

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JAMAR HALL,

Defendant-Appellant.

UNPUBLISHED

October 11, 2012

No. 306265

Wayne Circuit Court

LC No. 11-000473-FC

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to murder, MCL 750.83, felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm) (second offense), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to 25 to 40 years' imprisonment for each of the assault with intent to commit murder convictions, 4 to 10 years' imprisonment for the felon in possession conviction, and five years' imprisonment for the felony-firearm, second offense, conviction. He appeals as of right. We affirm.

I. BASIC FACTS

On October 7, 2007, Andrew Knight and his cousin, Andrew Hudson, hosted and attended a memorial birthday party for a deceased friend at Club Med, a Detroit nightclub. Approximately 200 people attended the party and the club was over capacity. At approximately 12:30 a.m., as defendant (a/k/a "Boo Bear") was walking into the entryway to the club, Hudson accidentally bumped defendant's crutch. Knight and Hudson recognized defendant but were not friends with him. A bouncer working the club that night, Martin Hale, did not identify defendant at trial, but stated that Hudson had bumped into a man on crutches that night. Hudson apologized, but defendant became immediately angry. Defendant put his finger in Hudson's face and threatened Hudson. There were varying accounts of what defendant said. According to Hale, the man on crutches said, "Punk b****, you'll get f****ed up in here," and said to his friend, "Hey man, go handle that." According to Hudson, defendant said, "[n]o n****er," "[f]*** that," and "[n]****er I'll kill you." According to Knight, defendant said, "B****, I'll kill you." Defendant dropped his crutches and told a friend standing next to him to "go get the 40."

Knight, Hudson, and their friends moved towards the interior doors. Defendant's friend came back into the entryway with two guns, and handed one to defendant. Defendant shot into

the club, through the interior doors. Hudson was about seven or eight feet away from defendant at the time. Knight was hit in the arm and side. Another party attendee, Sean Linston, was hit three times while standing inside the club.

At the hospital, Knight told police that he witnessed an altercation between “Boo Bear” and Hale in the entryway of the club. Knight also told police that defendant was on crutches, but did not tell police that defendant ordered a friend to get a gun or that Hudson had a verbal altercation with defendant before the shooting.

Six days after the shooting, the police showed Hale a six-person photographic lineup. Hale stated that two men looked familiar, but indicated that defendant looked more like the shooter.

Charges were not immediately brought against defendant for the shooting for reasons that are unclear. Police officers who investigated the shooting testified that there was difficulty locating the victims and also testified that there are a number of non-fatal shootings that go unprosecuted.

On December 18, 2010, Knight attended another party at a Detroit nightclub named Key Club where he saw defendant. According to Knight, defendant pointed his finger at Knight as if he was shooting Knight. Knight hit defendant on the head with a champagne bottle and then with his fists. Defendant was severely injured and spent time in the hospital. The police did not charge Knight in connection with the assault. Approximately five days later, a firebombing occurred. As a result of an investigation into the firebombing, Knight told the homicide investigators that defendant had shot him in 2007, and that he had assaulted defendant five days earlier at the Key Club. Defendant was subsequently charged, convicted, and sentenced as outlined above. He now appeals as of right.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence that he had the intent to kill the victims. We disagree.

This Court reviews sufficiency of the evidence questions de novo, in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). The prosecution may use circumstantial evidence and reasonable inferences to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). “[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).

Assault with intent to commit murder requires: “(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; 703 NW2d 230 (2005) (internal citation and quotation marks omitted). Assault with intent to murder requires a specific intent to kill. *Id.* at 148. “[I]ntent to kill may be inferred from any facts in evidence,” and “minimal circumstantial evidence is sufficient to establish a

defendant's intent to kill." *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). The jury may infer intent by considering:

the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985) (internal citations and quotation marks omitted).]

There was sufficient evidence that defendant had the intent to commit murder. Defendant fired a large caliber firearm directly into an overcapacity club multiple times from a distance of seven or eight feet. Defendant had an argument with Andrew Knight, a victim of the shooting, and Knight's cousin, Andrew Hudson, directly before he shot into the club. Defendant was visibly angry after the argument. Defendant told Hudson that he was going to kill him. This is sufficient evidence to establish the intent to kill element. Accordingly, there was sufficient evidence to support defendant's conviction for assault with intent to murder.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed prosecutorial misconduct that prejudiced his right to a fair trial. We disagree.

This Court reviews de novo issues of prosecutorial misconduct, in order to determine if the prosecutor's statements denied defendant a fair and impartial trial. *Bennett*, 290 Mich App at 475. "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor compromises a defendant's right to a fair trial when he "interjects issues broader than the guilt or innocence of the accused." *Id.* at 63-64. This Court must read a prosecutor's statements as a whole, and evaluate the statements in light of the evidence presented at trial and the defendant's argument. *Brown*, 279 Mich App at 135. A prosecutor's otherwise improper statement may not require reversal if it addresses an issue raised by the defense. *Unger*, 278 Mich App at 238.

During the prosecutor's opening statement, she stated, "Move forward another – I guess five days; December 23rd, 2010, five days after this Defendant is beaten at the Key Club there's a firebombing and shooting on Manistique Street -- I'm sorry a firebombing – not shooting." Defense counsel objected. The trial court excused the jury.

Defense counsel argued that the prosecutor's statements were improper because defendant was not charged with, or linked to, the firebombing and that the prosecutor was attempting to confuse and prejudice the jury. The prosecutor argued that the firebombing reference was relevant to Knight's credibility. The firebombing explained the circumstances around the delay in bringing charges against defendant and rebutted the defense's potential argument that Knight fabricated the charges in an attempt to protect himself from defendant's retaliation after Knight assaulted defendant.

The trial court ruled that prosecutor could state that during the course of the firebombing investigation, Knight was interviewed, and because of that interview, the 2007 shooting case was reopened. The prosecutor could not state that the firebombing involved Knight's mother and brother and the prosecutor was limited to establishing that Knight went to the scene of the firebombing and the police interviewed him there.

After the jury returned, the prosecutor stated:

the homicide unit is called out to Manistique street in the City of Detroit in response to a firebombing that had occurred. During the course of the investigation of this firebombing Mr. Knight and Mr. Hudson are interviewed. Mr. Knight is interviewed the night of the firebombing. The next day Mr. Hudson is interviewed and these two witnesses tell the police – now tell the homicide unit about what happened back on October 7th, 2007.

Defense counsel referred to the firebombing in his opening statement as well, noting that the firebombing had nothing to do with the present charges and that the prosecutor was attempting to prejudice and confuse them by mentioning the firebombing. Defense counsel also argued that the prosecution's witnesses were not credible because they only told the police that defendant was involved in the shooting after they assaulted defendant.

After the prosecution rested its case, defense counsel raised the topic of the firebombing in a bench conference, at which time the trial court stated that it should have instructed the jury to disregard the prosecutor's statement about the nature of the 2010 firebombing investigation. The trial court then opined that instructing the jury to disregard the prosecutor's statement in her opening, at this point, would simply emphasize the statement. The attorneys were ordered to avoid the topic in their closing arguments.

We conclude that the prosecutor's opening statements about the firebombing did not deny defendant a fair and impartial trial. The prosecutor's statements did not directly implicate defendant in the firebombing. The jury did not know that the firebombed homes belonged to Knight's brother and mother. The only other detail that the jury heard linking defendant to the firebombing was the proximity in time of Knight's assault of defendant to the firebombing. Even if the jurors linked the firebombing to defendant, courts presume that jurors follow their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). The trial court instructed the jury that the prosecutor's statements were not evidence. The trial court also limited the prosecution's statements going forward and did not allow her to specifically mention "firebombing" again. Furthermore, the prosecution was preemptively rebutting defendant's cross-examination about the time delay in bringing the charges against defendant. The trial court did not give a corrective instruction because it reasonably concluded that the instruction would just emphasize the prosecutor's statements. Finally, the jury asked the trial court to clarify the transferred intent instruction, clearly establishing that the jury was considering defendant's guilt regarding the shooting, and not the firebombing.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his trial counsel provided ineffective assistance of counsel by failing to move for a mistrial following the alleged prosecutorial misconduct. We disagree.

Defendant did not move for a new trial or a *Ginther*¹ hearing in the trial court; therefore, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Ineffective assistance of counsel claims are mixed questions of law and fact. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). This Court reviews a trial court's findings of fact, if any, for clear error, and reviews the ultimate constitutional issue arising from the ineffective assistance of counsel claim de novo. *Id.*

To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *Swain*, 288 Mich App at 643. Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *Id.*

Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. We will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. [*People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).]

Furthermore, "[t]his Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

Defense counsel's performance did not fall below an objectively reasonable standard. First, it is not at all apparent that the trial court would have even granted a motion for a mistrial. A trial court should only grant a mistrial if there was an irregularity in the trial that was prejudicial to the rights of defendant and impairs defendant's right to a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005); *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). A mistrial "should be granted only where the comment is so egregious that the prejudicial effect cannot be cured." *Bauder*, 269 Mich App at 195. In this case, the trial court stopped the prosecutor before she went into any detail about the firebombing incident. The trial court ruled in defendant's favor and limited the prosecutor's statements and questions on the subject. The prosecutor complied with the trial court's ruling. The trial court acknowledged that the prosecutor's remarks were problematic. It reasonably wanted to avoid giving a specific curative instruction that would further emphasize the prosecutor's remarks. It could have declared a mistrial without defense counsel requesting one, but did not. Clearly, the trial court did not believe that the effect of the prosecutor's comments was prejudicial enough to declare a mistrial. Therefore, defense counsel was not required to make a futile mistrial motion. *Ericksen*, 288 Mich App at 201.

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

Second, defense counsel appeared to strategically decide against requesting a mistrial. Defense counsel was quick to argue and object throughout the trial. Immediately after the verdict, defense counsel contacted the court stenographer to get the trial transcripts. When he did not receive the transcripts before sentencing, he attempted to adjourn the sentencing so that defendant could file a motion for a new trial. He alleged that the prosecutorial misconduct would support reversal of defendant's convictions. He argued at sentencing that the trial court should have declared a mistrial because the prosecution was attempting to convict defendant of the homicide relating to the firebombing instead of the 2007 shooting. On this record, we cannot find counsel to be ineffective.

Finally, any potential error was not outcome determinative. Three eyewitnesses testified that defendant (or a man on crutches who was identified by others as defendant) angrily shot multiple bullets into a crowded club after threatening Hudson. Thus, the result of the proceeding would not have been different.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto