STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DEANDRE WESLEY,

Defendant-Appellant.

UNPUBLISHED
May 16, 1997

No. 178984
Recorder's Court
LC No. 93-003483

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Following a bench trial, defendant appeals as of right from his convictions of voluntary manslaughter and possession of a firearm during the commission of a felony. MCL 750.321; MSA 28.553, MCL 750.227b; MSA 28.424(2). The judge sentenced him to six to fifteen years' imprisonment for the manslaughter conviction and two years for the felony-firearm conviction. We affirm.

Defendant seeks a second trial based on newly discovered evidence. He asserts that prior bad acts were erroneously admitted, that there was insufficient evidence of voluntary manslaughter and that his conviction was contrary to the great weight of the evidence. He claims prosecutorial misconduct and that he was denied the effective assistance of counsel.

I

Defendant first argues that he was entitled to a new trial on the basis of newly discovered evidence. We disagree.

To obtain a new trial based on newly discovered evidence, a defendant must show that: 1) the evidence itself, and not merely its materiality, is newly discovered; 2) it is not cumulative; 3) on retrial it would probably cause a different result; and 4) the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial. *People v Miller (After Remand)*, 211 Mich App 30,

* Circuit judge, sitting on the Court of Appeals by assignment.

46-47; 535 NW2d 518 (1995). Newly discovered evidence will not warrant a new trial if it would be used merely for impeachment purposes. *People v Sharbnow*, 174 Mich App 94, 104; 435 NW2d 772 (1989). The Johnson affidavit may constitute newly discovered evidence. However, it does not provide grounds for a new trial, as it would be used merely to impeach Turner's testimony. *Id.* Moreover, there was overwhelming evidence, including defendant's own testimony, that defendant shot Kennedy at least three or four times. Hence, this Court is not convinced that the new evidence on retrial would cause a different result. *Miller*, *supra* at 46-47. As such, defendant is not entitled to a new trial. *Id.*

II

Next, defendant argues that it was improper to admit evidence about his drug dealing activities. He failed to object to the testimony and even testified himself that he sold drugs for a living. Hence, we find that the issue is not properly before us. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992).

III

Defendant also contends that there was insufficient evidence to support his conviction of voluntary manslaughter. We disagree.

In reviewing the sufficiency of the evidence in a criminal case, we examine all of the evidence in the light most favorable to the prosecution. We seek to determine whether a rational trier of fact could find that the essential elements of the crime were established beyond a reasonable doubt. *People v Turner*, 213 Mich App 558, 565; 540 NW2d 728 (1995). Here, the autopsy report stated that Kennedy died of multiple gunshot wounds: two to the buttocks and six to the lower extremities. Two eyewitnesses testified that defendant first shot Kennedy while the two were facing each other and were engaged in an argument. Then, as Kennedy turned to escape, defendant fired at him again. Contrary to defendant's position, the eyewitness testimony can account for the two gunshot wounds to Kennedy's buttocks.

Consequently, one could infer from defendant's actions and the circumstances surrounding Kennedy's death, that defendant acted under the influence of hot blood produced by adequate provocation. He shot before a reasonable time has passed for the blood to cool and reason to resume its habitual control. He intended to kill or seriously harm Kennedy when he fired at him. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). Thus, when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that defendant was guilty of voluntary manslaughter. *Turner*, *supra* at 565.

III

Next defendant maintains that his conviction for voluntary manslaughter was against the great weight of the evidence. Again, we disagree.

The evidence showed that defendant and Kennedy engaged in a verbal argument and physical altercation. During the course of the fight, defendant drew a gun and fired at Kennedy, striking him. This was sufficient to convict him of voluntary manslaughter. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993); *Hess*, *supra* at 38. The fact that Kennedy had gunshot wounds in his back does not exonerate defendant, as there was testimony that defendant shot Kennedy while Kennedy was trying to run away.

There were discrepancies in the number of shots fired as compared to the wounds found on Kennedy's body. While they are troublesome, they do not render defendant's conviction defective. Errors of this type in the testimony of lay witnesses are common.

IV

Defendant also argues that the trial court's findings of fact and conclusions of law were insufficient. We disagree.

Findings are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). Here, a reading of the trial court's findings of fact and conclusions of law evidences that the judge fully understood the issues and correctly applied the law. *Id.* He examined the elements of second-degree murder and, finding the evidence insufficient to support the charge, declined to convict defendant on it. He then examined the elements of voluntary manslaughter and found that defendant killed Kennedy in the heat of passion and without justification or excuse. He then convicted him of this lesser offense. The findings and conclusions show that the court was aware of the issues to be tried and correctly applied the law. *Id.*

V

Defendant argues that the prosecutor improperly suppressed critical evidence and improperly insinuated that defendant used two guns when shooting Kennedy. However, because the defense did not object and failure to review the issue will not lead to manifest injustice, appellate review is not warranted. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995).

VI

Finally, defendant contends that he was denied effective assistance of counsel. He claims that his attorney failed to investigate the discrepancy between the number of shots fired and the number of wounds Kennedy sustained. He failed, also, to request the presentation at trial of both Kennedy's coat and a residue report.

To establish a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient. He must show that counsel made errors so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. Next, the defendant must prove that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Strickland v Washington*, 466 US

668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994).

Here, defendant's complaints are based upon a disagreement with his counsel's trial strategy. Throughout trial, defendant argued that he acted in self-defense. He admitted to having shot Kennedy, but stated that he did it under mitigating circumstances. Asking for a report which might indicate that defendant did not shoot Kennedy and arguing that he did not fire the fatal shot would have contradicted the defense asserted.

In hindsight, another defense might have been more effective, but such hindsight will not provide the basis for a claim of ineffective assistance of counsel. Furthermore, the fact that a strategy was not successful does not render counsel ineffective. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Also, the decision to present other evidence can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense. A substantial defense is one which might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701; 538 NW2d 465 (1995).

In light of the overwhelming evidence against defendant, counsel's failure to present Kennedy's coat and the residue report would not have made a difference in the outcome of the trial. *Id.* And, in light of the fact the defendant's attorney managed to: 1) get the charges reduced from first-degree murder to second-degree murder at the preliminary examination; and then 2) have defendant convicted of the lesser offense of voluntary manslaughter, we conclude that counsel's representation was effective. Defendant has failed to show how he was prejudiced by counsel's representation. *Hurst*, *supra* at 640-641.

Affirmed.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky