STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2008
v OMAR ODALE BROCKMAN, Defendant-Appellant.	No. 278616 Wayne Circuit Court LC No. 07-004028-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KENDALE YAPE BROCKMAN, Defendant-Appellant.	No. 278736 Wayne Circuit Court LC No. 07-004028-02

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendants Omar Brockman and Kendale Brockman were tried jointly at a bench trial. Both defendants were convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant Omar Brockman was also convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Omar was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 25 to 70 years for the murder conviction, five to ten years for the felon-in-possession conviction, and 12 to 20 years for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Kendale was sentenced as a second habitual offender, MCL 769.10, to 83 months to 15 years' imprisonment. Defendants' convictions arise from a dispute over a debt with a long-time acquaintance on December 7, 2006. Both defendants appeal as of right. We affirm.

I. Docket No. 278736

Kendale argues that the evidence was insufficient to support his conviction of assault with intent to do great bodily harm less than murder. We disagree. We review de novo the sufficiency of the evidence at a bench trial. *People v Wilkens,* 267 Mich App 728, 738; 705 NW2d 728 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*

The crime of 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 second element requires "an intent to do serious injury of an aggravated nature." *People v Mitchell,* 149 Mich App 36, 39; 385 NW2d 717 (1986). An actor's state of mind may be inferred from all the facts and circumstances. *People v Lugo,* 214 Mich App 699, 709-710; 542 NW2d 921 (1995). Because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence is required. *People v McRunels,* 237 Mich App 168, 181; 603 NW2d 95 (1999).

Kendale was convicted of this crime based on the beating sustained by the victim inside the house. Viewed in a light most favorable to the prosecution, the evidence established that Kendale and Omar acted in concert to beat the victim for 20 to 30 minutes. Ladonna testified that Kendale was asking "where's my money, where's my money" during the beating. Dalana estimated that the victim may have been punched 50 times. Dalana testified that she saw both defendants kick and punch the victim, who did not fight back, and that she saw blood on the victim and walls in the house, which was consistent with stipulated autopsy evidence that the victim sustained a laceration to the back of the head and other abrasions. Considering all the facts and circumstances, the evidence was sufficient to support the trial court's findings that Kendale had the requisite intent to do great bodily harm when participating in the brutal assault.

Next, Kendale asserts that evidence of other bad acts was improperly admitted under MRE 404(b), thereby depriving him of due process. We conclude that Kendale has not shown that any other acts evidence was admitted at trial.

To the extent that Kendale predicates his argument on the prosecutor's direct examination of Dalana regarding her statement to the police that the victim purchased crack cocaine from Kendale, our review is limited to plain error affecting Kendale's substantial rights because Kendale failed to object to this evidence at trial. MRE 103(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Rather, Kendale raised this issue only in a posttrial motion for a new trial or dismissal.

Because the prosecutor's questioning of Dalana about the cocaine transaction was related to the events of December 7, 2006, and the charges pursued at trial,[1] MRE 404(b) was not

[1] The trial court found that the prosecutor failed to prove the murder charge with respect to Kendale. The trial court also found that a robbery charge was not proven because there was evidence that Kendale honestly believed that he had a right to take money from the victim. As indicated in the trial court's findings, the claim of right is not available unless there is a legal

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implicated. "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964).

In any event, "[u]nlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel." *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Here, the trial court indicated in its decision that it would not use other witnesses' out-of-court statements as substantive evidence. Further, Dalana testified in response to the prosecutor's questions that she did not actually see the victim buy crack cocaine from Kendale and that she did know what was exchanged between them. It is a witness's answer to questions, and not the questions that constitutes evidence. See *People v Kelly*, 122 Mich App 427, 432; 333 NW2d 68 (1983). Because the prosecutor failed to elicit substantive evidence of a cocaine transaction, Kendale has failed to establish any plain evidentiary error arising from the prosecutor's questioning of Dalana.

Nor has Kendale shown that he was prejudiced by the prosecutor's assertion in closing argument that a reasonable inference could be drawn regarding the cocaine transaction from a toxicology report showing that the victim had cocaine and cocaine metabolites in his system. The toxicology report was admitted after Kendale requested that it be included in the stipulated autopsy evidence.

But even if there was a plain error, it did not affect the outcome of the trial. *Jones, supra* at 356. A judge is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling. *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). Regardless of whether the alleged debt owed by the victim was based on a legal or illegal transaction, the trial court found that the prosecutor did not prove the robbery charge against Kendale, and there is no basis for concluding that the trial court would have resolved the assault charge differently if it had not heard about the alleged cocaine transaction. Therefore, reversal on this ground is not warranted.

II. Docket No. 278616

Omar argues that the evidence was insufficient to support his conviction of second-degree murder. Omar argues that, at most, only the crime of involuntary manslaughter was proven. We disagree.

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice is "the intent to kill, the intent to cause great bodily harm, or the

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right to property. See *People v Karasek*, 63 Mich App 706, 713; 234 NW2d 761 (1975) (claim of right defense not available where the defendant knows that alleged debt was a product of illegal activities).

intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The facts and circumstances of a killing, including the use of a deadly weapon, may give rise to an inference of malice. *People* v *Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). The prosecution need not negate every reasonable theory consistent with innocence, but must prove its own theory beyond a reasonable doubt in the face of whatever evidence the defendant may present. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002).

As indicated previously, we must view the evidence in a light most favorable to the prosecution. *Wilkens*, *supra* at 738. In considering this issue, we decline to consider the two affidavits submitted by Omar on appeal. Although our review is de novo, it is limited to the trial evidence. Enlargement of the record on appeal is generally not permitted. See MCR 7.210(A)(1); *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998).

The trial court found that Omar committed second-degree murder based on the events that occurred outside the house after Omar and Kendale stopped beating the victim. Although there were no eyewitnesses to the shooting, viewed in a light most favorable to the prosecution, it was reasonable to infer from the evidence that Omar was the shooter and that the victim was fleeing the scene when he was shot. The evidence showed that five or six gunshots were fired after Omar took the victim outside. Further, while there was no evidence indicating where Omar stood in relationship to the truck when the shooting occurred, the stipulated autopsy evidence indicated that there was no evidence of a close-range shooting. There was also evidence that the window on the driver's side of the victim's pickup truck was shot out. Other bullets struck or penetrated the metal part of the driver's door, and the victim sustained a fatal gunshot wound to his left hip. He crashed his truck into a house down the street from where the beating took place. In addition, Dalana testified that she thought she saw a silver gun when Omar reentered her home after the shooting.

Considering all the facts and circumstances, the evidence was sufficient to support the trial court's finding that Omar had the requisite malice for second-degree murder when he shot the victim. We decline to consider Omar's additional claim that the verdict was against the great weight of the evidence. Because the sole question briefed by Omar concerns the sufficiency of the evidence, any great weight argument has been abandoned. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (failure to brief an issue constitutes abandonment).

Omar also argues that his dual convictions for second-degree murder and assault with intent to do great bodily harm less than murder violate the Double Jeopardy Clause because the assault offense is subsumed within second-degree murder. Because this issue was not raised below, we shall consider it under the plain error doctrine. *Carines, supra* at 763; *People v Scott*, 275 Mich App 521, 524; 739 NW2d 702 (2007).

The trial court found that the assault was completed before Omar committed the murder. Omar has shown no basis for disturbing this finding. "There is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other." *Lugo, supra* at 708; see also *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002) (separate convictions for both assault with intent to do great bodily harm and assault within intent to commit murder did not

violate Double Jeopardy Clause). Accordingly, Omar's two convictions do not constitute plain error.

Next, Omar seeks a remand to the trial court to pursue a claim that trial counsel was ineffective for advising him not to testify at trial. Omar asserts in an affidavit that he could have presented a better defense to the murder charge at trial by admitting the shooting and explaining its circumstances.

Omar's affidavits are not properly before us pursuant to the rule that enlargement of the record is not permitted. *Shively, supra* at 628 n 1. Because Omar failed to move for a new trial or evidentiary hearing with respect to this claim, our review is limited to mistakes apparent from the record. *People v Rodriquez,* 251 Mich App 10, 38; 650 NW2d 96 (2002).

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). [*People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001) (Footnote omitted).]

The record does not indicate why counsel advised Omar not to testify or whether Omar discussed any proposed testimony with trial counsel. Even the affidavit proffered by Omar on appeal fails to contain any averments regarding what he and trial counsel discussed.

The record indicates only that trial counsel informed the trial court that he had advised Omar not to testify, but that Omar had the final decision regarding this matter. Omar personally informed the trial court that he did not want to testify and, therefore, waived the right to testify. See *People v Simmons,* 140 Mich App 681, 685; 364 NW2d 783 (1985) (a defendant waives the right to testify by deciding not to testify or acquiescing in counsel's decision that he not testify). Later, in closing argument, trial counsel relied on the absence of eyewitnesses to the shooting to argue that the prosecutor failed to prove first-degree premeditated murder and that, at most, Omar should only be found guilty of careless, reckless, and negligent use of a firearm.

Although trial counsel was not fully successful in his strategy, the calling of witnesses is presumed to be a matter of trial strategy, which we will not assess with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The failure to call a witness constitutes deficient performance only if it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Considering that Omar chose not to testify and the absence of any evidence regarding what advice counsel provided, Omar has not established the requisite deficient performance to succeed on a claim of ineffective assistance of counsel. *Carbin, supra* at 600. Further, we are not persuaded that a remand for an evidentiary hearing regarding this claim is warranted.

Finally, relying on the same affidavits underlying his claim of ineffective assistance of counsel, Omar argues that his sentence of 25 to 70 years for the second-degree murder conviction is invalid because it was based on inaccurate information. Because Omar failed to raise this issue at sentencing or in an appropriate post-sentencing motion, see MCR 6.429(C) and MCL 769.34(10), he failed to preserve this issue for appeal. Even if we were to consider this issue for plain error affecting Omar's substantial rights, see *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), relief would not be warranted because the trial court indicated that it was basing the sentence on the facts presented at trial. Thus, there is no basis for concluding that plain error occurred.

We decline to consider Omar's additional claim that offense variable 3 of the sentencing guidelines was misscored at 50 points. We deem this issue abandoned because it is insufficiently briefed. As indicated in *Kevorkian, supra* at 388-389, quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood