

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS M. ATKINS,

Defendant-Appellant.

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UNPUBLISHED

May 10, 2007

No. 268461

Wayne Circuit Court

LC No. 05-006902-01

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the murder conviction and 17-1/2 to 75 years' imprisonment for each of the assault convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentences for first-degree murder and felony-firearm, but vacate his convictions and sentences for assault with intent to commit murder.

Defendant's convictions arise from the shooting death of a 17-year-old victim, who died after receiving two close-range shotgun wounds, one to his left shoulder and one to his head, as he was lying on a stretcher and being treated by EMS technicians.

Defendant first argues that reversal is required because the prosecution failed to exercise due diligence in attempting to locate and produce an endorsed witness, Tammy Weaver, for trial. A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). But the inability to locate a listed witness after the exercise of due diligence constitutes good cause to strike the witness from the witness list. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of the witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). We review a trial court's determination of due diligence for an abuse of discretion. *Eccles, supra* at 389.

Testimony indicated that Tammy Weaver had a lengthy criminal history, including narcotics use and prostitution. She also had several aliases with different birthdates. She was

released from jail on November 4, 2005, but her whereabouts were unknown at the time of defendant's trial in January 2006. A witness detainer, dated November 15, 2005, was issued for Weaver in another case, and the police were unable to locate her then. Consequently, her name was entered in the Law Enforcement Information Network (LEIN), so that the police would be notified if she was stopped by law enforcement for anything. Detroit Police Sergeant Ernest Wilson determined that phone numbers on file for both Weaver and Weaver's mother were no longer in service. Wilson searched for Weaver by twice visiting her last known address, and by investigating Weaver's neighborhood and other locations where she was known to attend. No one had seen her recently. Wilson also checked the jails and morgues in Macomb, Oakland, and Wayne counties, he checked whether Weaver was in federal custody, and he contacted the state of Ohio, where Weaver's mother lived. In light of this record, the trial court did not abuse its discretion in determining that Weaver could not be produced for trial, despite the exercise of due diligence. Accordingly, the prosecutor properly was excused from producing Weaver for trial.

Next, defendant argues that trial counsel was ineffective for failing to object to evidence of defendant's other bad acts and for failing to request a limiting instruction. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*<sup>1</sup> hearing, our review is limited to mistakes apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Id.*; *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant argues that trial counsel should have objected to evidence of defendant's other bad acts, presumably under MRE 404(b), although defendant does not cite this rule. MRE 404(b)(1) prohibits evidence of a defendant's other crimes, wrongs, or acts "in order to show action in conformity therewith," but allows such evidence for other, noncharacter purposes. Much of the evidence of defendant's alleged "bad acts" came from defendant's own statements to witnesses, which were admissible as statements of a party. MRE 801(d)(2). Moreover, defendant essentially concedes that much of the evidence was relevant to giving the jury a complete picture of the events in question. Under the circumstances, defendant has not demonstrated that counsel was ineffective for failing to object to the evidence.

Defendant also argues that there was no possible strategic reason for counsel's failure to request a limiting instruction. However, counsel may have sought to avoid emphasizing defendant's other bad acts to the jury. Defendant has not overcome the presumption of trial strategy and, therefore, has not carried his burden of demonstrating that trial counsel was ineffective.

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

Finally, defendant argues that the evidence was insufficient to support his two convictions of assault with intent to commit murder, which were based on alleged assaults directed at the two EMS technicians who were tending to the decedent when he was shot. In evaluating a sufficiency of the evidence claim, we must review the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000).

The prosecution concedes, and we agree, that even when viewed in a light most favorable to the prosecution, the evidence was insufficient to support defendant's convictions of two counts of assault with intent to commit murder.

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 Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). An assault is an attempt to commit a battery or an unlawful act that places another in reasonable fear of receiving an immediate battery. *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). In this case, there was ample evidence to support the element of assault. However, "[i]t is necessary to find an actual intent to kill for conviction of assault with intent to murder." *People v Brown*, 196 Mich App 153, 159; 492 NW2d 770 (1992).

In this case, the EMS technicians testified that defendant warned them to "Watch out" or "Look out" before defendant shot the decedent, and there was no evidence of any threats or conduct by defendant directed at the technicians. While there was evidence of an assault, we agree with the prosecutor that the evidence did not support defendant's convictions of assault with intent to commit murder. Accordingly, defendant's two convictions of assault with intent to commit murder shall be vacated.<sup>2</sup>

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<sup>2</sup> We recognize that when an appellate court vacates a conviction of a greater offense because it is not supported by sufficient evidence, it may be appropriate to remand for entry of a conviction of a lesser offense when it is manifest that the jury's verdict necessarily encompassed factual findings of the essential elements of the lesser crime. *People v Randolph*, 466 Mich 532, 552 n 25; 648 NW2d 164 (2002); *People v Bearss*, 463 Mich 623, 632-633; 625 NW2d 10 (2001). Neither party addresses the question of remedy on appeal. The record discloses that the jury was instructed on assault with intent to do great bodily harm as the only lesser offense of assault with intent to commit murder. However, the sufficiency of the evidence for this lesser offense fails for the same reason that it fails for the greater offense, i.e., there was insufficient evidence of intent to specifically harm or kill the EMS technicians. Therefore, remand for entry of a conviction of assault with intent to do great bodily harm would not be appropriate. Although we have concluded that there was sufficient evidence of an assault, because the jury was not instructed on any other lesser offenses and because the prosecutor does not request remand for entry of a conviction on any lesser offenses, we conclude that remand for entry of a conviction on a lesser offense is not warranted in this case.

We affirm defendant's convictions and sentences for first-degree murder and felony-firearm, but vacate defendant's convictions and sentences for two counts of assault with intent to commit murder.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra