STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESLIE ALLEN BURD,

Defendant-Appellant.

UNPUBLISHED
October 16, 1998

No. 200912
Recorder's Court
LC No. 94-005783

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant received sentences of twenty-five to forty-five years' imprisonment for the second-degree murder and assault with intent to commit murder convictions, and the mandatory two years' imprisonment for the felony-firearm conviction. The second-degree murder and assault with intent to commit murder sentences run concurrently with each other, but consecutively to the felony-firearm sentence. We affirm.

Defendant first argues that he was denied a fair and impartial trial because the trial judge was biased and prejudiced against defendant. We disagree. De novo review of this issue is appropriate because defendant argues that he was denied his constitutional right to a fair trial and constitutional questions are reviewed de novo by this Court. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

Defendant first argues that the trial judge should have disqualified herself from hearing defendant's second trial because she also sat as the trier of fact at defendant's first trial. Defendant asserts that the appearance of impropriety and potential for bias and prejudice by the trial judge in this situation was so high that the trial judge should have disqualified herself before defendant's second trial.

Defendant has not shown or argued that actual bias or prejudice existed as required by MCR 2.003(B)(1). *Cain v Dept of Corrections*, 451 Mich 470, 509; 548 NW2d 210 (1996).

This Court has declined "to adopt a rule of automatic disqualification *solely* because a judge sat as a factfinder in a prior trial." *People v Upshaw*, 172 Mich App 386, 389; 431 NW2d 520 (1988). Unless special circumstances exist which increase the risk of unfairness, a trial judge's disqualification as factfinder in defendant's second trial is not required solely because the trial judge also sat as factfinder in defendant's first trial. *Id.* Defendant does not argue that any special circumstances existed which increased the risk of unfairness in this case.

Defendant also argues that the trial judge should have disqualified herself because defendant wrote letters to the trial judge, Chief Judge Vera Massey Jones, and Judge Isidore Torres which criticized the trial judge's actions. Disqualification of a trial judge is sometimes appropriate if the trial judge had been the target of personal abuse or criticism from a defendant. *Cain, supra* at 500; 548 NW2d 210 (1996); *Crampton v Dep't of State,* 395 Mich 347, 351-352; 235 NW2d 352 (1975). Defendant claims that the trial judge here was the target of such abuse. Defendant's argument is without merit. Defendant did not slander the trial judge so cruelly that it was highly unlikely that the trial judge could maintain the "calm detachment necessary for fair adjudication." *Mayberry v Pennsylvania*, 400 US 455, 465; 91 S Ct 499; 27 L Ed 2d 532 (1971). Defendant's statements did not create a situation in which the probability of actual bias on the part of the judge or decisionmaker was so high as to be constitutionally intolerable. *Crampton, supra* at 351. Accordingly, the trial judge correctly denied defendant's motion to disqualify herself as the trial judge in defendant's second trial. This conclusion is reinforced by the fact that defendant must have been satisfied with the trial judge because defendant waived his right to a jury trial a second time. *Upshaw, supra* at 389.

Defendant next argues that his trial counsel erred several times and, as a result, defendant was denied effective assistance of counsel. We disagree. Defendant did not move for a new trial nor did he seek an evidentiary hearing before the trial court. Therefore, this Court must review this issue on the basis of the existing record. *People v Marji,* 180 Mich App 525, 533; 447 NW2d 835 (1989). To justify reversal under the state and federal constitutions for ineffective assistance of counsel, a defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997); *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Defendant must overcome the presumption that the challenged action or inaction was sound trial strategy. *Id.*

Defendant first argues that defense counsel was ineffective because he failed to call witnesses that could have substantiated his claim of self-defense. Decisions concerning which witnesses to call are issues of trial strategy and will not be second-guessed. *People v Calhoun*, 178 Mich App 517, 523-524; 444 NW2d 232 (1989). Here, defendant has not presented a record which supports his claim that failure to call his proposed witnesses deprived him of a substantial defense or excludes hypotheses consistent with the view that his trial lawyer represented him adequately. *Id.* Nothing in the record indicates that defense counsel erred in not calling witnesses who were not present when the shooting occurred and whose testimony could just as easily have hurt defendant as helped him. *Mitchell, supra* at 165. Defendant was not denied effective assistance of counsel because his trial counsel failed to call these witnesses.

Defendant also argues that, during sentencing, trial counsel improperly acknowledged on the record that the initial scoring of the sentencing guidelines was incorrect and that the corrected range was higher. We disagree. It is evident from defense counsel's statement on the record that the trial court and the prosecutor were already aware of the error. Further, in light of the fact that the trial court sentenced defendant at the high end of the adjusted sentencing guidelines range, it does not appear that the trial court would have been inclined to be more lenient in sentencing defendant if counsel had not stated the error on the record. Therefore, defense counsel engaged in legitimate and lawful conduct and did not commit an error so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Mitchell, supra,* 454 Mich 165-166.

Defendant also argues that he was denied effective assistance of counsel because trial counsel made disparaging remarks about defendant at sentencing. Defense counsel argued for leniency in sentencing and advocated on defendant's behalf. Defense counsel also pointed out a mistake in the credit defendant received for days served, increasing defendant's credit by twenty-nine days. Defendant was not denied effective assistance of counsel at trial or at sentencing.

Finally defendant argues that there was insufficient evidence to support his convictions of second-degree murder and assault with intent to commit murder. Again, we disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and 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 Petrella*, 424 Mich 221, 269-270; 380 NW2d 11 (1985).

Whether defendant had an honest and reasonable belief that his life was in imminent danger came down to a question of credibility. In fact, the thrust of defendant's argument is that Johnson's and Thomas' testimony was so unreliable that it could not support defendant's convictions. However, credibility is a matter for the trier of fact to ascertain and we will not resolve it anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Furthermore, the trier of fact has the right to believe all, part, or none of the testimony of a witness. *People v Goodchild*, 68 Mich App 226, 235; 242 NW2d 465 (1976). The trial judge had an opportunity to observe the demeanor of the witnesses and found that parts of defendant's testimony were not credible. The trial judge obviously resolved any testimonial conflicts in favor of the prosecution. Viewed in a light most favorable to the prosecution, a rational trier of fact could have found that the evidence disproved defendant's self-defense claim beyond a reasonable doubt and proved the elements of second-degree murder and assault with intent to commit murder.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff