

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY KRUEGER,

Defendant-Appellant.

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UNPUBLISHED  
September 2, 2003

No. 240009  
Wayne Circuit Court  
LC No. 01-006687

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of assault with intent to commit murder, MCL 750.83. Defendant was sentenced to eight to fifteen years in prison. We affirm.

I

Defendant claims that the prosecution failed to present sufficient evidence to support his conviction of assault with intent to commit murder. Defendant argues that there was insufficient evidence to establish that he had the specific intent necessary to commit the offense. We disagree.

We review de novo a claim of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court must view the evidence in a light most favorable to the prosecution and determine 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 offense of assault with intent to commit murder requires proof beyond a reasonable doubt that defendant assaulted the victim, with an actual intent to kill, which if successful would have made the killing a murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). “The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *Id.* (citations omitted). Factors that may be considered when determining intent include 1) the nature of the defendant’s acts constituting the assault, 2) the temper or disposition of the defendant’s mind, 3) whether the instrument and means used were naturally adapted to produce death, 4) the defendant’s conduct and declarations before, at the time, and after the assault, and 5) all other circumstances calculated to throw light upon the intention with which the assault was made. *People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985).

Viewing the evidence in the light most favorable to the prosecution, we find that the prosecution presented sufficient evidence of defendant's intent to kill when assaulting the victim, defendant's ex-girlfriend's current boyfriend. Prior to the assault, defendant told his children that he wanted to stab the victim. Defendant took a knife from his home and drove a few miles to his ex-girlfriend's house. Upon entering the home, defendant asked where the victim was, ran up the stairs, and attacked the victim, stabbing him four times, including in the stomach and kidney area. The victim testified that before defendant stabbed him, defendant said, "you are a dead man." Given these facts, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant intended to kill when he assaulted the victim.

## II

Defendant further claims that the victim gave false testimony and that his testimony at trial was inconsistent with his testimony at defendant's preliminary examination, and therefore defendant's conviction was based on tainted, unreliable testimony. The primary basis of defendant's claim is that the victim misrepresented the severity of his wounds, as well as several less significant details about the incident. Thus, because the trial court was unaware of this misrepresentation, it was unable to appropriately judge the victim's credibility.

Defendant failed to preserve this issue for appeal by raising the issue before the trial court. We find no plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if the precise nature and severity of the wounds were not as the victim testified, any inaccuracies do not negate the general seriousness of the attack. It was undisputed that defendant stabbed the victim several times, including in the stomach and kidney area. The victim's general testimony concerning the incident was supported by the testimony of several other witnesses, including defendant's. Defendant was not prejudiced by any alleged error such that it affected the outcome of his trial. Further, reversal of his conviction is not warranted on the basis that he is innocent or that the fairness, integrity, or public reputation of the judicial proceedings was undermined. *Id.*

## III

Defendant alleges several claims of prosecutorial misconduct. Again, we find no plain error affecting defendant's substantial rights. *Id.*

Because we find no prejudicial error with regard to the alleged inaccuracies in the victim's testimony, we similarly find no prejudicial error in the prosecutor's failure to correct the alleged inaccuracies or inconsistencies between the victim's preliminary examination testimony and his trial testimony. Likewise, we find no error requiring reversal in the prosecutor's reference to the severity or nature of the victim's injuries in closing argument. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but is free to argue the evidence and all reasonable inferences as they relate to the theories of the case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor need not state an argument in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Defendant has failed to show error in the prosecutor's failure to fully investigate and seek admission of the victim's medical records as evidence. As discussed above, we find no basis for appellate relief based on alleged error concerning the nature and severity of the victim's wounds. *Carines, supra.*

Defendant has failed to show that he was prejudiced by the prosecutor's alleged use of terminology from defendant's psychiatric examination. We cannot conclude that any alleged error affected defendant's substantial rights. *Id.*

#### IV

Defendant claims that his counsel was ineffective for failing to investigate, failing to call expert witnesses, failing to object to false testimony and improper action by the prosecutor, failing to file appropriate motions, and failing to assert a meaningful defense. Because defendant did not move for a new trial or an evidentiary hearing with regard to his claims, review is limited to mistakes apparent on the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991); *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). We find no error requiring reversal.

Defendant has failed to show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Further, defendant has not overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id.* at 302.

Defendant claims that he was denied the effective assistance of counsel because of defense counsel's failure to object to false testimony and alleged prosecutorial misconduct. In light of our findings of no error requiring reversal with regard to the alleged false testimony and prosecutorial misconduct, this claim fails.

Given the circumstances of the offense and the overwhelming evidence supporting the court's findings, we reject defendant's remaining claims of ineffective assistance. Defendant has failed to show prejudicial error in regard to the nature and severity of the victim's wounds, thus counsel's alleged failure to obtain medical records or expert medical testimony is not a basis for reversal of defendant's conviction. Defendant has not overcome the strong presumption that counsel's decisions, including the choice of witnesses and evidence were matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has not otherwise shown error requiring reversal with regard to the failure to file motions or sentencing matters. Any alleged mistake is not apparent on the record. *Armendarez, supra.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defendant has not met this burden.

Affirmed.

/s/ Kathleen Jansen  
/s/ Janet T. Neff  
/s/ Kirsten Frank Kelly