

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KIRK BRYAN WHYTE,

Defendant-Appellant.

UNPUBLISHED

May 15, 2008

No. 276488

Midland Circuit Court

LC No. 06-002935-FH

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.82, and resisting or obstructing a police officer (2 counts), MCL 750.81d(1). He was sentenced as a fourth habitual offender, MCL 769.12, to seven to twenty years' imprisonment for the assault conviction and two to fifteen year's imprisonment for the resisting arrest convictions. He appeals as of right. We affirm.

Following a heated argument in which defendant and the victim shoved and yelled at each other, defendant threw a grill filled with hot charcoal and ashes at the victim. Charcoal and ashes from the grill landed on the victim and caused extensive first- and second-degree burns to her face, neck, chest, and arms. After the assault, defendant fled the scene, hid from the police, and ignored police commands to stop.

First, defendant argues that insufficient evidence was presented to the jury to support his conviction for assault with intent to do great bodily harm less than murder. We disagree.

In analyzing the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court does not consider whether any evidence existed that could support a conviction, but instead determines whether a rational trier of fact could have found that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Under this deferential standard, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A conviction for assault with intent to do great bodily harm less than murder requires proof of: “(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.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The intent to do great bodily harm less than murder “has been defined as an intent to do serious injury of an aggravated nature.” *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

An assault is defined as “ ‘either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.’ ” *People v Gardner*, 402 Mich 460, 479; 265 NW2d 1 (1978), quoting Perkins on Criminal Law (2d ed), p 117. The evidence established that defendant committed an assault when he threw the grill directly toward the victim shortly after they had a heated argument. Contrary to defendant’s assertions, the fact that the grill may not have actually hit the victim is of no significance, especially when it is not disputed that hot charcoals and ashes did indeed strike and burn her before she could get out of the way. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992) (no actual injury required).

A defendant’s intent may be inferred from all the facts and circumstances surrounding the crime. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). Also, because of the inherent difficulties with directly proving a defendant’s thoughts and unspoken purposes, minimal circumstantial evidence is sufficient to support a finding that a defendant acted with a specific intent in mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The physical evidence, along with the victim’s statements to multiple witnesses immediately after the assault, established that defendant threw the grill containing hot charcoals and ashes at the victim shortly after the two had engaged in a heated argument. Further, defendant’s actions in fleeing the scene, hiding under the evergreen tree, and resisting arrest are circumstantial evidence of consciousness of guilt. *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988). The evidence presented at trial supported an inference that defendant acted with an intent to do great bodily harm less than murder.

Although actual physical injury is not required for a conviction, *Harrington, supra* at 430, the undisputed evidence showed that the charcoals and ashes indeed caused the victim severe first- and second-degree burns to her face, neck, chest and arms. The record also contains testimony as to the pain the burns caused the victim.

Defendant also argues the prosecutor engaged in misconduct by making statements during his closing argument that were not supported by evidence presented at trial. We disagree.

“Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Because the challenged prosecutorial statements in this case were not preserved by objections and requests for curative instructions, appellate review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Callon, supra* at 329. Further, this Court has established that “we cannot find

error requiring reversal where a curative instruction could have alleviated any prejudicial effect.” *Id.*

A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecutor is free to argue all reasonable inferences that flow from the evidence as they relate to the prosecution’s theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

During his closing argument, the prosecutor described the testimony that defendant threw a very recently used grill containing hot charcoal and ashes at the victim. The prosecutor then suggested that this was sufficient for the jury to conclude that defendant intended to assault the victim with intent to cause great bodily harm and to cause her substantial injuries. These statements were proper because the prosecutor was arguing the evidence as well as reasonable inferences arising from it in relation to the case.

Regardless, the trial court gave a curative instruction when it instructed the jury that the attorneys’ arguments were not evidence. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970), and jurors are presumed to follow their instructions, *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Given that jurors are presumed to follow their instructions, these instructions operated to eliminate the potential for prejudice from the prosecution’s remarks. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Therefore, the prosecutor’s remarks did not affect defendant’s substantial rights. Defendant’s argument to the contrary is without merit.

Finally, in a supplemental brief filed pursuant to Administrative Order 2004-6, Standard 4, defendant argues that his trial counsel was ineffective for failing to call his fiancé and sister as witnesses. We disagree.

Defendant did not move for an evidentiary hearing or a new trial based on ineffective assistance of counsel in the trial court. Therefore, this Court’s review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The determination as to whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo. *Id.*

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). “[T]o overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* at 663-664

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses only constitutes ineffective assistance if it deprives the defendant of a substantial defense. *Dixon, supra*. “A defense is substantial if it might have made a difference in the outcome of the trial.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Neither proposed witnesses observed the assault. Therefore, it was reasonable for counsel to have concluded that their testimonies would have been minimally relevant and would have failed to aid the defense. Furthermore, although defendant speculates that the witnesses would have provided testimony favorable to him, the record is silent regarding what the witnesses would in fact have testified to. Moreover, the record reveals that the substance of the witnesses’ proposed testimony would have been cumulative to evidence already submitted by the victim. As such, the failure to call these witnesses did not deprive defendant of a substantial defense. In light of this and other evidence presented to the jury, defendant has not shown that a reasonable probability exists that, if counsel had called his fiancé and sister as witnesses, the outcome of the proceedings would have been different. Thus, defendant’s argument that he was denied effective assistance of counsel is without merit. See *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy