

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY HEATH,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

No. 207936

Recorder's Court

LC No. 97-000923

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

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of seven to fifteen years in prison for the manslaughter conviction and the mandatory two years in prison for the felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence to convict him of voluntary manslaughter and that his conviction was against the great weight of the evidence. When determining whether sufficient evidence has been presented to sustain a conviction, 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). A new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Further, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility for the constitutionally guaranteed jury determination of the credibility of the witnesses. *Id.*

Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to

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

cool and reason to resume its habitual control. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 483 (1993). The killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. *Id.*, citing *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *Fortson, supra* at 20.

In the present case, defendant's defense was self-defense. Defendant contends that the only witness who could see both defendant and the victim in the hair salon testified that the victim also had a gun and drew out his gun first, and argues that because no other witness could see both the victim and defendant, the evidence supports an acquittal based on self-defense. However, we disagree and believe that a reasonable trier of fact could have concluded that defendant did not shoot the victim in self-defense. Alvin Wilson (a barber at the salon) testified that defendant said, "What's up" to the victim and that defendant had a handgun at his waist. Wilson saw defendant pull his gun from his waistband. Wilson did not hear the victim make any threats to defendant. Beverly Johnson (a customer) testified that defendant and his friend were at the salon before the victim arrived. When the victim arrived, defendant and the victim faced each other and defendant said, "pull it out, pull it out." Johnson testified that defendant had a gun with him.

Lamont Gordon testified that the man with defendant asked for change for the pay phone. Later, the victim arrived at the salon. Gordon testified that defendant had a gun behind his leg as the victim and defendant were standing face to face. The man with defendant told defendant to "shoot him." Gordon testified that he did not see the victim with a gun. Marcell Brown (a friend of defendant who was waiting to have his hair cut) testified that he saw defendant and defendant's friend (identified as Holland Mann) at the salon before the victim arrived. Mann had a gun; however, after defendant and Mann went to the bathroom, defendant then had the gun. According to Brown, Mann and defendant stood up and Mann said to defendant, "pull it out, pull it out." Brown heard three to four shots and then saw the victim hit the floor. Brown also testified that the victim tried to run before he was shot. Defendant ran out the front door.

Based on this testimony, there was sufficient evidence for the jury to conclude that defendant did not act in self-defense. Because witnesses did not see the victim pull a gun out before defendant shot him, there was sufficient evidence to conclude that defendant did not honestly and reasonably believe he was in danger. Furthermore, a rational trier of fact could also conclude that defendant was the initial aggressor. Testimony indicated that defendant armed himself before the victim arrived. Defendant and Mann were both heard encouraging the other to shoot the victim. Brown testified that the victim was trying to run when defendant pulled out his gun. Given the above evidence, a reasonable trier of fact could determine that defendant was not acting in self-defense when he shot the victim.

Likewise, given the above evidence, the verdict was not against the great weight of the evidence. Although evidence was presented that several of the witnesses told police after the shooting that the victim did have a gun, Brown testified that he saw the victim's gun on the floor after the shooting and hid it. Some testimony clearly indicated that the victim was armed and may have had his gun drawn. If there is conflicting evidence, or a question as to the credibility of witnesses, the issues should

be left for the factfinder and a new trial will not normally be warranted. *Lemmon, supra* at 643. It cannot be said that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Defendant next argues that he was denied his right to effective assistance of counsel because he did not knowingly waive his right to testify. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. The defendant must also show that the deficient performance was prejudicial, which requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *People v Johnson*, 451 Mich 115, 121; 545 NW2d 637 (1996). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

In the present case, although defendant moved for a new trial in the trial court on the basis of ineffective assistance of counsel, no evidentiary hearing took place. In his brief on appeal, defendant requests that this Court remand the issue for an evidentiary hearing regarding the issue of effective assistance of counsel. However, this Court denied defendant's motion to remand in an order issued on August 21, 1998. Without the benefit of defendant's and defense counsel's testimony, it is difficult to review this claim, especially where the matter of calling witnesses is presumed to be sound trial strategy.

In *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985), this Court held that the defendant's counsel's failure to tell the defendant of his right to testify fell within the range or reasonable professional strategy. Similarly, in this case, this Court has no indication as to what defendant's testimony would have been. Additionally, defendant does not claim here that he was not aware that he had the right to testify. Rather, his argument is that counsel should have explained to him specifically the implications of the failure to testify where the claim was self-defense. Given that statement, it is logical to assume that defendant was aware that he had a right to testify. Defense counsel's decision to not have defendant testify was reasonable strategy and, accordingly, cannot constitute ineffective assistance of counsel.

Defendant also contends that there was no on-the-record waiver of his right to testify. However, this Court has held that there is no requirement that there be an on-the-record waiver of a defendant's right to testify. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).

Next, defendant argues that the trial court abused its discretion when it denied defendant the opportunity to cross-examine Sergeant Kinney about the death of Holland Mann. The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

At trial, the prosecutor objected when defense counsel wanted to question Sergeant Kinney about the shooting death of Mann near the same salon which occurred five days after the shooting of the victim in this case. Defendant argued that the testimony was relevant because it substantiated his state of mind and the legitimacy of the threats he received (for testifying in an unrelated homicide case as a

witness) before he shot the victim. Here, the trial court ruled that the information regarding Mann's death was not relevant. MRE 401 provides:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The trial court properly concluded that the fact that Mann was killed shortly after defendant killed the victim in the same general area was not relevant to whether defendant honestly and reasonably believed he was being threatened not to testify in another case. Therefore, Mann's death did not contribute to defendant's state of mind. Furthermore, there was no evidence that Mann was involved in the prior case in which defendant was supposed to testify as a witness. Accordingly, there was no abuse of discretion on the part of the trial court.

Lastly, defendant argues that the trial court abused its discretion when it assessed twenty-five points for offense variable three (intent to kill or injure). “[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate.” *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997); accord *People v Raby*, 456 Mich 487, 497-498; NW2d (1998). Recognizing that a “claim of a miscalculated variable is not in itself a claim of legal error,” *Mitchell, supra* at 175; *Raby, supra* at 496, defendant further contends that his sentence violates the principle of proportionality.

Defendant's sentence does not violate the principle of proportionality given the very serious nature of the crime (the victim suffered multiple gunshot wounds to the chest and hand) and defendant's prior record (a 1995 conviction for carrying a concealed weapon, a 1996 conviction for minor in possession of alcohol, and a 1997 conviction for carrying a concealed weapon). Thus, the trial court did not abuse its discretion in sentencing defendant to seven to fifteen years' imprisonment.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan