STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 13, 2006
v	No. 258266 Washtenaw Circuit Court
OMAR JERMAINE GATES, Defendant-Appellant.	LC No. 01-001965-FC

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm, MCL 750.84, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, two counts of wearing body armor during the commission of a violent crime, MCL 750.227f, and two counts of carrying a concealed weapon, MCL 750.227. We affirm.

Defendant's convictions arise from an altercation with Washtenaw County Sheriff's deputies Benjamin Knickerbocker and Keith Dalton, which occurred in the early morning hours of December 10, 2001. Officers Knickerbocker and Dalton were dispatched to investigate a malicious destruction of property call at an apartment complex in Ypsilanti. While there, they observed defendant acting suspiciously and followed him. When defendant began climbing a fence, Knickerbocker ordered him down and asked to speak with him. Defendant then began to run. He ignored orders to stop, and Knickerbocker tackled him. As he tackled defendant, Knickerbocker observed a semiautomatic handgun "fly out" from defendant's waistband. Subsequently, as Knickerbocker and defendant were spinning to the ground, defendant shot Knickerbocker in the left thigh with a second gun. More shots followed during the continuing struggle, and Knickerbocker suffered additional injuries to his right heel and left wrist. As Knickerbocker attempted to obtain control of defendant's gun, defendant fired two or three shots at Knickerbocker's head. He also fired several shots at Dalton, who had emerged from behind a car. Defendant fired continuously until his gun jammed, at which point Dalton handcuffed him.

Defendant testified that he and his girlfriend were driving home from a bar when they began arguing and defendant got out of the car. Defendant indicated that he drank alcohol, took ecstasy, and smoked marijuana earlier that night. Moreover, a few months earlier, his best friend was killed and his own life was threatened. After that time, defendant feared for his life, and on the night in question, he was wearing a bulletproof vest and was carrying two guns. The guns

were loaded and ready to fire in the event that defendant needed to use them for protection. Defendant testified that he was walking to a friend's house when he saw Officers Knickerbocker and Dalton. He tried to avoid the officers because he was armed and wearing a bulletproof vest. He "knew [he] was dirty." Defendant ran around a couple of buildings and tried to climb the fence. When he could not get over the fence, he jumped down and tried to run away from the officers. Defendant claimed that, before Knickerbocker reached him, he threw one of his guns to the ground behind him. Defendant then tried to throw the other one away, but Knickerbocker tackled him, causing the gun to fire. Defendant claimed that Knickerbocker grabbed the gun and more shots were fired. Defendant denied intentionally shooting at either Knickerbocker or Dalton. Instead, he claimed that the gun had a very light trigger pull and simply went off during the struggle with Knickerbocker.

Defendant was charged with two counts of assault with intent to commit murder, two counts of felony-firearm, two counts of carrying a concealed weapon and two counts of wearing body armor during the commission of a violent crime. Defendant conceded his guilt to the weapons and body armor charges during closing argument. In addition to those charges, the jury was instructed on assault with intent to commit murder and the lesser included offense of assault with intent to commit great bodily harm. The trial court declined to instruct on felonious assault or reckless discharge of a firearm, concluding that those offenses were not necessarily included lesser offenses. The jury found defendant guilty of one count of assault with intent to murder and one count of assault with intent to commit great bodily harm, along with the weapons and body armor charges.

I

Defendant argues that the trial court erred by not instructing the jury on felonious assault and reckless discharge of a firearm as lesser included offenses of assault with intent to commit murder. We disagree.

A claim of instructional error is reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions on cognate lesser offenses are not permitted, and instructions on necessarily included lesser offenses are permitted only in the circumstance where the charged greater offense requires a jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support such a finding. *People v Cornell*, 466 Mich 335, 357, 359; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). Thus, whether a jury instruction on a lesser offense is warranted depends on whether the lesser offense is a necessarily included offense or a cognate offense. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). A necessarily included lesser offense is one in which all elements are included in the elements of the greater offense, such that it would be impossible to commit the greater offense without first having also committed the lesser. *Id.* A cognate lesser offense is of the same class or category and shares several of the same elements as the greater offense, but includes some elements not part of that greater offense. *Mendoza, supra* at 532 n 4.

Reckless discharge of a firearm is a cognate lesser offense, and not a necessarily included lesser offense, of assault with intent to commit murder. *Lowery, supra* at 173-174. As such, the trial court properly declined to instruct the jury on reckless discharge of a firearm. See *Cornell, supra.* Similarly, felonious assault is a cognitive lesser offense of assault with intent to commit

murder. *People v Vinson*, 93 Mich App 483, 485-486; 287 NW2d 274 (1979). The elements of the crime of felonious assault require the offender to be in possession of a dangerous weapon, *People v Walls*, 265 Mich App 642, 645-646; 697 NW2d 535 (2005), while the elements of the crime of assault with intent to commit a murder do not. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Because felonious assault contains an element not included in assault with intent to murder, specifically the use of a dangerous weapon, it is a cognate lesser offense. *Mendoza*, *supra*. Accordingly, the trial court also properly declined to instruct the jury on felonious assault. See *Cornell*, *supra*.

II

Defendant argues, in propria persona, that the prosecutor committed misconduct by suppressing exculpatory, forensic crime scene evidence that bore on the bias, credibility, and vindictiveness of Officers Knickerbocker and Dalton. We disagree.

A prosecutor is required to disclose any exculpatory and material evidence in his possession. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish a violation of the due process right to the disclosure of exculpatory information, defendant must show: (1) that the state possessed evidence favorable to him; (2) that he did not possess the evidence and could not have obtained it with reasonable diligence; (3) that the prosecutor willfully or inadvertently suppressed the evidence; and (4) that, if the evidence was disclosed, it is reasonably probable that the result of trial would have been different. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

Defendant specifically asserts that the prosecution withheld bullets or bullet fragments, or information relating to bullets or bullet fragments, which struck or were surgically removed from defendant. He argues that, if this evidence was provided to him, he likely could have shown that the bullets that struck him were from his own handgun and that he was shot in the left shoulder by Officer Knickerbocker with that handgun. This, in turn, would contradict Knickerbocker's trial testimony that defendant discharged his weapon at Knickerbocker's head. It would also seriously impeach the credibility of both officers. Defendant, however, fails to demonstrate that the prosecution possessed any bullets or bullet fragments, or information relating to bullets or bullet fragments that were surgically removed from defendant. The lower court record reflects that the prosecutor responded to all discovery requests by the defense. Testimony and documents at trial established that police gathered numerous cartridge casings at the scene of the shooting. Eleven of those casings were determined to have been fired from Officer Dalton's service weapon. Seven were determined to have been fired from defendant's gun. One cartridge casing was consistent with defendant's weapon but was not definitively from that weapon. Additionally, two bullets were recovered from defendant's bullet-proof vest, and both were fired from Dalton's gun. The record does not indicate that the prosecution ever had possession of any bullets or bullet fragments removed from defendant's person. Therefore, defendant has not met his burden of establishing that the prosecution possessed and withheld the claimed evidence from him. See *id*.

We additionally note that due process does not require the police to seek and find exculpatory evidence. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Moreover, with respect to evidence of unknown probative value, which is thus only potentially exculpatory, loss of the evidence denies due process only when the police act in bad faith. *Arizona v*

Youngblood, 488 US 51; 109 S Ct 333, 337; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). In this case, there was no showing that the police acted at all, let alone in bad faith, with respect to any bullets removed from defendant's person at the hospital. Defendant's due process claims are meritless.

III

Defendant next argues, in propria persona, that he was deprived of the effective assistance of counsel both at trial and on appeal. Defendant asserts that his trial counsel was ineffective for failing to compel full disclosure of exculpatory evidence and that his appellate counsel was ineffective for failing to assert that the prosecution violated defendant's constitutional rights by failing to fully disclose exculpatory evidence to the defense. We disagree.

To establish ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma*, *supra* at 302. Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant asserts that his trial counsel was ineffective for failing to compel discovery of the evidence of bullets or bullet fragments removed during defendant's surgery. However, a review of the record reveals that each of defendant's trial attorneys requested appropriate discovery, including discovery of all exculpatory evidence, from the prosecutor and that the prosecutor responded to each request. Trial counsel is not required to advocate meritless positions. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Therefore, we conclude that defendant's trial counsel was not ineffective for failing to compel discovery when discovery was sought, responses were received and the prosecutor assured trial counsel that all exculpatory evidence was disclosed.

We also conclude that defendant's appellate counsel was not ineffective. To establish ineffective assistance on appeal, defendant must overcome the presumption that the decision regarding which claims to raise was sound strategy. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). Appellate counsel must be an active advocate for defendant, but he is not required to raise every possible argument urged by defendant for review regardless of merit. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002); *People v Johnson*, 144 Mich App 125, 131; 373 NW2d 263 (1985). Appellate counsel's decision not to advance weaker arguments and instead to focus on those more likely to prevail is not evidence of ineffective assistance of counsel. *Pratt*, *supra*, quoting *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995) (Boyle, J.). We have already determined that the issues raised by defendant in propria persona lack merit. Thus, defendant cannot establish ineffective assistance premised on any decision by his appellate counsel not to raise those issues on appeal. Additionally, because

defendant raised those issues himself, he cannot establish prejudice arising from his appellate counsel's alleged failure. *Id*.

IV

Finally, defendant argues that the trial court denied his right to a jury trial when it scored the sentencing guidelines based on facts, which were not specifically determined by the jury beyond a reasonable doubt, contrary to the United States Supreme Court's decisions in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531, 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court determined that *Blakely* was inapplicable because it involved a determinate sentencing scheme and Michigan has an indeterminate sentencing scheme. *Booker* also involved a determinate sentencing scheme. Our Supreme Court recently reaffirmed *Claypool*, holding that Michigan's indeterminate sentencing scheme does not violate the Sixth Amendment of the United States Constitution. *People v Drohan*, ___ Mich ___; ___ NW2d ___ (Docket No. 127489, decided June 13, 2006). Therefore, this issue is without merit.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto