intended Dixon to reasonably apprehend an immediate battery. *Wolfe*, 440 Mich at 515.

II. DEFENDANT'S SUPPLEMENTAL 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, none of which have merit.

A. Prosecutorial Misconduct

Defendant argues that the prosecutor engaged in numerous instances of prosecutorial misconduct. This Court reviews claims of prosecutorial misconduct to determine whether defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct is reviewed on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Defendant did not object at trial or request a curative instruction for the prosecutor's alleged misconduct. Therefore, the issue is unpreserved. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Appellate review for an unpreserved error is for plain error. *Id.* "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." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error affects substantial rights when it affects the outcome of the lower court proceeding. *Id.* Plain error requires reversal only if it resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764. This Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Callon,* 256 Mich App at 329-330.

Defendant first alleges that the prosecutor committed misconduct when she argued facts not in evidence during her opening statement. "When a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), aff'd *People v Tilley*, 405 Mich 38; 273 NW2d 471 (1979). Defendant has not shown that the prosecutor acted in bad faith. No plain error occurred. *Carines*, 460 Mich at 763. Additionally, the trial court instructed the jury that the attorneys' arguments were not evidence. Jurors are presumed to follow their instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). This curative instruction dispelled any potential prejudice. *Callon*, 256 Mich App at 331.

Defendant next argues the prosecutor argued facts not in evidence when she paraphrased defendant's testimony that Dixon pulled a gun partially out of his pocket during the confrontation. The prosecutor, however, accurately paraphrased what defendant said. The prosecutor is free to argue the facts in evidence and reasonable inferences. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor's paraphrasing of defendant's testimony was not plain error. *Carines*, 460 Mich at 763. Moreover, the trial court instructed the jury that the prosecutor's statements were not evidence, and the jury is presumed to follow its instructions. *Matuszak*, 263 Mich App at 58.

Defendant also argues that the prosecutor committed misconduct by inaccurately simulating the way he held his gun. Assuming this occurred, the trial court dispelled any

potential prejudice caused by the prosecutor's hand motions when it instructed the jury that the attorneys' arguments were not evidence. *Id.* at 58; *Callon*, 256 Mich App at 331.

Defendant further argues that the prosecutor committed misconduct when she commented on his nephews' failure to testify. Defendant testified that he went to get his gun after he saw that Dixon had a gun. Dixon denied having a gun. The prosecutor asked why defendant did not have his nephews, who were also present, corroborate his story. When defendant offers an alternate theory of the events, the prosecution may point out the weakness in defendant's case by commenting on defendant's failure to produce a corroborating witness. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). No plain error occurred. *Carines*, 460 Mich at 763.

Defendant next argues that the prosecutor committed misconduct by objecting during his closing argument. Defendant abandoned this argument by citing no relevant authority to support this position and by not rationalizing his argument. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant argues that the prosecutor portrayed him as a racist. Several witnesses testified that defendant repeatedly used racially derogatory language. The prosecutor is free to argue the facts that are in evidence. *Bahoda*, 448 Mich at 282. No plain error occurred. *Carines*, 460 Mich at 763.

Defendant next argues that the prosecutor committed misconduct during her closing argument by mischaracterizing the facts and testimony by telling the jury that "[d]efendant was already standing outside and shouting come-on you n***** while waiving his rifle." The record does not support that the prosecutor said this, so there is no plain error. *Id.*

Defendant also argues that the prosecutor committed misconduct by charging him with ethnic intimidation. We disagree. Prosecutors have broad charging discretion, and the evidence supported the ethnic intimidation charge even though the jury acquitted defendant of the offense. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004).

Finally, defendant argues that the cumulative effect of these alleged errors denied him a fair trial. We reject this argument because there are no errors to cumulate. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002).

B. Jury Instructions

Defendant argues that the trial court should have sua sponte instructed the jury on attempted felonious assault. By expressly approving the instructions that were read to the jury, defendant waived this issue. *Lueth*, 253 Mich App at 688.

Defendant also argues that the jury sent a request to the trial court to have an instruction reread or clarified and that the trial court summarily denied this request. The record does not reflect that this happened. Defendant argues that this portion of the transcript is missing, but he did not follow the procedure set forth in MCR 7.210(B)(2) related to unavailable transcripts. Defendant waived this issue because a failure to provide the pertinent transcripts precludes this Court from deciding the issue. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

C. Double Jeopardy

Defendant argues that his acquittal for ethnic intimidation necessarily acquitted him of felonious assault. Defendant did not raise this issue in the statement of questions presented. Therefore, it is abandoned. See *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Further, we find no merit to that claim where the two crimes each contain an element that the other does not, MCL 750.147b; MCL 750.82. *People v McGee*, 280 Mich 680, 682-683; 761 NW2d 743 (2008).

D. Ineffective Assistance of Counsel

Defendant argues that he was denied effective assistance of counsel. This issue is unpreserved because defendant did not move for an evidentiary hearing or a new trial. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Additionally, because the trial court did not hold a hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), review is limited to errors apparent on the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). The Sixth Amendment of the United States Constitution and the Michigan Constitution guarantee a defendant the right to assistance of counsel. US Const, Am VI; Const 1963, art 1, § 13. Before a defendant's conviction may be reversed on the basis of ineffective assistance of counsel, a defendant must show two things: (1) "counsel's performance fell below an objective standard of reasonableness," and (2) "the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result [of the proceeding] would have been different." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). There is a strong presumption that counsel's conduct was a part of a "sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant first argues that he was denied effective assistance of counsel because defense counsel failed to object when the prosecutor argued facts not in evidence and mischaracterized his testimony. We decline to review these arguments because defendant abandoned them by not citing to the record or any relevant authority to support his position. *Kelly*, 231 Mich App at 640-641.

Defendant next argues that he was denied effective assistance of counsel when defense counsel did not object to the prosecutor's supposedly inaccurate depiction of the way defendant held his gun. While it may have been objectively unreasonable for counsel to allow the prosecutor to misrepresent testimony by her hand gestures, assuming that occurred, defendant has not met his burden of showing a reasonable probability that counsel's failure to object affected the outcome of the case. *Hoag*, 460 Mich at 6.

Defendant also argues that defense counsel was ineffective for failing to object when the trial court refused to reread or clarify an instruction at the jury's request. Additionally, defendant argues that defense counsel was ineffective for failing to move for a new trial on this basis. The record does not reflect that the jury ever asked a question or asked for clarification. Defendant had the burden of establishing the factual predicate for his claim of ineffective assistance of counsel, and he failed to do so. *Id.*

Defendant further argues that the cumulative effect of errors denied him a fair trial. We disagree. Without a single instance of ineffective assistance of counsel, there cannot be a cumulative effect of errors. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Finally, defendant, in his brief, requested a remand for a *Ginther* hearing. Whether this Court chooses to grant a motion to remand is discretionary. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Defendant has failed to comply with the timing and filing requirements of MCR 7.211(A)(1), and (C)(1). Defendant's request for remand is denied.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Jane M. Beckering