

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOLLIS PARKS,

Defendant-Appellant.

UNPUBLISHED

December 19, 2000

No. 214113

Wayne Circuit Court

Criminal Division

LC No. 97-010493

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, discharge of a firearm from a motor vehicle, MCL 750.234a(1); MSA 28.431(1)(1), and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to two concurrent terms of ten to twenty years each for the assault and discharge-of-a-firearm convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm

Defendant was accused of shooting the victim in the jaw while the two men were stopped in separate vehicles at a traffic intersection.

Defendant first argues that the trial court abused its discretion by denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence. An abuse of discretion exists only where the court's denial was manifestly against the clear weight of the evidence. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). The motion should be granted only where the evidence preponderates so heavily against the verdict that allowing the verdict to stand would result in a serious miscarriage of justice. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). We find no abuse of discretion.

Defendant essentially argues that the discrepancies between the testimony of the victim and his passenger, coupled with the shortcomings of the police investigation, preponderate heavily against a finding of guilt. However, simply because the prosecutor's witnesses give inconsistent accounts of events does not render a guilty verdict against the great weight of the evidence. See *In re Ayres*, 239 Mich App 8, 24-25; 608 NW2d 132 (1999). Contrary to defendant's argument, there was strong evidence of defendant's guilt in this case. The victim

had known defendant for ten years, and was certain that defendant was the man who shot him. Given their previous relationship, the victim did not need more than a second or two of time in which to recognize defendant. Immediately after the shooting, the victim told a friend that defendant had shot him. Any discrepancies or inconsistencies between the victim's testimony and that of his passenger would not be unusual or suspect, given that the passenger did not know defendant. Although the police investigation may have been less than ideal, the fact remains that the victim was certain that defendant was the man who shot him. Although some of the testimony was in conflict, it cannot be said that the victim's testimony was so deprived of all probative value such that it was incapable of being believed by a reasonable juror. *Lemmon*, *supra* at 643. The trial court correctly declined to disturb the jury's verdict.

Next, defendant argues that the trial court erred by failing to inquire into possible juror bias against defendant when the jury asked the court what personal information about the jurors defense counsel possessed. Defendant has forfeited review of this issue because he has not demonstrated outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant merely speculates that the jury must have been afraid of defendant as a result of exposure to some extraneous influence. Any fear implicitly expressed by the jury was likely the result of hearing evidence that defendant had shot someone in the head at a traffic intersection. A jury's "fear of violent retaliation for an unwelcome verdict" does not deny a defendant's right to an impartial jury. See *In re Disclosure of Juror Names and Addresses*, 233 Mich App 604, 629-630; 592 NW2d 798 (1999) (holding that trial courts must take such concerns seriously and may accordingly prevent the media from having access to personal information about jurors). Defendant has simply failed to demonstrate any colorable claim of juror bias.

Next, defendant argues that he was denied a fair trial when the trial court failed to declare a mistrial after the court clerk, while reading the charges against defendant, mentioned, "This is a fourth habitual notice file." Alternatively, defendant argues that the trial court should have held an evidentiary hearing to determine whether this comment prejudiced the jury against defendant. However, defense counsel, while objecting to the comment, specifically informed the trial court that he did not wish to emphasize the comment to the jury. Moreover, defense counsel expressed agreement with the trial court's suggested resolution of the matter, which was simply to instruct the jury to apply the law as given to them by the judge and "not what anyone else says." Defense counsel's agreement on how to handle the matter constitutes a waiver of this issue, which extinguishes any possible error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

Next, defendant argues that the trial court erred by refusing to re-instruct the jury on the elements for certain charged offenses, where half of the jurors indicated that they wished to be re-instructed. The trial court had informed the jury that all requests for instructions or testimony must be unanimous. The jury submitted a question to the court regarding whether it must consider how the victim was assaulted in order to consider the weapons charges. The trial court refused to answer this question, but the court stated that it could re-instruct on the elements of the weapons charges, if the jury so desired. On a show of hands, only about half of the jurors indicated that they desired to be re-instructed on those elements. Therefore, the court declined to give the instructions again. Since defendant failed to object to this procedure, he must demonstrate outcome-determinative plain error in order to avoid forfeiture of this unpreserved

issue. *Carines*, *supra* at 763. In *People v Martin*, 392 Mich 553, 557-563; 221 NW2d 336 (1974), our Supreme Court held that it was error requiring reversal for the trial court to refuse a juror's request to clarify instructions on the elements of manslaughter, where the court's initial instructions were confusing. In the instant case, in contrast, defendant does not contend that the court's instructions on the elements of the weapons charges were confusing. Thus, any error in refusing to reread the instructions would not have affected the outcome. Defendant has failed to demonstrate plain error.

Next, defendant argues that the trial court displayed a lack of impartiality by discouraging the jury's request to have certain testimony reread, while immediately granting the jury's request to have the victim's testimony reread. The trial court's response to the jury's initial request for the testimony of the victim's passenger and defendant's supervisor was a proper exercise of its discretion. MCR 6.414(H); *People v Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976); *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). Moreover, defense counsel asked the court to grant the jury's request for the victim's testimony. Further, at defense counsel's behest, the trial court polled the jury to see whether it still wanted to have the previously requested testimony reread. None of the jurors indicated that they did. Defense counsel thus approved of the court's handling of the request for the victim's testimony and has waived any challenge to the court's action. *Carter*, *supra* at 215-216. In any event, defendant has failed to demonstrate how the trial court's proper handling of requests for the rereading of testimony pierced the veil of judicial impartiality. *Davis*, *supra* at 50.

Defendant next argues that the trial court erred by not ascertaining, on the record, whether he intelligently and knowingly waived his right to testify. However, an on-the-record waiver is not required. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985).

Defendant also argues that a double-jeopardy violation resulted from his dual convictions for assault with intent to commit murder and discharge of a firearm from a motor vehicle. However, this Court has previously rejected this identical argument. *People v Rivera*, 216 Mich App 648, 650-651; 550 NW2d 593 (1996).

Next, defendant argues that he was denied a fair trial because two responding police officers were not produced at trial to testify. However, defense counsel stipulated that the officers, if called to testify, would have testified consistently with their police report. Defense counsel's stipulation waived any error. *Carter*, *supra* at 216. Moreover, the prosecutor satisfied her statutory duty, which was simply to provide notice of all *res gestae* witnesses. MCL 767.40a; MSA 28.980(1); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant also argues that he was denied the effective assistance of counsel at trial. Because defendant failed to move in the trial court for a new trial or an evidentiary hearing on this ground, our review is limited to mistakes apparent from the record on appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). After reviewing the record in light of defendant's claims, we conclude that defendant was not denied the effective assistance of counsel. Defendant has not shown that counsel's performance fell below an objective standard of reasonableness or that a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been

different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant has not shown actual and substantial prejudice resulting from the five-month prearrest delay. *People v Crear*, 242 Mich App 158, 166; ___ NW2d ___ (2000); *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). Thus, counsel was not ineffective by failing to object to the delay. Additionally, counsel was not ineffective by failing to move for a mistrial after the court's clerk inadvertently referred to the habitual-offender notice. A mistrial would not have been warranted, and counsel is not required to make meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defense counsel was also not ineffective by failing to object to hearsay statements of the victim, since those statements were admissible. MRE 801(d)(1)(C); MRE 803(2). Counsel need not make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Also, defense counsel's decision whether to call or question witnesses was a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Finally, we reject defendant's claim that a new trial is required by the cumulative effect of a number of errors. Any arguable errors were of little consequence, so reversal is not required. *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999); *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Roman S. Gibbs

/s/ Michael J. Kelly

/s/ David H. Sawyer