STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2007
v	No. 268894 Saginaw Circuit Court
RONALD SCOTT MIELCAREK, Defendant-Appellant.	LC No. 04-024231-FC

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

In June 2005, defendant was convicted by a jury of possession of a firearm during the commission of a felony, MCL 750.227b, but the jury was unable to reach a verdict on an additional charge of assault with intent to commit murder, MCL 750.83. On January 2006, a second jury convicted defendant of the assault with intent to commit murder charge. He was sentenced to a prison term of 10 to 20 years, to be served consecutive to a two-year term of imprisonment that was imposed earlier for the felony-firearm conviction.[1] Defendant now appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant first argues that he was denied a fair trial because two prospective jurors who had family members who were clients of defense counsel, and one prospective juror who had previously worked with the victim, were all excused as jurors at trial. Conversely, the trial court did not excuse a juror who had worked with the prosecutor's wife.[2]

Defendant did not object to the trial court excusing any of the three jurors at trial. Therefore, this issue is not preserved. We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999)

The conduct and scope of voir dire is within the trial court's discretion. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996). The goal is to uncover potential juror bias so

[1] This Court affirmed the felony-firearm conviction in *People v Mielcarek*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 (Docket No. 264961).

[2] Defendant does not challenge the failure to excuse this juror.

that the defendant may be tried by a fair and impartial jury. *Id*. Prospective jurors can be challenged for cause if they are "biased for or against a party or attorney." MCR 2.511(D)(2). Once a party shows that a prospective juror is covered by one of the grounds listed in the court rule, the trial court is without discretion, and must excuse him. *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004).

In this case, two prospective jurors stated that members of their families either were or had been represented by defense counsel. The existence of a former or present relationship with defense counsel, a person directly involved in the case, could create an atmosphere of bias, either for or against defense counsel, thereby affecting the jurors' abilities to render a fair and impartial verdict. The same is true with another prospective juror's former working relationship with the victim. By contrast, such feelings are less likely to result from having worked with the prosecutor's wife, who was not directly involved in the case. Under the circumstances, defendant has failed to show that the trial court's decision to excuse the three jurors in question was plain error. See *Eccles*, *supra* at 383-384.

Next, defendant argues that the trial court erroneously denied his requests for lesser offense instructions on felonious assault and simple assault. We disagree.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). A trial court is only permitted to instruct on necessarily included lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 341; 646 NW2d 127 (2002). An instruction on a necessarily lesser included offense is "proper if the charged greater offense requires the 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 it." *Id.* at 357.

Felonious assault is not a necessarily included lesser offense of assault with intent to commit murder, because it requires the use of a dangerous weapon, which is not an element of assault with intent to commit murder. Therefore, the trial court properly denied defendant's request for an instruction on felonious assault.

Conversely, simple assault is a necessarily included misdemeanor offense of assault with intent to commit murder. See *People v Van Diver*, 80 Mich App 352, 356; 263 NW2d 370 (1977). The distinguishing element between the two offenses is the specific intent to kill, which is required for the greater offense. We agree with the trial court, however, that an instruction on simple assault was not supported by a rational view of the evidence. Although defendant claimed that he only intended to scare or intimidate the victim, it was undisputed that defendant brought a loaded gun to the bedroom, that he shot through a telephone as the victim was attempting to call the police, and that he followed the victim downstairs and shot in her direction again as she was leaving the house. Defendant thereafter left the scene and told Heidi Doughty that he thought he had killed the victim. Defendant made subsequent comments indicating a continued intent to kill the victim. Viewed rationally, the evidence did not support an instruction in simple assault. Furthermore, the jury was instructed on another intermediate lesser offense, assault with intent to do great bodily harm less than murder, but found defendant guilty of the greater offense. In this circumstance, any error in failing to instruct on simple assault was harmless. *People v Antoine*, 194 Mich App 189, 190; 486 NW2d 92 (1992).

Next, defendant argues that there was insufficient evidence to support his conviction for assault with intent to commit murder. We disagree.

The sufficiency of the evidence is reviewed by evaluating the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime charged proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may also draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

"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; 703 NW2d 230 (2005) (citation omitted). Defendant only challenges the intent element on appeal. Intent to kill may be inferred from any facts in evidence, including the defendant's conduct before and after the crime, and the use of a deadly weapon, such as a handgun. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

The evidence showed that, earlier in the day, defendant accused the victim of having an affair, and then went drinking. When he came home, he awoke the victim and again accused her of having an affair. Defendant had earlier removed his handgun from its case, and had brought it into the bedroom. He racked the weapon. Defendant pointed the loaded gun at the victim's head and then fired a shot that struck the telephone as the victim was trying to call the police. The victim ran downstairs and found another telephone, and defendant shot at her again as she was opening the front door, possibly grazing her ear. Four bullets remained in defendant's gun, and he hid four additional live rounds in a couch. Defendant thereafter told Doughty that he thought he had killed the victim by shooting her in the head. Defendant later expressed a continuing desire to kill the victim, and discussed various ways of doing so.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant shot at the victim with a specific intent to kill her.

Defendant next argues that the trial court erred by failing to declare a mistrial after the victim allegedly reacted emotionally during the playing of the victim's 911 call. We disagree.

Because defendant did not move for a mistrial, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The 911 recording was played for the jury by stipulation. At that time, no record was made of defendant's request to excuse the victim, or of the victim's alleged emotional reaction to hearing the tape. Before closing arguments, defense counsel made a record stating that the trial court had declined his request to excuse the victim from the courtroom, and that she had reacted emotionally during the call. However, there was no discussion concerning the severity of the victim's reaction. On this record, there is no basis for this Court to conclude that the victim's

alleged outburst was "so egregious" that its prejudicial effect could not have been cured by an appropriate instruction. See *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Thus, a plain error has not been shown. Furthermore, the record discloses that the trial court later instructed the jury not to allow sympathy to enter into its decision. Jurors are presumed to follow their instructions. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 221 (1998). Because there has been no showing that the jury was not capable of following the court's instruction, defendant's substantial rights were not affected.

Defendant next argues that the trial court erroneously admitted defendant's post-offense statements to Doughty in which he expressed a continued desire to kill the victim. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Defendant's statements were relevant to both a determination of consciousness of guilt, *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996), and defendant's intent at the time of the offense. MRE 401; see also *Anderson*, *supra* at 537. It was for the jury to determine the meaning and significance of the statements. *Sholl*, *supra* at 740. Whether Doughty believed the threats was merely a factor for the jury to consider, not a basis for excluding the evidence. Therefore, the trial court did not abuse its discretion in admitting the statements.

Next, defendant argues that the trial court erroneously scored offense variables 6, 7, and 10 of the sentencing guidelines.

Application of the legislative sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

MCL 777.36(1) instructs the sentencing court to score OV 6 at 50 points for a premeditated intent to kill, and 25 points for an unpremeditated intent to kill. "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). "While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable [person] an opportunity to take a second look at his contemplated actions." *Id*. Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the offense, and the defendant's conduct before and after the crime. *Id*. Premeditation can also be inferred from the type of weapon used. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

In this case, defendant brought a loaded semi-automatic handgun into the bedroom, aimed it at the victim's head and argued with her before firing a shot. He racked the gun and followed the victim downstairs. She found a telephone and was on her way out the door when defendant shot at her a second time. Defendant told Doughty that he had shot the victim in the head and killed her, and then later expressed a continuing desire to kill her, and discussed various ways of doing so. This evidence was sufficient to support the trial court's score of 50 points for OV 6.

The trial court scored OV 7, aggravated physical abuse, at 50 points because defendant chased the victim out of the house into the cold at night, wearing only a T-shirt and underwear. The trial court did not specify what element of OV 7 it believed defendant's conduct established. Presumably, the court believed that it satisfied the definitions of either sadism or terrorism. We conclude, however, that such evidence does not satisfy the definition of terrorism, because it was not designed to "substantially increase" the fear and anxiety the victim suffered during the offense. *Hornsby, supra* at 468. Similarly, the definition of sadism is not satisfied because, while it may have been humiliating for the victim to flee from the house in a T-shirt and underwear, defendant's conduct was not calculated to subject the victim to "extreme or prolonged . . . humiliation," and further, defendant's conduct was not calculated to produce suffering, or intended for his own gratification. MCL 777.37(3). Therefore, the trial court erred in scoring 50 points for OV 7.

