S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2012
v	Nos. 305240, 305244 & 305273 Saginaw Circuit Court
TERRENCE JAMAR SHEPPARD, Defendant-Appellant.	LC Nos. 09-033512-FH; 10-034095-FH; 10-034096-FC

Before: TALBOT, P.J., AND WILDER AND RIORDAN, JJ.

PER CURIAM.

Defendant's three appeals have been consolidated for appellate review. In Docket No. 305240, defendant appeals as of right his jury trial convictions of two counts of first-degree home invasion, MCL 750.110a(2).

In Docket No. 305244, defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), carrying a dangerous weapon with unlawful intent, MCL 750.226, felonious assault, MCL 750.82, assault with intent to commit a felony, MCL 750.87, and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1).

In Docket No. 305273, defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), carrying a dangerous weapon with unlawful intent, MCL 750.226, interfering with electronic communications, MCL 750.540(5)(a), attempted murder, MCL 750.91, and aggravated stalking, MCL 750.411i.

Defendant was sentenced as a second habitual offender, MCL 769.10, to 10 to 30 years for each conviction of first-degree home invasion, 24 to 90 months for each conviction of carrying a dangerous weapon with unlawful intent, two to six years for felonious assault, 5 to 15 years for assault with intent to commit a felony, one to three years for and assaulting, resisting, or obstructing a police officer, one to three years for interfering with electronic communications, 22 to 40 years for attempted murder, and 2 years to 90 months for aggravated stalking. We affirm in part, reverse in part.

I. FACTUAL BACKGROUND

Defendant and the victim had a dating relationship and have two children together. In September 2009, the victim and her mother were sleeping in the bedroom and awoke to find defendant in the room standing over them. The victim testified that defendant did not have a key and did not have permission to enter her mother's apartment. Defendant tried to grab the victim, but she and her mother ran to a neighbor's apartment. Defendant forced his way into the neighbor's apartment, physically pushing the neighbor aside while the victim hid in the bathroom. Defendant testified, in contrast, that he was invited into both apartments, the victim was drunk, and she would not return the keys to his residence. The police were called and when they arrived, defendant fled. The victim obtained a personal protection order against defendant.

In early March 2010, the victim was alone in her mother's apartment while her mother was at church. Defendant arrived and began to beat the door, trying to enter, and the victim called the police. Defendant kicked down the door and came into the apartment while holding a knife. Defendant told the victim he wanted her to come with him and that he was going to kill her. Defendant pursued the victim with the knife and cut her arm. He then grabbed her arm and escorted her out of the apartment, which was when the police arrived. The victim was able to escape from defendant's grasp and defendant fled when he saw the police.

In late March 2010, the victim was at her mother's house sleeping in the living room. The victim realized that defendant was outside of the residence and ran into the bedroom. The victim then heard glass breaking, and defendant admitted that he threw a brick through the glass patio door. The victim and her mother barricaded themselves in the bedroom by pushing a dresser against the door. While defendant denied entering the residence, the victim testified that defendant was inside the house, pushing the bedroom door open, and attempting to enter the room. Defendant also was holding a knife and ordered the victim to exit the room. Defendant threatened to kill the victim. After hearing the threat, the victim realized that defendant would enter the bedroom and kill her, so she climbed out the window and called the police. While the victim's mother also tried to call the police, defendant cut the phone cord. Defendant eventually gained entrance to the bedroom and the victim's mother told him that the victim exited through the window. Defendant then exited the apartment.

Defendant was eventually located and arrested. He was charged separately for the three incidents, the date of all three trials was set for the same day, and the prosecutor requested that the trials be joined. Over defendant's objections, the trial court joined the trials. Defendant was convicted of four counts of first-degree home invasion, two counts of carrying a dangerous weapon with unlawful intent, felonious assault, assault with intent to commit a felony, assaulting, resisting, or obstructing a police officer, interfering with electronic communications, attempted murder, and aggravated stalking. Defendant now appeals.

II. ATTEMPTED MURDER

A. Standard of Review

Defendant argues that there was insufficient evidence to support his attempted murder conviction.[1] "We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. Analysis

Attempted murder, MCL 750.91, occurs when:

> [a]ny person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, or by any means not constituting the crime of assault with intent to murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years.

As indicated by the language, the attempted murder statute "is designed to proscribe and punish those attempts at murder not within the ambit of the assault with intent murder statute . . . ." *People v Smith*, 89 Mich App 478, 483; 280 NW2d 862 (1979). In other words, attempted murder and assault with intent to murder are "mutually exclusive crimes." *People v Long*, 246 Mich App 582, 589; 633 NW2d 843 (2001). If the crime constitutes an assault with intent to murder, it cannot form the basis of an attempted murder conviction. See *Smith*, 89 Mich App at 483.

Defendant's behavior constituted an assault with intent to murder. A person is guilty of assault with intent to murder if he "assault[s] another with intent to commit the crime of murder . . . ." MCL 750.83. An assault is "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Defendant placed the victim in reasonable apprehension of an immediate battery when he forced his way into the residence, tried to enter the bedroom where the victim was hiding, and threatened to kill the victim while holding a knife. Defendant's statements that he intended to kill the victim demonstrate the requisite intent to commit murder. Due to the fortuitous escape of the victim, defendant's behavior did not escalate

[1] The attempted murder conviction was in regard to defendant's behavior during the last incident in late March 2010.

beyond an assault with intent to murder. Therefore, defendant's attempted murder conviction was improper and must be vacated.[2]

III. JOINDER OF CASES

A. Standard of Review

"To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute related offenses for which joinder is appropriate." *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009) (internal quotations omitted). We review for clear error the trial court's factual findings and we review de novo the trial court's conclusions of law. *Id.* "A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court made a mistake." *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011).

B. Analysis

The trial court did not err in joining the three cases. MCR 6.120(B) provides, in part:

> [o]n its own initiative, the motion of a party, or the stipulation of all parties, . . . the court may join offenses charged in two or more informations or indictments against a single defendant . . . when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> > (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
> >
> > > (a) the same conduct or transaction, or
> > >
> > > (b) a series of connected acts, or
> > >
> > > (c) a series of acts constituting parts of a single scheme or plan.
> >
> > (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

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[2] Defendant's challenge to the attempted murder jury instruction is moot in light of our holding that his attempted murder conviction should be vacated. Additionally, since we agree that defendant's attempted murder conviction was erroneous, "we need not consider defendant's claims of ineffective assistance that relate only to his conviction of attempted murder." *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996).

Defendant's crimes arose from three incidents comprising a series of connected acts. Defendant attempted to domestically harass the same victim in the same manner when he repeatedly broke into her mother's apartment with force and threatened violence. A review of the other relevant factors also indicates that joinder was proper. While defendant alleges that the prosecutor's motion was not timely, defendant presumably was prepared for trial at the time of the motion because all three cases were set for trial on that day. Further, it was more convenient for the witnesses to testify only once, and it conserved the parties' resources.

Defendant also alleges that joinder of the trials was prejudicial and allowed the jury to convict defendant based on improper evidence such as character evidence. Our Supreme Court has noted that "[t]he admissibility of evidence in other trials is an important consideration because '[j]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial.'" *Williams*, 483 Mich at 237, quoting *United States v Harris,* 635 F2d 526, 527 (CA6, 1980). While defendant argues that pursuant to MRE 404(b), his other bad acts would not have been admitted in the other trials, MCL 768.27b(1) states that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403."[3]

Also, while defendant asserts that evidence of the other crimes would be prejudicial according to MRE 403, "[a]ll relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *Id.* at 614. Not only has defendant offered no argument that the evidence was not probative, he also failed to demonstrate that it "stir[red] the jurors to 'such passion . . . as to [be swept] beyond rational consideration of [the defendant's] guilt or innocence of the crime on trial.'" *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998), quoting McCormick, Evidence (2d ed) § 190, p 454.

IV. COMPETENCY

A. Preservation & Standard of Review

A claim is not preserved if it is not raised before, addressed by, or decided by the trial court and it is reviewed only for plain error affecting substantial rights. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Whether a defendant received effective assistance of counsel is a mixed question of fact and law, *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), and unpreserved claims of ineffective assistance of counsel are "limited to mistakes apparent from the record[,]" *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

[3] Placing the mother of his children in fear of physical harm constitutes a crime involving domestic violence. MCL 768.27b(5)(a) & (b).

B. Analysis

First, defendant argues that he is entitled to a new competency hearing because the examining psychologist's telephonic testimony violated his constitutional right to confront the witness. We decline to address this issue because defense counsel expressly agreed to allow the examining psychologist to testify telephonically. "There is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel." *People v Buie*, __Mich __; __NW2d__ (Docket No. 142698, issued May 24, 2012) (slip op at 11). Moreover, for the reasons discussed below, there was no manifest injustice resulting from any of the alleged errors in the competency hearing.

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687. The Court has held that this second prong asks whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

First, defendant alleges that he was denied the effective assistance of counsel when his counsel failed to obtain an independent competency examination. MCR 6.125(D) provides that "[o]n a showing of good cause by either party, the court may order an independent examination of the defendant relating to the issue of competence to stand trial." While defense counsel expressed doubts about defendant's competency to stand trial, there is no evidence that an independent exam was warranted. Nothing on the record suggests that the validity of the court ordered competency exam was comprised. Even if counsel harbored doubts about defendant's competency, this does not necessarily translate to good cause for an independent exam, especially since there is no evidence that defense counsel was offering anything other than a personal opinion that defendant's competence may be questionable. Without more, it cannot be said that but for counsel's failure to pursue this matter, the trial court would have granted an independent examination. Therefore, there is no evidence that the outcome of the competency hearing or the trial would have been different if defense counsel had sought an independent competency exam.

Defendant's second claim of ineffective assistance of counsel arises from counsel's failure to insist that the examining psychologist testify in person, not telephonically. While defendant alleges that allowing the psychologist to testify telephonically violated MCR 6.006, there is no express prohibition in that court rule to this effect. Also, considering that defense counsel conducted a voir dire of the witness and a searching cross-examination, there is nothing on the record to support a conclusion that counsel's performance was either objective unreasonable or prejudiced defendant. While defendant expends the majority of his energy explaining how he has a general due process right to confront a witness, he failed to articulate

any way in which defense counsel's alleged error would have affected the outcome of either the competency hearing or the trial. As we have stated numerous times:

> [i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. [*People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009) (internal quotations and citations omitted).]

V. CONCLUSION

Since defendant's behavior constituted assault with intent to murder, we vacate his attempted murder conviction. There was no error in the joinder of the trials. Lastly, defendant waived any objection to the telephonic testimony at the competency hearing and he was not denied the effective assistance of counsel at the competency hearing. We affirm in part, reverse in part. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan