

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY KYLES,

Defendant-Appellant.

UNPUBLISHED

June 13, 2000

No. 207355

Oakland Circuit Court

LC No. 97-152577-FC

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of second-degree murder, MCL 750.317; MSA 28.549. He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to four concurrent terms of life imprisonment. We affirm.

This case arises from a house burning in which an adult and three children died. The prosecutor presented evidence that defendant, angry with an occupant of the house as a rival drug dealer, started the fire by throwing a Molotov cocktail. Defendant maintained that he was the victim of mistaken identification.

Defendant first argues that the eyewitness identification of defendant in court was tainted because police had shown that witness a photograph of defendant while he was in custody, but defendant had not been given an opportunity to participate in the identification procedure. Defendant further argues that defense counsel's failure to raise this issue constituted ineffective assistance of counsel. We conclude that the court committed no error in allowing the in-court identification, and that counsel was not ineffective for declining to raise this issue.

A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Where a witness has identified an incarcerated suspect in a photographic lineup conducted without allowing the suspect to have counsel present, a trial court should not admit subsequent in-court identification absent a showing, on clear and convincing

evidence, of an independent basis for the identification. *Gray, supra* at 115, citing *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973).

In this case, there was an independent basis for the witness' in-court identification of defendant. The record indicates that the witness became fairly well acquainted with defendant while the two were incarcerated in the same facility prior to the fire. There was evidence that the two met and conversed on at least two occasions after their incarceration, but before the fire. The witness recognized defendant when he saw defendant starting the fire, and the witness briefly discussed the matter with defendant shortly after the fire. In light of this record, we agree with the trial court that the witness was able to identify defendant from his own experience and was not susceptible to any possible suggestiveness stemming from being shown defendant's photograph.

In addition, because counsel would have had nothing to gain from raising the issue, it did not constitute ineffective assistance to decline to put an objection on the record. Nor did counsel demonstrate any lack of effectiveness by not pursuing defendant's theory that someone else in the neighborhood, who resembled defendant, actually started the fire. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). See also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). We further agree with the trial court that the existing record is sufficient to decide these issues and that no evidentiary hearing is required.

Defendant also argues that an acquaintance of the eyewitness was improperly allowed to bolster the eyewitness' testimony, and that the prosecutor compounded the error in closing argument. We disagree. Over defense counsel's general hearsay objection, the trial court admitted the acquaintance's testimony as a prior consistent statement offered to rebut the suggestion that the eyewitness' account of the firebombing was a recent fabrication. Such statements are exempted from the definition of hearsay. MRE 801(d)(1)(B). On appeal, defendant argues that the acquaintance's conversation was a subsequent consistent statement, not a prior one. Defense counsel did not make this argument at trial, thus waiving the issue on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). In any event, in light of the eyewitness' extensive testimony implicating defendant, and the extensive evidence that defendant had a motive to attack the house and had, in fact, threatened to commit such violence, the acquaintance's testimony bolstering the eyewitness' veracity was not likely dispositive of the result. A reviewing court should reverse on the basis of an unpreserved nonconstitutional error only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 773; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), and *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). Here, even if the challenged testimony had been improperly admitted, the error nonetheless is not sufficiently egregious to warrant reversal.

We find meritless defendant's allegation of prosecutorial misconduct during closing arguments. Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction

would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Because the acquaintance's testimony, and any exaggeration concerning it that the jury may have taken from the prosecutor's remarks, were not likely decisive of the outcome of this case, we find no manifest injustice.

Defendant also argues that the trial court abused its discretion in denying his motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. We disagree.

As an initial matter, we are not persuaded by defendant's post-trial assertions regarding his mistaken-identity defense. It is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce. It is not necessary for the prosecution to disprove every reasonable theory of innocence. *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984). Defendant, as a matter of trial strategy, decided which factual defenses to present at trial and we decline to entertain defendant's alternative defense strategy on appeal.

Nor are we persuaded by defendant's attempts to impugn the jury's verdict. The trial court instructed the jury on first-degree felony murder, and also, as required by the law of this state, on the lesser offense of second-degree murder. *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975). Following extensive deliberations, in the course of which it requested review of the testimony of three witnesses and briefly announced that it was deadlocked, the jury found defendant guilty of second-degree murder only. Defendant correctly points out that under the evidence in this case the jury could not have properly found defendant guilty of second-degree murder without also finding the elements of first-degree felony murder. However, whereas defendant argues that this result indicates that the jury was not persuaded of the case against defendant, we decline to join in that speculative conclusion. "Although some compromise verdicts may be assailable in logic, they are supportable because of the jury's role in our criminal justice system" *People v Cazal*, 412 Mich 680, 687; 316 NW2d 705 (1982). Verdicts cannot be upset by speculation or inquiry into such matters. *Id.* at 689.

Instead, the appropriate inquiry is whether the jury verdict is supported by the evidence. *Cazal*, *supra* at 689. In this case, there was ample evidence to support the jury verdict. An eyewitness identified defendant as the person who started the fire, witnesses testified that defendant admonished them not to talk to the police about the fire, and there was evidence that defendant had threatened violence against the house and its occupants. Further, where, as here, the evidence produced at trial would have supported conviction for the greater offense, defendant suffered no prejudice because the jury instead convicted him of a lesser included offense. *People v Torres (On Remand)*, 222 Mich App 411, 422; 564 NW2d 149 (1997).

Finally, we find no error in the trial court's denial of defendant's motion for new trial. When defense counsel argued that the reason for the protracted jury deliberations was that the jury had doubts concerning defendant's identity as the firebomber, the trial court replied, "I, in fact, talked to the jury myself after every trial, so I think your conclusions are inaccurate." On appeal, defendant argues that

this statement indicates that the trial court acted with improper reliance on her personal knowledge of jury deliberations. We disagree.

Because counsel was not entitled to speculate on the reasons for the jury's lengthy deliberations, or its decision to return a verdict of guilty of second-degree as opposed to first-degree murder, *Cazal*, *supra* at 689, the trial judge would properly have discredited counsel's assertions even without any recourse to her discussions with the individual jurors. Further, because the judge was referring to her post-trial discussions with jurors, there was no possibility that she intruded upon the jury's deliberations.

Affirmed.

/s/ Roman S. Gribbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey