

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE HANKINS,

Defendant-Appellant.

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UNPUBLISHED

June 15, 2010

No. 291280

Oakland Circuit Court

LC No. 2008-223256-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve consecutive terms of imprisonment of two years for the felony-firearm conviction, and eighty-one months to twenty years for the assault conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

This case arises from the shooting of defendant's girlfriend's son, who occasionally resided with defendant and his girlfriend in their motel room. The prosecuting attorney presented evidence that defendant shot that victim in the course of a heated argument that began when the victim ate some of defendant's ice cream. The girlfriend testified that defendant exclaimed that the victim "has to die" then shot him in the jaw, shoulder, and leg. Various witnesses testified that, thereafter, defendant calmly waited for the police, and expressed concern for his victim. According to a police witness, defendant also said of the victim, "I just can't take him beating on me anymore."

Defense counsel conceded that defendant was guilty of several crimes in the matter, but argued that he acted without the intent to commit murder.

On appeal, defendant argues that defense counsel was ineffective for having declined to put forward a theory of self-defense, and also that certain argument by the prosecuting attorney denied him a fair trial.

II. Assistance of Counsel

The United States and Michigan constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. The constitutional right to counsel is a right to the *effective* assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

A defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

In this case, defense counsel elected to explain on the record his decision not to request an instruction on self-defense:

In relation to the issue of self-defense, I went and I discussed this matter with [defendant]. I went to see him a couple of times over at the jail. Self-defense means that . . . he, technically, was justified in doing what he was doing, the fact that he shot this man. The testimony is clear, not only from the reports but from the testimony . . . that the victim in this case who was shot was unarmed, did not have a weapon, and he was allowed to reside at the dwelling . . . . My argument has always been that . . . the shooting is not a justifiable shooting. It's just that [defendant] did not intend on murdering the person. So, therefore, I don't think self-defense would be a . . . proper instruction here and I wanted to put it on the record in case somebody appeals it later on.

It is well settled that it can be legitimate trial strategy for defense counsel to concede lesser crimes in hopes of avoiding a guilty verdict on greater ones. See *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). As this Court noted, "Where defense counsel . . . recognizes and candidly asserts the inevitable, he is often serving his client's interest best by bringing out the damaging information and thus lessening the impact." *Id.* In this case, in light of the evidence of defendant's aggression against his unarmed victim, including that he shot him three times, the strategy of conceding improprieties while attacking the prosecution's theory of intent to murder was obviously a sound one. Because that theory was wholly incompatible with a self-defense theory, to instruct the jury on self-defense would have been to undercut the sound defensive strategy chosen.

We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

For these reasons, we conclude that defendant has failed to show a deficiency in counsel's performance. *Daniel*, 207 Mich App at 58. Moreover, in light of the evidence of defendant's excessive violence, there is no reasonable probability that a self-defense instruction would have produced a different result. *Poole*, 218 Mich App at 718. Defendant's claim of ineffective assistance of counsel must fail.

### III. Prosecutorial Misconduct

Defendant characterizes as prosecutorial misconduct the following statement from the prosecuting attorney's closing argument: "This case is about corroboration as much as it is anything else, corroboration. And if we're going to talk about credibility, we also have to talk about the manufacture of an excuse for what the Defendant did."

However, defendant concedes that there was no objection to this argument at trial, and that this issue is thus not preserved for appellate review. "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 failure to review the issue would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant asserts that the challenged argument ran afoul of the rule that, "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *Unger*, 278 Mich App at 236, quoting *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). This Court has held that prosecutorial argument that defense counsel does not believe his or her client "undermines the defendant's presumption of innocence," and "impermissibly shifts the focus from the evidence itself to the defense counsel's personality." *Wise*, 134 Mich App at 102.

We do not agree, however, that the jury should have taken the challenged argument to suggest that defense counsel was manufacturing an excuse for defendant's conduct. Given that the testimony included that defendant, immediately upon shooting his victim, explained to a police officer that the victim had been beating him, and otherwise expressed concern for the victim's well being, the jury should have understood the argument in question as a challenge to defendant's sincerity in connection with such statements.

A prosecuting attorney enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, to the extent that the jury might have taken that argument as an assertion that defense counsel thought defendant guilty as charged but fabricated a theory of mitigation, such improper argument is not prejudicial where, as here, the bulk of the prosecutor's arguments were properly tied to the evidence and applicable law. See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988) ("A prosecutor's closing argument should be considered in its entirety."). Moreover, any misapprehension over how to interpret the argument could readily have been remedied by a timely objection and curative instruction. See *Unger*, 278 Mich App at 234-235.

For these reasons, defendant fails to show that his claim of prosecutorial misconduct warrants any appellate relief.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Alton T. Davis