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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2006
v	No. 260549 Wayne Circuit Court
SYLVESTER DEWAN NORTH, Defendant-Appellant.	LC No. 04-007354-01

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right jury convictions of assault with intent to murder, MCL 750.83, assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b(1). We affirm.

On October 13, 2001, Cecil Clark was talking to Kimberly Covington in front of his godmother's house in Detroit. Clinton Wilform was standing approximately one and one-half houses away talking with friends. Defendant drove past and, after parking his car slightly in front of Covington's car, got out of his vehicle and confronted Wilform. After Clark asked defendant a question, defendant shot once at Clark, hitting him in the left thigh. Defendant then turned his attention back to Wilform and shot at Wilform three or four times. Defendant did not hit Wilform. He then returned to his car and drove off.

Defendant first claims on appeal that the trial court erred in denying his motion for a continuance because his appointed counsel, Robert Plumpe, was unprepared for trial. Specifically, defendant argues that Plumpe was unprepared to cross-examine Clark because Plumpe failed to obtain from Leroy Daggs, defendant's retained counsel who had fallen ill, an affidavit signed by Clark's father. According to defendant, Clark's father averred in the affidavit that Clark had told him that he could not identify the shooter.

Generally, we review a trial court's decision to grant or deny a continuance for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). However, defendant requested that the trial court grant a continuance because he wanted Daggs, who had recently been released from the hospital but may have been in a nursing home, to resume the role

of defense counsel. Defendant did not move for a continuance on the ground that Plumpe was unprepared for trial. [1] Because an objection based on one ground is insufficient to preserve an appellate attack based on a different ground, *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), the issue whether the trial court erred in denying defendant's motion for a continuance is unpreserved. We review unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

In reviewing a trial court's decision to deny a continuance, we consider the following factors: (1) whether the defendant is asserting a constitutional right; (2) whether the defendant has a legitimate reason for asserting the right; (3) whether the defendant was negligent in asserting the right; and (4) whether the defendant is merely attempting to delay trial. *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In addition, if the trial court erred in denying the continuance, a defendant is only entitled to reversal if he demonstrates that he was prejudiced as a result of the trial court's error. *People v Peña*, 224 Mich App 650, 661; 569 NW2d 871 (1997), mod in part 457 Mich 885 (1998).

Defendant is asserting a constitutional right. The right to counsel guaranteed by the United States and Michigan constitutions, US Const, Am VI; Const 1963, art I, sec 20, is the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The right to effective assistance of counsel includes having prepared counsel, one who has investigated and is prepared to present all substantial defenses. *People v Battles*, 109 Mich App 487, 490; 311 NW2d 779 (1981); *People v Lewis*, 64 Mich App 175, 183-184; 235 NW2d 100 (1975). Here, defendant does not have a legitimate reason for asserting that Plumpe was unprepared for trial.[2] The trial court appointed Plumpe to represent defendant approximately six weeks before defendant's trial commenced. In these six weeks, Plumpe received discovery from the prosecution, moved the trial court to prohibit Covington from identifying defendant at trial, and filed a witness list, which included Clark's father, who, if called, could have testified as to the contents of his alleged affidavit. Plumpe also knew of the alleged existence of the affidavit signed by Clark's father. Under these circumstances, we cannot conclude that the trial court plainly erred in denying defendant's motion for a continuance.

Defendant next claims that his conviction for assault with intent to commit murder was not supported by sufficient evidence. Specifically, defendant asserts that there was insufficient evidence to establish an intent to murder. He argues that, at most, the evidence established an intent to scare or to intimidate. In reviewing the sufficiency of the evidence to sustain a conviction, we view the evidence in a light most favorable to the prosecution and determine

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[1] We note that defendant's supplemental authority is inapposite for several reasons, including that defendant does not argue on appeal that he was erroneously deprived of his Sixth Amendment right to counsel of his choice. See *United States v Gonzalez-Lopez*, ___ US ___; 126 S Ct 2557, 2561-2562; ___ L Ed 3d ___ (2006).

[2] We also note that the matter had been adjourned three times to allow Daggs time to recover, and defendant failed to present any evidence that Daggs would be able to return as his counsel.

whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

The elements of assault with intent to kill are: (1) an assault; (2) with an actual intent to kill; and (3) which, if successful would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). An intent to kill may be inferred from any facts in evidence. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Further, given the difficulty of proving a defendant's state of mind, minimal circumstantial evidence that the defendant intended to kill is sufficient. *McRunels*, *supra*; *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

The evidence presented here included that when defendant drove past Wilform, the two men stared each other down. It is undisputed that defendant and Wilform did not like each other based on past history. After defendant drove past, he parked his car and exited, while holding a gun. He then approached Wilform. After shooting once at Clark, from about six to eight feet away, defendant returned his attention to Wilform and fired three or four shots directly at Wilform, while standing about 12 to 15 feet from Wilform. Wilform, along with Clark and Covington, testified that defendant fired these three or four gunshots directly at Wilform. From this testimony, a rational trier of fact could infer that defendant was not merely shooting his gun to scare or intimidate Wilform but, rather, he was shooting directly at Wilform with the intent to hit him. Further, because defendant fired three or four shots at Wilform, a person he did not like, at close range, a rational trier of fact could infer that defendant shot at Wilform with the intent to kill him. Accordingly, defendant's conviction for assault with intent to murder is supported by sufficient evidence.

Defendant also argues, in his Standard 4 brief, that the prosecutor impermissibly asked Constance North, defendant's mother, to comment on Clark's credibility. Generally, we review de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, because defendant did not object to the prosecutor's cross-examination of Constance on the ground that she was impermissibly asked to comment on Clark's credibility, we review defendant's claim of prosecutorial misconduct for plain error affecting his substantial rights. *Kimble*, *supra*; *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). Regardless, we will not reverse if a curative instruction could have cured any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

It is improper for a prosecutor to ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). We agree with defendant that the prosecutor violated this rule. However, reversal is not required. Defendant has not demonstrated that the error affected his substantial rights. See *Carines*, *supra* at 763. The evidence against defendant was overwhelming and the improper questions did not affect the verdict. Second, if defendant had objected, a curative instruction could have cured any prejudice suffered by defendant. See *Buckey*, *supra* at 18; *Ackerman*, *supra*. And, we note that, even though defendant did not object, the trial court's instruction to the jury, that its job included determining the credibility of witnesses, dispelled any prejudice defendant suffered by the prosecutor's improper questioning of Constance. Consequently, defendant is not entitled to a reversal of his convictions on the basis that the prosecutor impermissibly asked Constance to comment on Clark's credibility.

Finally defendant claims that the trial court erred in scoring ten points to offense variable (OV) 19, MCL 777.49, because there was no evidence indicating that he avoided the police or that he used any of his aliases to interfere with the administration of justice. We review a trial court's scoring decisions for an abuse of discretion. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). We will uphold a scoring decision for which there is any evidence in support. *Id.* at 454.

Ten points may be scored for OV 19 if the defendant "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Providing the police with a false name, even before criminal charges are filed, constitutes interference with the administration of justice. *People v Barbee*, 470 Mich 283, 278-288; 681 NW2d 348 (2004). After the initial warrant for defendant's arrest was issued in 2001, defendant left the jurisdiction. In 2003, he provided a false name, Dejuan Kelly, to the police in St. Paul, Minnesota. We conclude that, pursuant to *Barbee*, this was evidence that defendant interfered with the administration of justice. Thus, the trial court did not abuse its discretion in scoring ten points to OV 19, and defendant is not entitled to be resentenced.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter