

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 22, 2011

v

WILLIE EDWARDS,

No. 299263
Wayne Circuit Court
LC No. 10-003027-FC

Defendant-Appellant.

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. A jury convicted defendant of assault with intent to commit great bodily harm less than murder, MCL 750.82, felon in possession of a firearm, and felony-firearm. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to prison terms of 10 to 30 years for the assault and felon in possession convictions, and to a consecutive 2-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises from the shooting of Andrew Paschel. Defendant argues that the prosecutor failed to present sufficient evidence to support a finding that defendant had the intent to do great bodily harm to Paschel.¹ We review sufficiency of the evidence claims de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, would warrant a reasonable juror in finding that all the elements of the charged crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399–400; 614 NW2d 78 (2000). In doing so, this Court must not interfere with the jury’s role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514–515; 489 NW2d 748 (1992).

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault) and (2) an intent to do great bodily harm less than murder. MCL 750.84; *People v Parcha*, 227 Mich App

¹ Defendant’s argument is based on his testimony.

236, 239; 575 NW2d 316 (1997). A defendant's intent to do great bodily harm may be inferred from all of the facts and circumstances surrounding the offense, including the defendant's acts, the means employed to perpetrate the assault, and the manner of the assault. *People v Lugo*, 214 Mich App 699, 709–710; 542 NW2d 921 (1995); *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982). Only minimal circumstantial evidence is sufficient to establish a defendant's intent. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

Viewed in a light most favorable to the prosecution, the evidence revealed that Paschel was unarmed and walking toward the house where he resided when defendant fired a handgun behind him. When Paschel confronted defendant about the gun, defendant pointed the gun toward Paschel and shot him in the leg. Defendant continued to keep the gun pointed at Paschel's chest as Paschel attempted to get the gun away from defendant. During the struggle, Paschel was struck by two more gunshots. Defendant's use of a firearm to commit the assault against Paschel, the firing of the gun at Paschel, and the continued pointing of the gun at Paschel's chest, supports the inference that defendant intended to cause great bodily harm to Paschel.²

Defendant next argues that the trial court improperly refused the jury's request to review a transcript of Paschel's testimony and improperly foreclosed the possibility of allowing the jury to review the testimony. A trial court's response to a jury's request to review testimony is reviewed for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

The jury began deliberating at approximately 2:25 p.m. on May 26, 2010, and was released for the day at approximately 4:07 p.m. The following morning at 10:48 a.m., the court announced that it had received a note indicating that the jury had reached a verdict. Before the verdict was announced, the trial court stated on the record:

Also, I'm not sure which of these or if any of these notes were put on the record. I know you did approach the bench, when the jury first started asking questions. They wanted the instruction pertinent to self-defense, which were sent in, and counsel actually gave the court the package that should go in.

So the second one was a request of the transcript of June's testimony, both counsel approached the bench and stipulated that I could send in a note indicating that they should use their collective memories, and we had a second request to see written transcript of the phone call or audio, which I also sent the same note indicating they should use their collective memories to recall.

After that, we did get an indication that they have a verdict.

MCR 6.414(J) provides:

² Defendant does not dispute that Paschel suffered great bodily harm.

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, defense counsel's apparent expression of satisfaction with the trial court's supplemental instruction waived any claim of error. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Even if this issue was not waived, no error occurred. According to the trial court, it advised the jury that a transcript was not available and that the jury should rely on their collective memories of the witnesses' testimony. The exact content of the court's instruction is not available. However, there is no indication that the trial court foreclosed the possibility of having the testimony reviewed at a later time. Indeed, the trial court instructed the jury as follows before deliberations commenced:

As far as a transcript, it's intended that you use your collective memories of the twelve of you who will decide this case regarding testimony, and you may use your notes if you like. There is no transcript of what is said. The transcript is being taken down in shorthand form. If you were to require any, whoever [sic: however], it would have to be transcribed and read back, and only a specific portion. So that's for your information.

Accordingly, the record does not support a finding that the court foreclosed the possibility of having the testimony reviewed at a later date. Thus, there was no error.

Lastly, defendant argues in the alternative that trial counsel was ineffective for agreeing to the court's supplemental instruction to the jury to rely on its collective memory with regard to Paschel's testimony. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court or seek a *Ginther*³ hearing, this Court's review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 U S 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's actions constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

As discussed above, the record does not support a finding that the trial court abused its discretion by instructing the jury to rely on its collective memory regarding Paschel's testimony. We cannot conclude that counsel made a serious error by approving the court's instruction because defendant has not demonstrated that the instruction was improper. There is no indication on the record that the court foreclosed the possibility of rehearing the testimony.⁴ Because the response did not constitute an abuse of discretion by the court, trial counsel was not ineffective for approving it.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

⁴ Had defendant moved for an evidentiary hearing in the trial court, details regarding the stipulation could have been put on the record.