STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2000
v	No. 207637 Jackson Circuit Court
SYLVESTER E. PEARL, Defendant-Appellant.	LC No. 97-079431-FC

Before: Kelly, P.J., and Markey and Collins, JJ.

PER CURIAM.

Following a jury trial on charges of open murder and possession of a firearm during the commission of a felony, defendant was convicted 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). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to forty to eighty years' imprisonment for his second-degree murder conviction, to be served consecutive to the mandatory two-year sentence for his felony-firearm conviction. He appeals his convictions as of right. We affirm.

This case arises from the shooting death of Juan Delarosa. The prosecution's theory was that defendant killed Delarosa because he owed defendant $85 for marijuana, and because defendant believed that Delarosa had burglarized defendant's shop. The defense theory was that witness Anthony Clay, who implicated defendant in the killing, was the killer.

Defendant's first argument on appeal is that he was denied a fair trial because the prosecution deliberately misled the jury to believe that key prosecution witness Anthony Clay had no expectations of leniency in exchange for his testimony. Defendant also argues that the trial court clearly erred when, on remand from this Court for an evidentiary hearing, it found that the prosecution had made no deal with Clay in exchange for his testimony at trial. Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Paquette,* 214 Mich App 336, 341-342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair trial. *Id.* This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C); *People v Everard,* 225 Mich App 455, 458; 571

NW2d 536 (1997). A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *Id.*

Defendant contends that there clearly was an agreement, or at the very least, an expectation of leniency, established by the prosecutor prior to Clay's testimony. Defendant points to a newspaper article, dated February 21, 1998, four months after defendant's conviction, in support of his argument. The article discusses charges brought against Clay by Jackson County Prosecutor John McBain in the slaying of Delarosa. It states, in pertinent part:

> Clay agreed to testify at Pearl's trial in exchange for leniency from prosecutors. McBain said that he most likely would uphold the bargain by not charging Clay as a habitual offender, which would greatly increase a prison sentence if convicted.

Defendant also points to a note on Clay's waiver of his preliminary examination as evidence that Clay understood that he had a plea agreement that included consideration for his testimony against defendant. Finally, defendant points out that at trial, Clay was never asked whether he was waiving his Fifth Amendment privilege against self-incrimination, and contends that Clay would not have testified and implicated himself in the murder without some expectation of leniency.

After reviewing the testimony given at the evidentiary hearing, we conclude that the trial court did not clearly err in finding that no expectation or understanding of leniency in exchange for Clay's testimony was established by the prosecutor prior to that testimony. Both McBain and the assistant prosecutor who tried defendant's case testified that no expectations of leniency in exchange for testimony had been created by anyone in their office. McBain testified that at the time he spoke to the reporter who authored the article on which defendant relies, he had not promised Clay any consideration for testimony, but after Clay's testimony in defendant's case, he did extend consideration to Clay. Because Clay was not charged in Delarosa's murder until after he testified, the note on Clay's waiver of preliminary examination does not contradict McBain's testimony. Furthermore, while the reporter testified that he did not fabricate the article, he could not recall the conversations on which he relied in writing the article[1] and admitted that he has, on occasion, made mistakes in the past. Credibility is a matter for the trial court, as the trier of fact, to decide. *People v Fetterly*, 229 Mich App 511, 545; 583 NW2d 199 (1998). The trial court concluded that while Clay may have had some independent expectation that he would receive favorable treatment if he testified, the hearing testimony showed that any such expectation was not created by the prosecutor. We find no clear error.

In light of our conclusion that the trial court did not err in finding that no expectations or understandings of leniency in exchange for Clay's testimony were created by the prosecutor, we conclude that the prosecutor's statements that Clay did not ask for anything in return for his testimony did not deny defendant a fair trial. See *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976).

Defendant's second argument on appeal is that the trial court abused its discretion in admitting, without advance notice by the prosecution, "other acts" evidence of defendant's drug dealing. Because defendant did not object to the admission of this evidence at trial, our review is limited to determining

whether admission of the evidence resulted in manifest injustice. *People v Ramsdell,* 230 Mich App 386, 404; 585 NW2d 1 (1998).

The prosecution is required to provide notice prior to trial when it intends to introduce other acts evidence. MRE 404(b)(2); *People v Ullah,* 216 Mich App 669, 674; 550 NW2d 568 (1996). Although the prosecution in this case failed to provide such notice, we find that manifest injustice did not result from the introduction of the other acts evidence. Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). However, it is not admissible if offered solely to show the criminal propensity of an individual and that he acted in conformity with that propensity. *Id.* at 65. Essentially, other acts evidence is admissible whenever it is relevant on a noncharacter theory. *People v Gimotty,* 216 Mich App 254, 259; 549 NW2d 39 (1996).

The prosecution contends that the evidence was relevant to show defendant's motive, a proper purpose listed under MRE 404(b)(1). Proof of motive in a prosecution for murder, although not essential, is always relevant and evidence of other acts to prove motive may be admitted under MRE 404(b)(1). *People v Rice (On Remand),* 235 Mich App 429, 440; 597 NW2d 843 (1999). Defendant acknowledges that the evidence of his drug dealing is logically relevant, given that the prosecution's theory was that defendant killed Delarosa because Delarosa owed defendant $85 for drugs, but argues that it was overwhelmingly prejudicial, given the availability of other proof and facts. Defendant cites no Michigan law in support of his argument that the prosecution is required to use "less inflammatory theories," where available, instead of other acts evidence, to make its case, and the federal caselaw he cites is factually distinguishable from the instant case. We conclude that the challenged evidence was admissible because it is highly probative of defendant's motive to kill Delarosa, and its probative value is not substantially outweighed by the danger of unfair prejudice.

Defendant's third argument on appeal is that he was denied effective assistance of counsel. Defendant did not move for an evidentiary hearing or new trial based on ineffective assistance of counsel in the trial court. Therefore, this Court's review is limited to errors apparent on the record. *People v Stewart (On Remand),* 219 Mich App 38, 42; 555 NW2d 715 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger,* 212 Mich App 67, 69; 536 NW2d 809 (1995). In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 314. The defendant must also overcome a strong presumption that his counsel's actions constituted sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant contends that he was denied effective assistance of counsel because trial counsel did not object to the admission of other acts evidence, did not object to the prosecutor's assertion that Clay had received nothing in consideration for his testimony implicating himself and defendant in the murder of

Delarosa, and did not request a limiting instruction concerning the other acts evidence. However, as discussed above, the other acts evidence was admissible and the trial court's ruling that no deal existed for Clay's testimony was not clearly erroneous. Counsel is not ineffective for failing to make futile objections. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989). With regard to defendant's assertion that trial counsel was ineffective for failing to request a limiting instruction concerning the other acts evidence, defendant has not demonstrated that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. The evidence of defendant's involvement in the shooting was overwhelming. Therefore, we conclude that defendant was not denied effective assistance of counsel.

Defendant argues next that the trial court abused its discretion in admitting a photograph of the victim's body showing that his head had been wrapped in a plastic garbage bag tied with rope and cording. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Riegle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). This Court will not find an abuse of discretion merely because it determines that it would have ruled differently on a close evidentiary question. *Smith*, *supra* at 550.

Defendant argues that the challenged photograph was not probative "for the limited fact that the prosecutor apparently sought to prove: the identification of the decedent," and that it was used to prove facts not substantially at issue. Furthermore, the photograph was not necessary to show the condition in which the body was found, because witnesses had already testified to those facts. Finally, defendant contends that the photograph is extremely gruesome and its potential to prejudice the jury far outweighed any probative value it may have. With regard to photographic evidence, our Supreme Court has stated:

> The decision to admit or exclude photographs is within the sole discretion of the trial court. Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. [*People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Citations omitted.]

The record does not indicate that the prosecution offered the photograph to establish the identity of the decedent. Rather, it was offered to show the condition in which the body was found, i.e., the manner in which it had been wrapped and tied. While there was testimony from several witnesses with regard to the manner in which Delarosa's body was wrapped and tied before being transported to the wooded area where it was found, that testimony was not entirely consistent. Thus, the picture could have assisted the jurors in making credibility determinations. Furthermore, although there was testimony from those who discovered the body regarding its condition, the photograph is more effective than an oral description of the way in which the bags and rope were arranged. Finally, as the prosecution argues on appeal, the picture can be considered probative of defendant's intent; the packaging of the

body for disposal indicates deliberate behavior. See *People v Jesse Smith*, 81 Mich App 190, 210; 265 NW2d 77 (1978).

