STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MOORER,

Defendant-Appellant.

UNPUBLISHED
February 26, 1999

No. 199261
Recorder's Court
LC No. 96-003583

Before: Markman, P.J., and Jansen and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was initially sentenced to a term of twenty to forty years' imprisonment for the second-degree murder conviction, and a consecutive two-year term for the felony-firearm conviction. The second-degree murder sentence was subsequently vacated and a reduced sentence of eighteen to forty years was imposed under the habitual offender statute, MCL 769.10(1)(a); MSA 28.1082(1)(a). Defendant appeals as of right and we affirm.

I

Defendant first argues that the prosecutor deprived him of a fair trial by repeatedly commenting on his failure to testify. Because defendant did not object to the allegedly improper remarks at trial, appellate review of this issue is precluded unless any resulting prejudice was so great that it could not have been cured by a cautionary instruction, or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Contrary to defendant's argument, the prosecutor made permissible comments regarding the evidence, including defendant's exculpatory statement to the police, and addressed defense counsel's closing argument. *People v McReavy*, 436 Mich 197, 211-220; 462 NW2d 1 (1990); *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). The prosecutor did not impermissibly comment on

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

defendant's failure to testify. We find that the remarks did not result in any prejudice that could not have been cured by a timely instruction, and that no further review of this issue will not result in a miscarriage of justice.

II

Next, defendant claims that the evidence was insufficient to support his convictions. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of both second-degree murder and felony-firearm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996); *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). It was permissible to infer malice from the use of the firearm. See *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). The credibility of the witnesses was a matter for the trier of fact to resolve. This Court will not resolve it anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

III

Defendant next argues that the trial court erred in failing to give a moral certainty instruction, in failing to instruct on justification or excuse, and in failing to give a cautionary instruction concerning his exculpatory statement. Because defendant did not request any of these instructions at trial, he is not entitled to appellate relief absent a miscarriage of justice. MCR 2.613(A); MCL 769.26; MSA 28.1096.

It is now settled in Michigan that a moral certainty instruction is not a required part of the definition of reasonable doubt. *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Second, because defendant did not come forward with evidence of justification or excuse and instead consistently denied having shot his wife, the trial court did not err in failing to instruct on justification or excuse. *People v Anderson*, 409 Mich 474, 491; 295 NW2d 482 (1980); *People v McGinnis*, 402 Mich 343, 346-347; 262 NW2d 669 (1978); *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Lastly, a proved-to-be false exculpatory statement which relates to the elements of the crime may be considered as substantive evidence of guilt. *People v Wolford*, 189 Mich App 478, 482; 473 NW2d 767 (1991); *People v Dandron*, 70 Mich App 439, 440-441; 245 NW2d 782 (1976). See also *People v Arnold*, 43 Mich 303, 304-306; 5 NW 385 (1880). Therefore, a miscarriage of justice has not been shown and, accordingly, appellate relief is not warranted.

IV

Next, defendant argues in his principal brief and in a supplemental brief filed in pro per that he was denied the effective assistance of counsel. Specifically, defendant argues that trial counsel was ineffective for failing to seek suppression of defendant's police statement, failing to object to the prosecutor's comments regarding defendant's decision to not testify, failing to object to the trial court's jury instructions, failing to object to the filing of the habitual offender notice, failing to produce witness Tiffany Blount, and failing to obtain a forensic expert to refute the physical facts that did not support the prosecution's theory.

We initially note that defendant did not move for a new trial below and no evidentiary hearing[1] was held on this basis. A defendant must make a testimonial record to support his claims. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Defendant has not made a testimonial record to support his claims; therefore, our review of this issue is limited to the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

We find no basis for relief due to alleged ineffective assistance of counsel with respect to defendant's claims concerning counsel's failure to move to suppress defendant's exculpatory statement, failure to object to the jury instructions (see issue III, *supra*), failure to object to the prosecutor's comments (see issue I, *supra*), or failure to object to the trial court's authority to impose an enhanced sentence under the habitual offender statute (see issue V, *infra*) because defendant has not shown that he was prejudiced by any of these actions or decisions. *People v Mitchell*, 454 Mich 145, 162-168; 560 NW2d 600 (1997); *People v LaVearn*, 448 Mich 207, 213-216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Similarly, defendant has failed to show that counsel's decision to not call Tiffany Blount as a witness, a matter of trial strategy, was in any way deficient or prejudicial. *Mitchell*, *supra*, pp 156, 163.

Finally, trial counsel's failure to obtain a forensic expert to investigate the physical evidence is a claim that requires further evidentiary support; support that defendant has not produced. See *id.*, p 163. Based on the record before us, we cannot conclude that trial counsel's failure to call or obtain a forensic expert, otherwise a matter of trial strategy, was an error so serious as to deprive defendant of a fair trial. *LaVearn*, *supra*, p 213. In other words, defendant has not established through a testimonial record that, but for counsel's conduct, the result of the proceeding would have been different. *Pickens*, *supra*, p 314. It is just as reasonable to assume that a forensic expert would not have testified in a manner consistent with defendant's defense.

Accordingly, defendant has not met his burden of proving his ineffective assistance of counsel claim.

V

Defendant next argues that he is entitled to resentencing because the prosecutor delayed filing a notice of intent to seek sentence enhancement under the habitual statute until the day of sentencing.

Contrary to what defendant asserts, the record indicates that the required notice was filed before defendant's arraignment in district court, and again thereafter with the information.[2] Thus, defendant had ample actual notice of the prosecutor's intent to seek sentence enhancement and has shown no prejudice. We decline to reverse on the basis that the notice may have been filed prematurely. See MCL 769.13; MSA 28.1085.

VI

Lastly, we reject defendant's claim that a new trial is required because of cumulative error. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Stephen J. Markman
/s/ Kathleen Jansen
/s/ Joseph B. Sullivan

[1] Defendant filed a motion to remand for an evidentiary hearing in this regard with this Court along with his appellate brief on December 30, 1997. The motion to remand was denied in an order issued on March 5, 1998.

[2] Contrary to what defendant claims, the record does not indicate that the notice was filed by a magistrate, allegedly in violation of the "separation of powers" doctrine. Rather, it was part of the warrant authorized by the magistrate.