STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH HARVEY COTTENHAM II,

Defendant-Appellant.

UNPUBLISHED
December 14, 1999

No. 214353
Saginaw Circuit Court
LC No. 98-015034 FC

Before: Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of assault with intent to commit murder, MCL 750.83; MSA 28.278, and carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423. These convictions stemmed from an incident where defendant stabbed his ex-girlfriend in the face and neck. Defendant was sentenced as an habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of imprisonment of fifteen to thirty years and sixty to ninety months, respectively. We affirm.

Defendant first argues that the trial court abused its discretion by denying his challenge to the jury array after a prospective juror declared that defendant had broken the windshield of her car and "had a run-in" with her boyfriend. Although the trial court immediately excused this prospective juror, defendant argued that the entire array was contaminated by her comment. The trial court offered to give a curative instruction to the jury that it was not to consider any comments of prospective jurors as evidence. Defendant refused, choosing instead to not mention the comment further to the jury array. Defendant did not ask any prospective jurors whether the comment would affect their ability to impartially consider the evidence of the case, and he only exercised eight of his twelve peremptory challenges. At the close of voir dire, defendant expressed his satisfaction with the jury. Under these circumstances, we conclude that defendant has forfeited his challenge to the jury array.

A party forfeits a challenge to jury composition where that party fails to exhaust all of the available peremptory challenges. *People v Rose*, 268 Mich 529, 531; 256 NW 536 (1934); *People v Hubbard (After Remand)*, 217 Mich App 459, 467; 552 NW2d 493 (1996). An exception exists where the exercise of all peremptory challenges would be unintelligent and pointless. *Hubbard*, *supra*

at 467; *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). "A peremptory challenge is exercised unintelligently and pointlessly when the exercise would not prevent error, eliminate its prejudice, or further demonstrate the error and its prejudice." *Hubbard, supra* at 467-468. In this case, defendant could have questioned prospective jurors regarding their reaction to the comment at issue and then exercised peremptory challenges if he was not completely satisfied that all the jurors would be impartial. Also, defendant refused the trial court's offer of a curative instruction. Defendant failed to attempt to eliminate the prejudicial effect of the comment or to further demonstrate its prejudice. Exhaustion of defendant's peremptory challenges would not have been unintelligent or pointless. Therefore, defendant's failure to exhaust all of his peremptory challenges constitutes a forfeiture of this issue on appeal.

Next, defendant argues that he was denied a fair trial by the prosecutor's comments during voir dire regarding intoxication and its effect on intent. Specifically, defendant contends that the prosecutor "coached" the prospective jurors into rejecting a voluntary intoxication defense. Defendant did not object to the prosecutor's comments during voir dire; therefore, this issue is unpreserved, and we decline to review it unless a curative instruction could not have eliminated the prejudicial effect of the comments or unless failure to review the issue would result in a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997).

In this case, although defendant did not request a curative instruction, the trial court instructed the jury, both during voir dire and before its deliberations, that intoxication was a defense to specific intent. The court instructed the jury that it must determine whether defendant's mind was so overcome by alcohol that he could not have formed the specific intent to kill. In light of the presumption that jurors will follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), we conclude that any prejudice from the prosecutor's comments was cured by the court's instruction. Defendant argues on appeal that the instruction came too late to cure the prejudice; however, in light of defendant's failure to request a curative instruction at all, we find this argument unpersuasive. We find no miscarriage of justice in refusing to review this issue further.

Next, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to object to a leading question by the prosecutor that elicited incriminating testimony. During direct examination of the victim, the following exchange took place:

Q. Did Mr. Cottenham say something to you at that time when you were out there?

A. No.

Q. Did he indicate to you what he was going to do or what you were going to do?

A. Repeat that again, please.

Q. Did Mr. Cottenham indicate that it was time for you to die?

A. Yes, he did.

Defendant contends that this testimony was the "most damaging" evidence against him and that trial counsel was therefore ineffective by failing to object to the prosecutor's leading question that elicited the statement. Because defendant failed to move for a new trial or evidentiary hearing, our review is limited to mistakes apparent from the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To justify reversal, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

We conclude that defendant was not denied the effective assistance of counsel. Trial counsel is not required to make meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Had defense counsel objected to the leading question, the statement would likely have still come into evidence. The prosecutor may have rephrased the question appropriately to elicit the statement, or the court may have allowed the prosecutor to ask the leading question because the witness was identified with an adverse party. MRE 611(c)(3). Although the witness was the victim, she had since reconciled with defendant and was engaged to him at the time of trial. Moreover, she initially denied that defendant had said anything to her immediately before the attack. Under these circumstances, the prosecutor's leading question was appropriate. Defendant has failed to demonstrate prejudice resulting from counsel's failure to object to the leading question.

Finally, defendant argues that reversal is required because the trial court improperly admitted hearsay evidence. We review the decision whether to admit evidence for an abuse of discretion. *People v Howard*, 226 Mich App 528, 551; 575 NW2d 16 (1997). The prosecutor asked a police officer to testify regarding a statement the victim made to the officer. The officer testified that the victim stated that defendant told her it was time for her to die. Although defendant objected, the trial court ruled that the statement was admissible to impeach the victim's testimony. However, the victim had already testified that defendant had made the comment to her; therefore, the victim's statement to the officer was not inconsistent with her testimony and was inadmissible hearsay. MRE 802.

However, reversal is not required in this case. An evidentiary error is not a basis for reversal where the error was harmless. MCR 2.613(A); MCL 769.26; MSA 28.1096. For preserved, nonconstitutional error, the defendant must affirmatively demonstrate that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). In other words, an evidentiary error is not a basis for reversal unless "it is more probable than not that the error was outcome determinative." *Id*. at 496. In this case, defendant has failed to demonstrate that the error was outcome determinative. The evidence that defendant intended to kill the victim, despite his intoxication, was overwhelming. Defendant armed himself with a knife, sought the victim at her place of employment, lured her outside, and stabbed her in the face and neck. When someone shouted at defendant, he fled in his car. These actions demonstrate deliberate design and a conscious effort to avoid detection. Moreover, the inadmissible statement merely reiterated the victim's testimony at trial. The jury had already heard that defendant told the victim that it was time for her to die. Under these circumstances, defendant has failed to

demonstrate that the error resulted in a miscarriage of justice.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder