

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FABIAN L. HOLT,

Defendant-Appellant.

UNPUBLISHED

June 2, 2009

No. 283214

Wayne Circuit Court

LC No. 07-013348-FC

Before: Servitto, P.J., and O’Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, felonious assault MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 25 to 50 years for the assault with intent to commit murder conviction, and two terms of 5 to 20 years for the felonious assault and felon-in-possession convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We vacate defendant’s conviction and sentence for felonious assault, but affirm his remaining convictions and sentences.

Defendant was convicted of assaulting Kevin Johnson shortly after Johnson confronted defendant at defendant’s home, and accused defendant of stealing property from a nearby house that Johnson was renovating. According to witnesses at trial, shortly after Johnson left defendant’s home, defendant emerged from a house with a gun, proceeded down the street toward Johnson’s house, and then started shooting at Johnson, who was inside his truck preparing to leave. Johnson attempted to drive off, but lost control of his vehicle and crashed into a nearby building. Defendant presented two defense witnesses who both testified that they heard gunshots; one, who lived with defendant, testified that she believed defendant was in the home at the time the shots were fired. The other witness testified that although he did not see the shooting, he saw another person with a gun in the vicinity of the shooting.

I. Effective Assistance of Counsel

Defendant argues that trial counsel was ineffective for failing to cross-examine Johnson about an alleged immunity agreement not to prosecute him for carrying a firearm in his truck. Because defendant did not raise this issue in the trial court and no *Ginther*¹ hearing was held, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made an error so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). In addition, defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Decisions involving the questioning of witnesses are generally considered matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Contrary to what defendant asserts, the record does not indicate that there was an immunity agreement for Johnson’s testimony. Rather, before Johnson testified, the prosecutor merely disclosed that he had informed both Johnson and defense counsel “that based on the evidence that we’ve reviewed, there’s no basis at this time to charge him with carrying a concealed weapon in a vehicle.” Although there was no evidence that Johnson used or was armed with a gun during the offense, there was evidence suggesting that he stored a gun inside his truck. At trial, defense counsel cross-examined Johnson at length about the licensing of his gun, the laws pertaining to carrying a firearm in a truck, and his lack of memory concerning exactly where he stored the gun. Under the circumstances, defendant has not overcome the presumption that counsel’s strategy in cross-examining Johnson as he did; inferring illegality rather than referring to the prosecutor’s statement that there was no basis to charge Johnson with a crime, was sound strategy. The handgun in Johnson’s truck was irrelevant, given that there was no claim he used or displayed the gun, and in light of the defense that defendant was not the shooter. Defendant has not met his burden of showing that defense counsel was ineffective.

II. Double Jeopardy

Defendant next argues that his dual convictions for assault with intent to commit murder and felonious assault, arising from a single assault, violate his double jeopardy protection against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The prosecutor concedes that the two offenses were intended as alternate charges in this case, and that the felonious assault conviction should therefore be vacated. Given the prosecutor’s concession, we direct that defendant’s felonious assault conviction and sentence be vacated.

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

III. Defendant's Standard 4 Brief

Defendant raises three issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

Defendant first argues that there was insufficient evidence of an intent to kill to support his conviction of assault with intent to commit murder. In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to 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 Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

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." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). "The intent to kill may be proven by inference from any facts in evidence." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

Testimony at trial indicated that shortly after Johnson confronted defendant and accused defendant of stealing Johnson's property, defendant emerged from a house armed with a gun and fired several shots in the direction of Johnson, who was inside his truck. Two witnesses testified that after the car truck crashed, the shooter approached the driver's side of the vehicle and fired at least one shot into the truck. Apparent bullet holes were discovered in the back of Johnson's truck, the rear driver's side window was shattered, and a bullet was recovered from the rear seat cushion. Viewed most favorably to the prosecution, this evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant shot at Johnson with the intent to murder him.

Defendant also argues that the trial court erred by failing to instruct the jury in accordance with CJI2d 17.4, mitigating circumstances, which would have informed the jury that if the assault took place under circumstances that would have reduced the charge to manslaughter had Johnson died, he could not be guilty of assault with intent to commit murder. Because defendant did not request this instruction at trial, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). To reduce a crime from murder to manslaughter, the defendant must have acted "out of passion rather than reason." *People v Tierney*, 266 Mich App 687, 715; 703 NW2d 204 (2005). The provocation must be such that it would cause a reasonable person to lose control. *Id.*

On appeal, defendant does not suggest what evidence showed that the assault occurred under circumstances that would have made any killing manslaughter had Johnson died. Our review of the record discloses that the evidence did not support giving CJI2d 17.4. Defendant

did not offer any evidence at trial that he assaulted Johnson in the heat of passion. Indeed, the defense theory at trial was that defendant was not the shooter. Accordingly, the failure to instruct in accordance with CJI2d 17.4 was not plain error.

Defendant also argues that the trial court erred by failing to give a full set of the CJI2d chapter 17 standard jury instructions on assaults.² As previously indicated, jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *Canales, supra* at 574. Thus, the trial court was not required to instruct on issues, defenses, or theories not supported by the evidence. Chapter 17 of CJI2d contains instructions applicable to the various different types of assault, including offenses that were not charged here. In this case, defendant was charged with assault with intent to commit murder and felonious assault, and the trial court instructed the jury on those offenses, as well as the lesser offense of assault with intent to do great bodily harm. Other than referring to CJI2d 17.4, which we have concluded the evidence did not support, defendant does not attempt to explain how any other instructions in CJI2d, chapter 17, were either applicable to this case or supported by the evidence. Thus, defendant has not established a plain error.

In sum, we vacate defendant's conviction and sentence for felonious assault, and affirm his remaining convictions and sentences.

Affirmed in part and vacated in part.

/s/ Deborah A. Servitto

/s/ Peter D. O'Connell

/s/ Brian K. Zahra

² Defendant erroneously asserts that the assault instructions are contained in chapter 7 of CJI2d. Chapter 7 contains instructions for various different criminal defenses. The assault instructions are contained in chapter 17.