

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL GEARD SHEA, JR.,

Defendant-Appellant.

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UNPUBLISHED

February 10, 2005

No. 251452

Oakland Circuit Court

LC No. 03-188268-FC

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

PER CURIAM.

Defendant appeals as of right jury trial conviction of assault with intent to murder, MCL 750.83. Defendant was sentenced to 12½ to 25 years' imprisonment. We affirm.

First, defendant contends that the trial court committed plain error when it refused to reread trial testimony requested by the jury in violation of MCR 6.414(H). We disagree. Defendant has failed to preserve this issue for appellate review because he did not object to the judge's denial of the jury's request in the trial court. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). This Court reviews unpreserved claims for plain error. *Carter, supra* at 215-216; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, the jury was excused to begin deliberations at 11:02 a.m. Apparently, during deliberations, the jury sent out a note stating: "Request items of evidence pictures, medical records, and the knife, and witness testimony." The note indicates that the following response was sent in:

- (1) all of the exhibits are being provided.
- (2) there are four latex gloves. Only jurors wearing a glove should handle the knife.
- (3) Witness testimony cannot be provided, please rely upon your recollections and notes. [signed] Judge Brennan.

A note regarding the jury reaching a verdict was sent out at 2:39 p.m. and the jury was returned at 2:42 p.m.

A trial court has the discretion whether to allow a jury to reexamine selected testimony. MCR 6.414(H); *Carter, supra* at 218. The court may order the jury to continue deliberations

without the requested review, as long as it does not deny any future possibility of rehearing the testimony. MCR 6.414(H); *Carter, supra* at 218-219. Here, the trial court did not instruct the jurors that they could never rehear the testimony. It merely instructed the jurors to rely on their recollections and notes. As the court did not foreclose the future possibility of rehearing the testimony by the jury, we find that the declination was within the court's discretion and did not violate MCR 6.414(H).

Also, assuming *arguendo* the trial court erred in refusing the jury's request to review the testimony, defendant failed to meet his burden of demonstrating that any error affected the outcome of the trial. See *Carines, supra* at 763. It was a one-day trial with only five witnesses, and the jury was allowed to take notes. All five witnesses gave consistent, credible testimony about the victim, Nicole Shea, receiving knife wounds on her hands, legs and forehead after defendant stabbed her and threw a knife at her. The record does not show that the jury had a question about a specific witness' testimony or could not return a verdict without certain testimony. Because there is no indication that the jury not receiving the transcript of the witnesses' testimony affected the outcome of the proceedings, reversal is unwarranted. *Id.*

Defendant next argues that the trial court erred when it refused his request to add a felonious assault charge as a cognate lesser-included offense and to instruct the jury on felonious assault. We disagree. Claims of instructional error are reviewed *de novo*. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

First, we note that the prosecution, not defendant, is the party to add a new charge. MCL 767.76; MCR 6.112(H); see *Genessee Prosecutor v Genessee Circuit Judge*, 386 Mich 672, 682-684; 194 NW2d 693 (1972) (holding that the separation of power would be violated if the circuit court accepts a plea to a cognate offense that had not been charged by the prosecutor); see also *People v Fortson*, 202 Mich App 13, 15; 507 NW2d 763 (1993) (finding no error in allowing the prosecutor to amend the information to add a new count). As such, defendant's argument, that the court erred in refusing his request to add a charge, is without merit.

Also, we reject defendant's argument that the court erred in refusing his request to give a felonious assault instruction pursuant *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002). MCL 768.32(1) "only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002), citing *Cornell, supra* at 356. It is well established that the offense of felonious assault is a cognate, not a necessarily included, lesser offense of assault with intent to murder with which defendant was charged with. *People v Vinson*, 93 Mich App 483, 485-486; 287 NW2d 274 (1979). The elements of assault with intent to commit murder are: (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. The intent to kill may be proven by inference. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). As felonious assault has elements not found in assault with intent to commit murder, it is a cognate lesser offense. *People v Mendoza*, 468 Mich 527, 532 n 4; 664 NW2d 685 (2003). As such, the trial court did not err in refusing to instruct the jury on felonious assault. *Reese, supra* at 446; *Cornell, supra* at 356.

Additionally, we reject defendant's contention that the trial court's failure to instruct on a cognate lesser-included offense denied defendant his right to present a defense because such view was overruled by the Supreme Court in *Cornell*, *supra* at 335. The trial court correctly followed *Cornell*, which is binding precedent and controls in this case. See also *People v Alter*, 255 Mich App 194, 200-201; 659 NW2d 667 (2003) (holding that *Cornell* is binding precedent on the issue whether a trial court is permitted to instruct on cognate lesser included offenses).

Defendant next asserts an ineffective assistance of counsel claim. Because defendant did not move for a new trial or a *Ginther*<sup>1</sup> hearing, this Court's review is limited to the mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant claims that his counsel was ineffective for failing to object to the prosecutor's motion to remove the lesser-included offenses of assault with intent to murder. We disagree. Even if trial counsel was ineffective, defendant failed to show that he was prejudiced. Testimony at trial shows that defendant slashed a knife at Nicole a dozen times, and threw a knife at her. Also, defendant repeatedly made threats against Nicole, stating, "somebody is going to die." In light of the overwhelming evidence establishing that defendant assaulted Nicole with the intent to kill her, it was highly improbable that the result would have been different but for counsel's alleged error. *Cone*, *supra* at 1843. Additionally, the trial court instructed the jury on assault with intent to do great bodily harm less than murder as a necessarily lesser included offense of assault with intent to murder. Still, the jury found defendant guilty of assault with intent to murder. As such, we find no prejudice and conclude that defendant did not receive ineffective assistance of counsel. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902 (1996).

Defendant further claims that counsel was ineffective for failing to vigorously cross-examine and impeach the witnesses. First, contrary to defendant's argument, defense counsel vigorously cross-examined Dr. Arash Armin regarding the CAT scan result which showed a collection of blood on her stab wound on her forehead, but no brain damage. Counsel's decisions whether to question how a knife could stick into the skin covering the skull without penetrating the bone are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Similarly, counsel vigorously cross-examined Nicole, Clifford Elkin and Natalie Elkin, and counsel's decisions whether to impeach them with their allegedly inconsistent statements to the police are also presumed to be matters of trial strategy

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

that this Court will not second-guess. *Id.*; *Rockey, supra* at 76-77. Additionally counsel impeached Nicole's statement regarding her blood loss with her medical records during cross-examination and counsel's closing argument. As such, defendant failed to show that defense counsel's cross-examination was deficient or prejudicial to him. Also, given the evidence against defendant, there was no reasonable probability of a different outcome, and thus, there was no prejudice.

Defendant next argues that cumulative error denied him a fair trial. This claim has no merit. Where defendant failed to show any error at all, there was no accumulation of error of which to make issue. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Finally, defendant argues that the trial court's scoring decisions violate his right to jury trial pursuant to *Blakely v Washington*, 542 US 2531; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Because defendant did not raise this issue at trial, this issue is not preserved and we review this issue under the plain error standard. *Carines, supra* at 763-764. In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court noted that *Blakely* is inapplicable to Michigan's sentencing system stating, "Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment." Defendant argues that *Claypool* is mere dicta and not binding on this Court. In *People v Dorhan*, \_\_Mich App\_\_; \_\_NW2d\_\_ (Docket No. 249995, issued October 12, 2004), slip op, p 7 n 4, the defendant raised the exact same argument regarding *Blakely* that defendant does in this case and this Court rejected the assertion that the statement from *Claypool* pertaining to *Blakely* is not binding precedent. Pursuant to MCR 7.215(C)(2), *Dorhan* is binding precedent and controls in this case. As such, we reject defendant's argument. Defendant does not challenge on appeal the trial court's scoring of the sentencing guidelines on any other basis.

Affirmed.

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