

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW ROY MCKINNEY,

Defendant-Appellant.

UNPUBLISHED

February 8, 2005

No. 250929

Macomb Circuit Court

LC No. 02-003926-FC

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to commit murder, MCL 750.83, assault with a dangerous weapon, MCL 750.82, and felony-firearm, MCL 750.227. Defendant was sentenced to fifteen to thirty years' imprisonment for the assault with intent to commit murder conviction, one to four years' imprisonment for the assault with a dangerous weapon conviction, and two years' imprisonment for the felony-firearm conviction. Defendant's felony-firearm sentence runs consecutively to his concurrent sentences for assault with intent to commit murder and assault with a dangerous weapon. We affirm.

I

Defendant's convictions arose from a June 14, 2002, incident involving his former wife, Pamela McKinney. She and defendant were married in January 1992, separated in 1995, and divorced in 1997. Pamela McKinney testified that in April 2002, she obtained a personal protection order (PPO) against defendant because he, for six months, terrorized her after the divorce by calling her in the middle of night; by writing the word "soon" on her car and her mail/correspondence (a bill); and by stating "soon" to her after she and defendant met in an area restaurant. At that restaurant meeting, defendant discussed the circumstances of their separation and made the statement, "If my wife left me, if that really, in fact, happened, I'd be a crazy man." Pamela McKinney testified that she was terrified after the meeting with defendant, so she obtained the PPO.

On the morning in question, Pamela McKinney was driving her white Neon to work in a southerly direction when she observed defendant driving a van approaching her from the opposite direction. Defendant rammed her Neon head-on with the van. The force of the impact shattered the Neon's windshield. Pamela McKinney testified that when she saw defendant's eyes, she knew he wanted to harm her. She reached for her cellular phone, but the battery was dead. She proceeded as fast as possible away when she heard gunshots. She decided to drive to

the police department, approximately one-half mile away. The road was under construction and two lanes were barricaded. She slowed to make a right turn, but was prevented by the amount of traffic. Defendant rammed her vehicle again with the van. The Neon veered into the construction area, but she continued to drive, attempting to reach the police station. She struck barricades as she was driving and, to avoid being shot, she drove the Neon in a zigzag manner. A bullet struck the Neon. The bullet traveled through the driver seat and struck her in the back.¹ Pamela McKinney was forced to stop driving when her car became stuck in a hole in an unpaved area of the road. Yelling for assistance, she jumped out of the car and ran toward traffic. Defendant fled the scene on foot. The police and EMS were at the scene and she was taken to the hospital. Pamela McKinney testified that after her release from the hospital later that day, she temporarily relocated until after defendant was arrested.

Witnesses to the incident similarly described the events of that day. Michael Zynda testified that he observed Pamela McKinney in a white car being chased by defendant in a van. Zynda had to drive up on the curb to get out of the way. Zynda observed defendant shoot at Pamela McKinney with a shotgun. Defendant “pumped” the shotgun and Zynda heard two gunshots. After the white car became stuck in a hole, Zynda no longer saw the van.

Keith Ringstad and Clifford Ringstad were working in the area at the time in question. Keith Ringstad observed the car chase. When Pamela McKinney stopped at the stop sign, Keith Ringstad saw both vehicles hit their breaks before the van rammed the Neon, but he testified that the impact did not force the Neon into traffic. Keith Ringstad testified that the Neon made the turn at approximately twenty or twenty-five miles per hour. Clifford Ringstad also testified that he observed the van following the Neon and that the force of the impact did not force the Neon into traffic. He heard three gunshots after the Neon and van turned the corner.

Jerry Pirrotta testified that when he initially observed the Neon and van, he believed the drivers were racing. Pirrotta saw black smoke, which he believed was backfire. Pirrotta heard the minivan “revving up” to accelerate. Pirrotta realized the black smoke was not from backfire but instead from gunshots.

Hibib Maktabi testified that he observed the van following the Neon. Maktabi testified that he observed defendant fire two or three gunshots as he leaned out the window of the van.

Cindy Colson observed the Neon approach her vehicle rapidly from behind. Colson heard five loud bangs and, after the Neon crashed, Colson left her vehicle and approached the Neon to assist. As she approached the Neon, Pamela McKinney yelled, “get down, he has a gun.” Colson testified that she saw a burgundy vehicle with defendant outside the window and the vehicle disappeared when it turned on a side street.

When the police recovered the van, their investigation revealed that defendant was the registered owner. A visual inspection revealed that the van sustained heavy front-end damage and had three holes in the windshield. Burn markings surrounded the edges of the holes in the

¹ The bullet did not break Pamela McKinney’s skin and she suffered extensive bruising.

windshield, indicating that a weapon had been placed next to the windshield and fired. Inside the van, the police recovered a 12-gauge shotgun, five spent 12-gauge shotgun cartridges, a hunting knife, shovel, sleeping bag, rubber gloves and karate sticks. Following deliberations, the jury convicted defendant as charged. Defendant now appeals.

II

We review a challenge to the sufficiency of the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002). This Court will not revisit the jury's determinations of the credibility of witnesses or weight of the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "All conflicts with regard to the evidence must be resolved in favor of the prosecution." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000), citing *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Lee, supra* at 167-168.

Generally, preserved claims of instructional error are reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). We review the instructions in their entirety to determine whether the instructions fairly presented the issues and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). However, because defendant failed to object, this Court reviews unpreserved claims of instructional error for plain error affecting defendant's substantial rights. *Id.* at 124-125.

This Court reviews claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). When a claim of prosecutorial misconduct is not properly preserved, our review is limited to whether a plain error affected defendant's substantial rights. *Id.* at 274-275. This Court will not find error requiring reversal unless the prejudicial effect of the prosecutor's comments could not have been cured by a timely instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Here, defendant failed to move for an evidentiary hearing or a new trial, therefore our review is limited to facts existing in the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

III

A

Defendant first argues that the prosecution presented insufficient evidence to convict him of the crimes charged. With regard to the assault with intent to commit murder and felony-

firearm conviction conviction, defendant contends that the prosecution failed to present sufficient evidence that he had the specific intent to commit murder. Defendant claims that he only intended to scare Pamela McKinney in light of evidence demonstrating he had “little likelihood of success” and that he only rammed the Neon when she reached the stop sign versus forcing her vehicle into traffic when he had the best opportunity to commit murder. With regard to the assault with a dangerous weapon conviction, defendant contends that his act of ramming the Neon should be classified as malicious destruction of property or some other crime in light of the prosecution’s statement to the jury that he was attempting to disable Pamela McKinney’s vehicle. We disagree.

To establish assault with intent to commit murder, the prosecutor must prove (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Thus, it is not enough that the defendant acted only with an intent to cause serious bodily injury or with a conscious disregard of the risk of death. *People v Lipps*, 167 Mich App 99, 105-106; 421 NW2d 586 (1988), citing *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985); *People v Cochran*, 155 Mich App 191, 193-194; 399 NW2d 44 (1986). The intent to kill may be proved by inference from any facts in evidence. *McRunels*, *supra* at 168. Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient. *Id.*

The elements of assault with a dangerous weapon are an assault, with a dangerous weapon, and with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). “[A]n automobile, adapted to accomplishing an assault and capable of inflicting serious injury is, when so employed, a “dangerous weapon” within the meaning of the statute which penalizes felonious assault.” *People v Blacksmith*, 66 Mich App 216, 221; 238 NW2d 810 (1975), citing *People v Goolsby*, 284 Mich 375, 378-380; 279 NW 867 (1938).

Felony-firearm is the crime of carrying or possessing a firearm during the commission or attempted commission of a felony. *People v Moore*, 470 Mich 56, 58; 679 NW2d 41 (2004).

In this case, when the evidence is viewed in the light most favorable to the prosecution, we find that the evidence was more than sufficient to support defendant’s convictions. Pamela McKinney identified defendant as the person who rammed her vehicle, chased her, and fired gunshots at her vehicle. A 12-gauge shotgun with five spent shells was retrieved from defendant’s van. In addition to evidence establishing that defendant shot bullet holes in the van’s windshield, eyewitness testimony demonstrated that defendant leaned outside the van’s window to fire the gun. The eyewitnesses also testified that defendant accelerated the van and “pumped” and reloaded the gun. Significantly, the prosecution submitted evidence that the gunshot damage to Pamela McKinney’s vehicle was limited to the driver side. In this regard, we reject defendant’s claim that she may have maneuvered in the direct path of an oncoming bullet because she drove in a zigzag manner. Testimony was presented that defendant was a hunter, supporting a reasonable inference that he had the ability and knowledge to handle a firearm. Given this evidence, the prosecution introduced sufficient evidence for a rational juror to find beyond a reasonable doubt that defendant had the specific intent to commit murder and that he committed the crimes for which he was charged.

B

Defendant next claims that the trial court erred in failing to instruct the jury on the definition of murder. We disagree. Defendant never requested that the trial court give the instruction at issue. Further, other than two unrelated objections specifically noted by the trial court,² we find that defense counsel's expression of satisfaction with the trial court's jury instructions waived and removed any claim of instructional error to review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).³

C

We next address defendant's multiple claims of prosecutorial misconduct. Defendant first argues that the prosecution improperly interjected evidence of prior bad acts by eliciting information in the prosecution's case-in-chief and by referring in closing arguments to testimony from Pamela McKinney that she had obtained a PPO against him. Defendant also argues that the prosecution did not file the required notice under MRE 404(b). Defendant further contends that Pamela McKinney's testimony taken together with the prosecution's references in closing argument to her testimony that defendant made her nervous; that she knew he would come after her; that she and their children needed counseling after the incident, and that she felt the need to relocate until after he was arrested; was prejudicial and cast him as bad person. We disagree. We initially note that defendant did not object to the prosecution's elicitation of testimony from Pamela McKinney pertaining to the PPO, and thus our review is limited to plain error that affected defendant's substantial rights. *Carines, supra* at 763.

Generally, the decision whether "bad acts" evidence is admissible is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit bad acts. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 55, 64; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). However, the evidence may be admissible for other purposes under MRE 404(b)(1), which 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,

² The trial court denied defendant's requests for an instruction on simple assault and an instruction on felonious assault as a lesser included offense to assault with intent to commit murder.

³ Moreover, even if we considered defendant's instructional issue under the plain error test applicable to unpreserved issues, *Carines, supra* at 763; we would conclude that reversal is not warranted. The record shows, by reading CJI2d 17.3, "Assault with Intent to Murder" and CJI2d 3.9, the instruction pertaining to specific intent, the trial court properly instructed the jury that it had to find beyond a reasonable doubt that defendant intended to kill Pamela McKinney. *McRunels, supra* at 181.

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.

Accordingly, evidence of past acts is admissible under MRE 401 if relevant to any fact at issue outside of the defendant's criminal propensity, as long as the risk of unfair prejudice does not substantially outweigh its probative value. *VanderVliet, supra* at 55, 64. In this case, while we agree that prosecution failed to provide the required notice under 404(b), we do not find that the risk of unfair prejudice outweighed the probative value of the testimony given the substantial evidence presented against defendant. Further, the evidence was relevant to prove defendant's intent and motive to kill Pamela McKinney. MRE 401. We therefore find that defendant has not established plain error.

Defendant also argues that the prosecution argued facts not in evidence when the prosecution stated that a forensic examination was not performed because it was not necessary; that the knife, shovel and rubber gloves retrieved from defendant's van were not "normal" evidence; that defendant did not just "snap;" and that there would be no mental services for defendant. We disagree. Upon review of the entire record, we conclude that the prosecutor argued facts in evidence or reasonable inferences arising from the evidence and responded to arguments or evidence raised by the defense. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Defendant next asserts that the prosecutor improperly expressed her personal beliefs with her statements that the case was "straightforward; that "an innocent man would not have run away", and that Pamela McKinney "would not . . . go back to her home" after the incident. We disagree. When the prosecutor relates his personal beliefs to the evidence, a defendant has not established reversible error. *See People v Suiter*, 82 Mich App 214, 220; 266 NW2d 762 (1978). Here, the record shows that the prosecutor argued facts in evidence. Pamela McKinney testified that she was afraid to return home immediately after the incident and Police Officer Ostrowski also testified that he remained with her until he was satisfied that she had made satisfactory arrangements for transportation and that she would not be returning home. Pamela McKinney also testified that defendant fled on foot after the accident. Although flight by itself is insufficient to sustain a conviction, evidence of flight may be probative of a consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Further, because the trial court properly instructed the jury on flight and that the arguments of the attorneys are not evidence, we find no error. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v McPherson*, 263 Mich App 124, 140; 687 NW2d 370 (2004) (jurors are presumed to follow their instructions).

Defendant also argues that the prosecution raised an improper civic duty argument with the statement that the victim "went through a horrible ordeal . . . [a]nd I ask that you do your job and that you give her piece of mind." Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may use hard and emotional language and is not required to argue in the "blandest" language possible. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Even assuming that the comments were improper, we find no error requiring reversal. Taken in context, the comments were isolated. Further, any prejudice was cured because the trial court instructed the jury that its decision should not be influenced by sympathy and that the arguments of the attorneys are not evidence. *Graves, supra; McPherson, supra.*

We note that, in defendant's next claim of prosecutorial misconduct, he misstates the record when he states that the prosecution argued that if the jury found Pamela McKinney credible, it *must* find defendant guilty. Instead, the record shows that the prosecution stated, "[I]f you heard Pamela McKinney's testimony . . . and you find her to be a credible witness, that is all that you need to convict this man of all three crimes that he's charged with." The prosecution's statement was not improper as it accurately reflected the law that the jury could reject or accept Pamela McKinney's testimony. "The trier of fact determines what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Finally, because defendant has not established any errors requiring reversal, we reject his claim that the cumulative effect of the prosecutor's misconduct denied him a fair trial. In sum, defendant has not shown that he is entitled to reversal on the basis of prosecutorial misconduct.

D

Next, defendant argues that trial counsel was ineffective for failing to object to the trial court's instructions, failing to object to Pamela McKinney's testimony pertaining to the PPO and her relationship with defendant, and failing to object to the prosecution's comments. Defendant also contends that the cumulative effect of trial counsel's failures constitute ineffective assistance of counsel. Again, we disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel made an error so serious that he was prejudiced by the error in question, i.e., the error might have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Consistent with our conclusions, *supra*, we find that defendant's claims fail, as any objection by trial counsel would have been meritless. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (an attorney is not required to advocate a meritless position). Because defendant has failed to establish reversible errors regarding the trial court's instructions or the prosecutor's conduct, we reject defendant's claims of cumulative error by trial counsel.

We also find unpersuasive defendant's claim of ineffective assistance of counsel raised in defendant's standard 11 brief wherein he argues that, although trial counsel obtained an order to have defendant evaluated to determine whether he was mentally competent to stand trial and

whether he was criminally responsible,⁴ trial counsel was nonetheless ineffective for failing to seek an independent evaluation to pursue an insanity defense.

The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* The decision whether to present an insanity defense can be an issue of trial strategy, and this Court will not reverse where failure to raise an insanity defense is a question of trial strategy. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). Insanity is an affirmative defense that requires proof that, as a result of mental illness or mental retardation, the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or to conform his conduct to the requirements of the law. MCL 768.21a(1); see also *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001).

We initially note that defendant has attached over two-hundred pages of medical records dating from 1996 to 2001 to his standard 11 brief to establish a basis for pursuing an insanity defense; however, these records are not reviewable as they are not properly before this Court. We reiterate that because defendant failed to move for a new trial or *Ginther* hearing, this Court's review is limited to mistakes on the record. *Darden, supra* at 604. In any event, we note there is nothing in the medical records pertaining to his mental condition near the time of the instant offense.

Hence, there is no record evidence before this Court to establish that defendant lacked the substantial capacity to appreciate the nature and quality or the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Rather, the record shows defendant sent Pamela McKinney a letter apologizing for his actions. Given this evidence, taken together with defendant's advance messages of "soon" to Pamela McKinney, we conclude that it is not reasonably likely that had an insanity defense been presented, the result of the proceedings would have been different.

Nor does the record show that defendant was denied a substantial defense. Trial counsel aggressively argued that defendant lacked the specific intent to kill Pamela McKinney. Trial counsel challenged the prosecution's interpretation of the word "soon." While the prosecution argued that the word reflected premeditation and defendant's specific intent to commit the instant offense, trial counsel argued that it reflected defendant's intent to commit another suicide attempt. Trial counsel also reiterated that defendant's and Pamela McKinney's meeting on that particular road on the day in question was pure coincidence because they approached each other from opposite directions. Trial counsel also argued that defendant had ample opportunity to kill Pamela McKinney because he was a "hunter and killer" with the skills necessary to effectuate a

⁴ Evidence at trial established that defendant attempted suicide on multiple occasions and was treated for injuries sustained in a hunting accident. In his standard 11 brief, defendant states that his evaluation at the Detroit Forensic Center determined that he was competent to stand trial and, although mentally ill, he was criminally responsible for his acts.

killing if that were his true objective. The fact that the jury rejected trial counsel's argument that he only intended to scare Pamela McKinney does not negate trial counsel's ability to forego an insanity defense as trial strategy. *Matuszak, supra* at 61 (a particular strategy does not constitute ineffective assistance of counsel simply because it does not work); *Newton, supra* at 493. In sum, defendant has failed to rebut the presumption that he received the effective assistance of counsel. *Matuszak, supra* at 61.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White