Lastly, five points may be scored for OV 10 if the defendant exploits a vulnerable victim because of a difference in size or strength. MCL 777.40(1)(c). "Exploit" means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "Vulnerability" means "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). However, as subsection (2) warns, the mere existence of a difference in size or strength, "does not automatically equate with victim vulnerability."

In the present case, while defendant does not dispute the physical difference in size and strength between himself and the victim, the evidence does not show that defendant "manipulated" the victim, or that the victim's "readily apparent susceptibility to injury, physical restraint, persuasion, or temptation" was a factor in the commission of the offense. Rather, the offense was accomplished through the use of a weapon, and was committed because of defendant's belief that the victim was having an affair. Under the circumstances, we conclude that OV 10 should have been scored at 0.

If offense variables 7 and 10 were both scored at zero points, defendant's total OV score would be reduced to 90 points, instead of 145 points as calculated by the trial court, placing him in offense variable level V instead of VI. See MCL 777.62. The resulting sentencing guidelines range would be 81 to 135 months, instead of 108 to 180 months. Although defendant's 120-month minimum sentence is within the corrected guidelines range, because the scoring errors affect the appropriate guidelines range, resentencing is required in order to afford the trial court an opportunity to alter defendant's sentence "in relationship to the correct guidelines range," if the current sentence does not conform to the trial court's original "intention." MCL 769.34(10); *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Defendant also raises several issues in a pro se supplemental brief, none of which have merit.

Defendant first argues that the prosecutor's conduct during closing argument deprived him of a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). In

this case, however, defendant did not object to any of the alleged misconduct. Therefore, defendant must show plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

It is improper for a prosecutor to inject issues broader than a defendant's guilt or innocence. See *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Although motive is not an element of assault with intent to commit murder, it is relevant to proving intent to kill, which is an element of the crime. *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). The prosecutor's discussion of motive did not inject extraneous issues into the deliberations, and did not mislead or confuse the jury.

Defendant argues that the prosecutor improperly and repeatedly accused him of lying, without any evidentiary basis, and improperly vouched for the credibility of his own witnesses. As defendant argues, "[a] prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *Id*. In this case, the prosecutor's comments were based on CJI2d 2.6 (determining credibility), and were not improper. The prosecutor's comments concerning defendant's credibility, including remarks that defendant had lied to the jury, were based on the evidence—which the prosecutor referred to in his comments—that defendant had admittedly lied to the victim about his affair, and admittedly lied to the police about the shooting. The prosecutor properly argued that, in light of the evidence introduced at trial, including defendant's prior lies and the victim's testimony, the jury should conclude that defendant was also lying when he testified that he did not intend to kill the victim. Thus, the prosecutor's comments were proper.

Defendant also argues that the prosecutor improperly speculated what defendant may have said to himself after missing the first shot, without any evidentiary basis, and improperly expressed his personal sentiments. A prosecutor is free to comment on the evidence, to draw all reasonable inferences from the evidence, and to argue how the evidence relates to the prosecutor's theory of the case. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), rem on other grounds sub nom *People v Thomas*, 439 Mich 896 (1991); see also *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). In this case, the prosecutor posited that, after the first shot, defendant may have been thinking, "Holy cow, what do I do now?" However, the prosecutor was properly relating the evidence—including the live round found by the police under the bed—to his theory of the case, i.e., that defendant twice shot at the victim with the intent to kill her. The prosecutor did not inject his personal sentiments into the case.

Defendant argues that there was no evidentiary support for the prosecutor's comment that defendant brought the gun into the bedroom on the night of the shooting, and that the prosecutor's argument improperly shifted the burden of proof. "A prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Further, as argued by defendant, a prosecutor cannot undermine the presumption of innocence by suggesting that the defendant has an obligation to prove anything, because such an argument tends to shift the burden of proof. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, "although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument

with regard to the inferences created does not shift the burden of proof." *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

In the present case, the prosecutor did not imply that defendant had an obligation to prove anything, and did not argue facts not in evidence. Rather, drawing reasonable inferences from the available evidence, including the location of the gun and the gun case, as well as defendant's own testimony that the gun was in the closet, the prosecutor argued that defendant *most likely* brought the gun into the house on the night of the crime. The fact that a question was not specifically asked does not preclude the prosecutor from drawing reasonable inferences from the evidence admitted at trial, and using those inferences to prove his case.

Defendant argues that the prosecutor referred to facts not in evidence by speculating that defendant racked the gun before going downstairs. Once again, in arguing that defendant racked the gun after the first shot, before going downstairs, the prosecutor was properly relating the evidence to his theory of the case. On rebuttal, the prosecutor properly addressed defense counsel's argument that the prosecutor's theory concerning the live round under the bed was speculative. A prosecutor can respond to a defendant's closing argument. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Further, the prosecutor was not required to phrase his argument in the blandest possible terms—after all, the prosecutor is an advocate and has not only the right, but also the duty, to advocate his case vigorously. *Marji*, *supra* at 538; see also *Cox*, *supra* at 451. Here, the prosecutor's comments were fair, and did not deprive defendant of a fair trial.

Defendant argues that there was no evidentiary support for the prosecutor's comment that the victim did not ask defendant to get his gun and shoot her. The comment was, again, a reasonable inference based on the evidence. It was also a reasonable response to defendant's closing argument. The prosecutor did not refer to facts not in evidence.

Defendant also argues that there was no evidentiary basis for the prosecutor's argument that the second shot grazed the victim's ear. This was also a proper comment on the evidence and the parties' theories of the case. While the medical evidence indicated that the source of the victim's injury could not be determined with certainty, the prosecutor was free to draw reasonable inferences from the evidence as a whole, and to use those inferences to argue his case to the jury.

Defendant argues that the prosecutor shifted the burden of proof by arguing that defendant shot at the victim's head because he intended to kill her, and that the prosecutor's question and answer technique confused the jury. Once again, the prosecutor did not shift the burden of proof to defendant. Rather, the challenged comment, that defendant aimed at the victim's head because he intended to kill her, was a reasonable inference drawn from the victim's testimony that defendant pointed the gun at her head. Additionally, there is no record support for defendant's argument that the prosecutor's question and answer technique was confusing.

Defendant again asserts that, on rebuttal, the prosecutor shifted the burden of proof by arguing that defendant intended to kill the victim, and lied about it to the jury. Contrary to defendant's argument, the prosecutor did not suggest that defendant had an obligation to prove anything, and did not refer to facts not in evidence. Rather, the prosecutor was addressing

defense counsel's argument that the prosecution's case was based on the parties' divorce. The prosecutor stated that his theory of the case was that defendant intended to kill the victim, and properly reminded the jury that motive is not an element of the crime.

Lastly, defendant argues that, on rebuttal, the prosecutor improperly vouched for the credibility of his witnesses, improperly interjected his personal knowledge and beliefs about the case, and improperly placed the prestige of the prosecutor's office (and the prestige of the police) behind the prosecution's witnesses. Clearly, a "prosecutor may not to place the prestige of his office behind the assertion that the defendant is guilty, [although] he may argue that the evidence establishes [the] defendant's guilt." *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988). As previously indicated, a prosecutor may not vouch for the credibility of a witness, but he may argue from the facts that a witness is credible. *Howard*, *supra* at 548. Additionally, the "prosecutor's comments must be considered in light of the defenses counsel's comments." *Watson*, *supra* at 592-593.

In this case, defense counsel pointed out what he perceived as inadequacies in the prosecution's case. The prosecutor was entitled to respond. The prosecutor did not vouch for the credibility of his witnesses, he did not inject his personal beliefs into the proceedings, and he did not place the prestige of his office or of the police behind the prosecution's witnesses. Rather, the prosecutor responded that a lot of evidence was produced at trial for such an allegedly incompetent group. Additionally, the prosecutor argued, based on the evidence, including defendant's own testimony of where he was standing when each shot was fired, that police testimony concerning bullet trajectories was worthy of belief.

For these reasons, we reject this claim of error. Defendant has failed to establish that any of the prosecutor's conduct was improper, let alone constituted plain error.