We acknowledge that the effectiveness of the photograph in showing the manner in which the head was wrapped also raises the possibility that the evidence will "excite passion and prejudice." See *People v Eddington*, 387 Mich 551, 563; 198 NW2d 297 (1972). After viewing the picture in question, however, we conclude that it was not so gruesome as to prejudice the jury against defendant. The picture does not depict any more of the body than necessary to show the bag and ropes; no wounds are visible. On balance, we conclude that the photograph's probative value was not substantially outweighed by the danger of unfair prejudice, and the trial court did not abuse its discretion in admitting it.

Defendant's fifth argument is that he was denied a fair trial because of prosecutorial misconduct. Because defendant did not object at trial to the alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *Ramsdell, supra*. Again, issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *Paquette, supra*. The test is whether defendant was denied a fair trial. *Id.*

Defendant argues that because nothing in the record supports the prosecutor's assertion during closing argument that defendant forced both Clay and Neelis, a friend of defendant, to shoot Delarosa after defendant shot him, defendant was denied a fair trial. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992), but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

Here, while there was evidence from which a jury could reasonably infer that defendant forced Clay to shoot Delarosa after defendant shot him, there was no evidence presented at trial from which a jury could reasonably infer that Neelis shot Delarosa after defendant did, let alone that defendant forced him to do so. However, because the trial court instructed the jury both before trial began and after it was completed that the lawyers' statements are not evidence, we conclude that the prosecutor's statements did not result in manifest injustice. See *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant also argues that the prosecution's statement that three of the bullets found in the victim's body were "conclusive with bullets found" at defendant's home, when the forensic examiner's actual testimony was that those bullets were "consistent" with ammunition found in defendant's home, was so prejudicial as to deprive him of a fair trial. Our review of the challenged statement in context supports the prosecution's contention that the prosecutor merely misspoke, and meant to say "consistent," rather than "conclusive." Had defendant objected, such a misstatement could easily have been corrected. Moreover, such a statement, whether a mistake or not, would be particularly amenable

to a curative instruction. Accordingly, we conclude that the prosecutor's statements did not result in manifest injustice and defendant is not entitled to a new trial.

Defendant's next argument on appeal is that the trial court erred in refusing to give requested jury instructions that were supported by the evidence. We disagree. This Court reviews de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998).

Here, the trial court instructed the jury with regard to Count I, open murder, on first-degree murder, second-degree murder, and involuntary manslaughter, as well as on aiding and abetting and being an accessory after the fact. Defendant argues that he was entitled to instruction under CJI2d 11.20, Careless, Reckless, or Negligent Use of a Firearm Resulting in Injury or Death, because careless, reckless or negligent use of firearms is a lesser included offense of second-degree murder. Careless, reckless or negligent use of firearms, MCL 752.861; MSA 28.436(21), is a misdemeanor. A trial court may instruct on a lesser included misdemeanor when, among other things, the instruction is supported by a rational view of the evidence. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987); *Ramsdell, supra* at 403. At the very least, this requires that there be evidence that would justify a conviction on the lesser offense. *Steele, supra*.

The final element of careless, reckless or negligent use of firearms identified in CJI2d 11.20 is that the shooting "was not the result of defendant's willfulness or wantoness." Although defendant testified that he did not aim at Delarosa, he acknowledged that he pointed the gun in the direction of Delarosa and fired twice. In *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998), an order reversing this Court's judgment and reinstating the trial court's judgment in lieu of granting leave to appeal,[2] our Supreme Court stated:

> Because the uncontested facts adduced at trial established that the firing of the weapon by the defendant was intentional, the circuit court properly refused a requested instruction on the lesser offense of careless, reckless, and negligent discharge of a firearm causing death because defendant's conduct did not fall within the scope of the conduct prohibited by the statute. MCL 752.861; MSA 28.436(21).

Because defendant acknowledged that he intentionally fired the gun in the direction of Delarosa, we conclude that the evidence does not support an instruction under CJI2d 11.20 and the trial court did not err in refusing to give that instruction.

Defendant also argues that the trial court erred in refusing to instruct under CJI2d 7.2. He asserts that if he was responsible for Delarosa's death, it was accidental, because he believed Delarosa was already dead when he fired the gun. Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Bartlett*, supra at 143. However, even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id* at 143-144.

Here, the court instructed on second-degree murder, which requires that the defendant either have intended to kill, intended to do great bodily harm, or knowingly created a very high risk of death or

great bodily harm knowing that death or such harm would be the likely result of his actions. See CJI2d 16.5. Defendant acknowledged that he intentionally shot in the direction of Delarosa; in other words, he did not contend that the gun accidentally discharged. Rather, he argues that he did not intend the consequences of death or great bodily harm because he believed that Delarosa was already dead. However, the instruction on second-degree murder requires that the jury find that defendant knew that death or great bodily harm would be the likely result of his actions. Because the jury instructions given by the trial court fairly presented the issues to be tried and sufficiently protected defendant's rights, the court's failure to give CJI2d 7.2 is not error requiring reversal.

Defendant's final argument on appeal is that he was denied a fair trial because he was required to wear leg shackles during his trial. This Court reviews a decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Freedom from shackling of a defendant during trial has long been recognized as an important component of a fair and impartial trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Shackling of a defendant during trial is permitted only in extraordinary circumstances. *Dixon, supra* at 404. A defendant may be shackled only to prevent the defendant's escape, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. *Dunn, supra* at 425. The existence of such circumstances must be supported by record evidence. *Id.*

There is no record evidence that defendant had been uncooperative or that he had a history of escape from custody or assaultive behavior. The trial court did express legitimate concerns for courtroom safety, namely, the number of exits in the courtroom, the presence of only one bailiff, and the charge of murder against defendant. When denying defendant's similar motion at his first trial,[3] the court also noted defendant's three prior felony offenses.

However, the circumstances cited by the trial court do not rise to the level of "extraordinary" found in *People v Jankowski*, 130 Mich App 143; 342 NW2d 911 (1983) (where this Court held shackling of the defendant did not constitute abuse of discretion where the defendant had absconded on bail, expressed preference of death over imprisonment, and courtroom was site of earlier escapes) or *People v Julian*, 171 Mich App 153; 429 NW2d 615 (1988) (where this Court upheld shackling during trial of defendant with extensive misconduct record, including assault). The trial court had other options for securing the courtroom, such as locking some exits and ordering the bailiff not to handle other matters while trial was in session. Because there was no evidence that defendant presented an escape risk or safety risk, and because leaving the leg chains on was not the court's only option in securing the courtroom, the trial court abused its discretion is refusing to remove defendant's leg chains.

While this Court is disturbed by the leg shackling of defendant, to justify reversal of a conviction on the basis of being shackled, defendant must show that prejudice resulted. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988). Here, defendant's argument assumes that his leg chains were in view of the jury. However, he does not specify how or when the jury actually was able to see that he was wearing leg chains. At defendant's first trial, the court indicated that because of the set-up of the courtroom, the jury likely would not be able to see the shackles. Defendant did not contest this assertion either in the trial court or on appeal. Furthermore, when defendant took the stand, the court had him do so while the jury was out of the room. Finally, because of the extensive testimony regarding

defendant's statements to fellow inmates, the jury in this case was aware that defendant was in jail. Because defendant has not shown prejudice, reversal of his conviction is not warranted. See *People v Johnson*, 160 Mich App 490, 492-493; 408 NW2d 485 (1987).

Affirmed.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Jeffrey G. Collins

[1] The reporter testified that he no longer had any notes regarding any conversations he had with McBain. The policy of his employer is that notes are destroyed three or four days after a story runs.

[2] An order that is a final Supreme Court disposition of an application and contains a concise statement of the applicable facts and reason for the decision is binding precedent. *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993).

[3] This was defendant's second trial on these charges; the first ended in a mistrial. At defendant's first trial, he also requested that the leg shackles be removed, and the court denied the motion.