

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERMAN D. PHILPOT,

Defendant-Appellant.

---

UNPUBLISHED

August 17, 2001

No. 223062

Wayne Circuit Court

LC No. 98-014142

Before: Bandstra C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, and was sentenced, as a fourth habitual offender, MCL 769.12, to five to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant contends that he was denied a fair trial by testimony elicited during plaintiff's case in chief. A police officer testified that the victim identified her attacker as "Philpot," and that he found defendant's name in the police computer and obtained his "mug photograph" downtown. In addition, the victim testified that she had known defendant from the neighborhood, stating that "[h]e's a—I don't know if he's a drug-head or alcoholic or whatever . . ." Defendant argues that this testimony was inadmissible because it improperly informed the jury that defendant had a prior criminal record and impugned defendant's character, respectively.

However, defendant did not object to the testimony. Generally, the failure to object to the introduction of testimony forfeits appellate review. *People v Kilbourn*, 454 Mich 677, 685; 563 NW2d 669 (1997). Nevertheless, an unpreserved issue may be reviewed if it involves a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). A "plain error affecting substantial rights" typically occurs where the error affected the outcome of the proceedings. *Id.*, 763. However, this Court will only reverse where the defendant further establishes that he or she is either "actually innocent" or that "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*, 763-764, 774.

In regard to the victim's testimony, we note that it was voluntary and unresponsive to the prosecutor's permissible inquiry into how she knew defendant. Accordingly, the testimony was insufficient to provide the grounds for a mistrial. See *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Moreover, the victim's testimony stopped short of stating that defendant

used alcohol or drugs. Thus, while it would have been preferable for the statement to have not occurred, we are not persuaded that this statement was serious enough to affect the outcome of the proceedings. Indeed, our Supreme Court has noted that a defendant is entitled to a “fair trial,” and not a “perfect trial.” *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988).

In regard to the police officer’s testimony, this Court has cautioned that prosecutors have “a high degree of duty to insure that police officers do not venture into forbidden areas in their testimony.” *People v McCartney*, 46 Mich App 691, 693-694; 208 NW2d 547 (1973). In the instant matter, we do not believe that the police officer’s initial response was responsive; however, the prosecutor asked a follow-up question that essentially invited the police officer to elaborate on his answer. An argument can be made that the police officer’s testimony bordered on venturing into the “forbidden area” of defendant’s criminal history. Nevertheless, an argument can also be made that the reference was indirect enough to minimize the potential prejudice. Indeed, the jurors would have to make an inferential leap before reaching a conclusion that the defendant had a criminal history. Accordingly, we are not persuaded that the testimony was serious enough to affect the outcome of the proceedings.

Moreover, the record suggests that the jury’s resolution of the factual circumstances required a determination of who the more credible witness was—the victim or defendant. Defendant’s contention that the victim’s stab wounds requiring 400 stitches were caused by his use of common silverware to defend himself against her attack inherently raises doubts about his credibility. In addition, a review of his testimony alone revealed several inconsistencies that would certainly cause reasonable jurors to question his veracity. We believe that defendant’s lack of credibility was more detrimental to the jury’s rejection of his self-defense claim than the testimony at issue. The jury was instructed on both self-defense and two lesser-included offenses, but found defendant guilty of the assault with intent to do great bodily harm. Having found further support for a conclusion that the challenged testimony was not serious enough to affect the outcome of the proceedings, we conclude that defendant may not avoid forfeiture. *Carines, supra*, 763-764.

Defendant also argues that the trial court erred by failing to sua sponte remedy the prejudicial effect of the testimony. We have previously declined to impose a duty on a trial court to sua sponte provide limiting instructions. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Contrary to defendant’s suggestion, we believe that defendant received a fair trial. Accordingly, we do not believe that error resulted from the trial court’s failure to sua sponte order provide a limiting instruction, much less grant a mistrial.

Defendant next argues that he was denied the right to a fair trial because the trial court gave a flight instruction. Once again, defendant did not object to the jury instructions; therefore, appellate review of this issue has been forfeited. *Carines, supra*, 460 Mich 774. Because there was evidence that defendant both ran away from the scene of the crime and was apprehended in Las Vegas, we do not believe that the flight instruction constituted plain error. Regardless, the instruction cautioned the jurors not to conclude that the evidence of flight proved defendant’s guilt, noting that flight could be caused by panic, mistake, or even fear. Accordingly, the flight instruction protected, rather than harmed, defendant’s interests in the outcome of the

proceedings. Therefore, we do not believe that the flight instruction was outcome determinative. Consequently, defendant cannot avoid forfeiture of this issue.

Finally, defendant argues that he was denied his constitutional right to effective assistance of counsel by trial counsel's failure to object to the issues discussed above. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). There is a strong presumption that counsel was effective. *Rice, supra*, 444. To overcome this presumption, defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Id.* Trial counsel will not be second-guessed regarding matters of trial strategy, nor will counsel's competence be evaluated with the benefit of hindsight. *Id.*, 445.

In the instant matter, it is plausible that defense counsel's failure to object to the aforementioned testimony was a sound trial strategy designed to prevent additional attention from being drawn to testimony that was not otherwise highly prejudicial or inflammatory. Moreover, as noted above, there was evidence of flight to support the giving of a flight instruction. Counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Regardless, the flight instruction may have helped defendant because the trial court instructed the jury that flight might be in response to fear or for other innocent reasons. Finally, even if trial counsel's performance had unreasonably deviated from professional norms, we do not believe that defendant has established prejudice where his testimony raised serious questions regarding his veracity.

Affirmed.

/s/ Richard A. Bandstra  
/s/ William C. Whitbeck  
/s/ Donald S. Owens