Next, defendant argues that his statement to the police was taken in violation of his right to counsel, and should have been suppressed. We disagree. Because defendant did not move to suppress his statement below, or object to the evidence of his statement at trial, this issue is unpreserved. Our review is for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

On appeal, defendant has submitted an affidavit from Doughty in which she avers that defendant requested an attorney upon being arrested, but the police refused to allow him to speak to one. However, the affidavit does not address whether, after being told that the attorney would meet him at the jail, defendant nonetheless agreed to speak to the police.

When a statement is obtained in violation of a defendant's right to counsel, the prosecution is prohibited from using the statement in its case-in-chief. *People v Frazier*, 270 Mich App 172, 179; 715 NW2d 341 (2006), rev'd in part on other grounds 478 Mich 231 (2007). In the present case, although a witness referred to defendant's statement during the prosecutor's case-in-chief, the content of the statement did not tend to incriminate defendant. Rather, the arresting officer testified that defendant denied any knowledge of the crime. Therefore, any error did not affect defendant's substantial rights.

The statement was also used to impeach defendant. It is well settled that, "if otherwise voluntary," a statement taken in violation of a defendant's right to counsel is "admissible for

impeachment purposes."[3] *Frazier, supra* at 180-181. In other words, a defendant cannot use the illegal method by which a statement is allegedly obtained as "a shield against contradiction of his untruths" at trial. *Id.*, quoting *Walder v United States*, 347 US 62, 65; 74 S Ct 354; 98 L Ed 2d 503 (1954); see also *Michigan v Harvey*, 494 US 344, 351; 110 S Ct 1176; 108 L Ed 2d 293 (1990); *Harris v New York*, 401 US 222, 225-226; 91 S Ct 643; 28 L Ed 2d 1 (1971). Thus, use of the statement for impeachment purposes was not plain error.

Next, defendant argues that the trial court erred in instructing the jury that he had been charged with more than one offense, and in instructing the jury to determine whether a handgun is a deadly weapon.

At trial, in explaining what constitutes evidence, the trial court instructed the jury "the fact that [defendant] is charged with more than one crime is not evidence." The court later realized its misstatement and offered to correct its mistake, but defense counsel declined a curative instruction. Defense counsel's express decision to forego a curative instruction waived any error. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); see also *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000).

In its instructions concerning the elements of assault with intent to do great bodily harm less than murder, the court read former CJI2d 3.9 (specific intent)[4] and CJI2d 17.10 (definition of a dangerous weapon). Defendant only challenges the definition of a dangerous weapon.

Intent to cause great bodily harm—like intent to kill—can be inferred from the use of a deadly weapon. See *People v Harrington*, 194 Mich App 424, 429-430; 487 NW2d 479 (1992). In this case, it is undisputed that defendant used a handgun. Thus, it was proper to instruct the jury that if it concluded that defendant's handgun was a dangerous weapon, it could use that finding to infer that defendant acted with intent to do great bodily harm. Viewed as a whole, the instruction fairly apprised the jury of the issues to be tried and sufficiently protected defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). There was no plain error.

Defendant next argues that defense counsel committed several mistakes at trial, depriving him of the effective assistance of counsel. Because no *Ginther*[5] hearing was held, our review of this issue is limited to mistakes apparent on the record. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

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[3] Defendant does not argue that the statement was involuntary.

[4] The committee notes indicate that CJI2d 3.9 was deleted in May 2005, in response to comments by our Supreme Court in *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004), that the instruction was unnecessary in light of the virtual abolition of voluntary intoxication as a defense. On appeal, defendant does not challenge the trial court's instruction based on former CJI2d 3.9.

[5] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id*. at 312, 314. That is, defendant must show a reasonable probability that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *LaVearn*, *supra* at 216.

Defendant argues that counsel was ineffective for failing to meet with him before trial. Failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Although defendant asserts that he did not have an opportunity to meet with defense counsel until trial, defendant makes no effort to explain how he was prejudiced by counsel's failure to meet with him earlier, or how an earlier meeting could have benefited his case. Absent a showing of prejudice, this claim of ineffective assistance of counsel must fail.

Defendant also argues that counsel was ineffective for not investigating the operability of the gun, and for failing to interview Doughty. There is no record support for defendant's claim that defense counsel failed to investigate the gun issue. Nor is there any record support for defendant's theory that the gun may have fired bullets erratically. Indeed, if that were the case, counsel may have wanted to avoid presenting such evidence as a matter of trial strategy, to prevent the prosecution from arguing that defendant intentionally fired the gun at the victim, but missed only because the bullets did not fire accurately.

Similarly, there is no record support for defendant's claim that defense counsel failed to interview Doughty. Furthermore, failing to interview a witness does not necessarily constitute ineffective assistance. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). In order to overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997); see also *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant has submitted an affidavit from Doughty in which she avers that she was threatened with perjury charges if she did not cooperate with the police. However, Doughty does not aver that any of her trial testimony was false. Defendant has not shown that any alleged failure to interview Doughty affected the outcome of trial or deprived defendant of a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant also argues that defense counsel was ineffective for failing to interview and subpoena Anthony Simmons. Defendant asserts that Simmons would have testified that when he was with defendant earlier in the evening, defendant did not intend to kill his wife. Once again, there is no record support for defendant's claim that defense counsel failed to interview this witness, or for defendant's claim that the witness would have testified in the manner defendant claims. More importantly, the witness was not present during the shooting and would not be able to testify concerning defendant's intent at the time of the shooting. Accordingly, there is no

reasonable possibility that Simmons's testimony might have made a difference in the outcome of defendant's trial.

Defendant also argues that counsel was ineffective for failing to object to the prosecutor's conduct during closing argument, and to the trial court's jury instructions, as discussed earlier in this opinion. As previously discussed, the prosecutor's conduct was not improper. Therefore, counsel was not ineffective for failing to object. An attorney is not required to make a futile objection. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). The court's misstatement that defendant was charged with more than one crime was not serious or prejudicial, and defendant has failed to overcome the presumption that counsel made a sound strategy decision by declining the court's offer to correct the misstatement, to avoid calling attention to the issue. Further, because the trial court did not err in instructing the jury on the definition of a dangerous weapon, counsel was not ineffective for failing to object to the instruction.

Next, defendant argues that counsel was ineffective for failing to move to suppress defendant's statements, allegedly taken in violation of defendant's right to counsel. As previously discussed, however, the brief reference to defendant's statement in the prosecutor's case-in-chief was not prejudicial, and the statement was properly used for impeachment. Therefore, counsel was not ineffective for failing to object.

Defendant argues that defense counsel was ineffective for failing to inform him that he had previously represented Doughty, which defendant alleges led to a conflict of interest. There is no record support for defendant's claim that counsel failed to disclose that he had previously represented Doughty. Moreover, defendant does not explain how the alleged representation led to an actual conflict of interest that affected counsel's representation of defendant. Therefore, defendant has failed to show a serious error resulting in prejudice.

Lastly, defendant argues that defense counsel was ineffective for failing to move for a mistrial, and in failing to move for a directed verdict. As discussed previously, there is no merit to defendant's claim that he was entitled to a mistrial. Similarly, because there was a question of fact whether defendant assaulted the victim with an intent to kill, defendant was not entitled to a directed verdict. Therefore, counsel was not ineffective for failing to request a mistrial or move for a directed verdict.

Next, defendant argues that the jury's verdict is against the great weight of the evidence. We disagree. Because defendant did not raise this issue in an appropriate motion before the trial court, the issue is not preserved and our review is limited to plain error affecting substantial rights. *Carines, supra* at 763; *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988).

A new trial may be granted where the verdict is against the great weight of the evidence, but "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id*. (citation omitted). In this case, there was ample evidence to support the jury's verdict. The verdict is not against the great weight of the evidence.

Next, defendant argues that the prosecutor's misconduct, the trial court's instructional errors, and the erroneous admission of Doughty's testimony concerning defendant's statements, combined to deprive him of a fair trial. We have previously addressed, and rejected, each of these issues. Therefore, the cumulative effect of these matters did not deny defendant a fair trial or justify a mistrial. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); see also *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra