STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 9, 2002
v	No. 227350 Wayne Circuit Court
DORIAN G. JONES, Defendant-Appellant.	LC No. 99-003599

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of life imprisonment for the murder conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the fatal shooting of Donald Robertson, who was shot five times, twice in the chest at close range and three times to the back of the head. Defendant claimed that Robertson attacked him with a sledgehammer and that he shot Robertson in self-defense.

Defendant argues that the trial court erred by excusing the prosecution's failure to call defendant's cousin, Cornell Jones, without requiring the prosecution to show that it exercised due diligence to produce him at trial. Contrary to defendant's suggestion, there is no longer a requirement of due diligence. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000). Rather, the prosecution is entitled to add or delete witnesses from its witness list at any time for good cause. MCL 767.40a; *Burwick, supra*; *Snider, supra*. A trial court's decision to allow deletion of a witness is reviewed for an abuse of discretion. *Burwick, supra*.

The trial court allowed the prosecution to delete Jones after the prosecution reported that it had not been able to serve Jones, who appeared to be avoiding service, and after the court observed that the evidence pointed to Jones as a co-participant in the crime. We agree that the prosecution showed good cause to strike Jones as a witness. There was evidence that defendant and Jones went to "kick [Robertson's] ass," and left together to go to Robertson's house. As the trial court observed, a prosecutor does not have a duty to locate and serve a witness where there is evidence that he was an accomplice. See *People v O'Quinn*, 185 Mich App 40, 45; 460 NW2d

264 (1990). Thus, the trial court did not abuse its discretion in allowing the prosecution to strike Jones from its witness list. Further, because the prosecution was not required to call Jones, the trial court did not abuse its discretion in refusing to give the "missing witness" instruction, CJI2d 5.12. See *Snider*, *supra*.

Defendant also argues that the trial court abused its discretion by excluding evidence of Robertson's reputation for violence. The admission of evidence is within the trial court's discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). When a defendant claims self-defense, both specific acts of violence and the decedent's reputation for violence are admissible to show the defendant's reasonable apprehension of harm. *People v Harris*, 458 Mich 310, 316-317, 319; 583 NW2d 680 (1998). Here, we agree that the trial court erred in excluding evidence that defendant believed that Robertson was a "hit man" and other evidence of Robertson's violent character. However, the record reveals that the court did allow defendant to testify that Robertson was on Michigan's "Most Wanted" list, that Robertson had hurt people before, that Robertson "did time" for a violent crime, that Robertson "was known for getting the jobs done on what he did, and come [sic] out untouchable," and that Robertson always carried a gun. Evidence was also presented that Robertson was carrying a sledgehammer, that he was argumentative, "whooping and hollering," and that Robertson pushed and argued with defendant. In light of the other evidence received at trial regarding Robertson's violent background, we are convinced that the trial court's error in excluding the additional evidence of Robertson's propensity for violence was harmless. Defendant cannot show that it is more probable than not that he would have been acquitted but for the exclusion of this additional evidence. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Next, defendant argues that the trial court erred in denying his request to instruct the jury on voluntary manslaughter. A requested instruction on a cognate lesser offense must be given if there is sufficient evidence to support a conviction on the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). This Court reviews the evidence to determine whether the requested instruction is consistent with the evidence and the defendant's theory of the case. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997).

To support a conviction of voluntary manslaughter, there must be evidence that defendant killed in the heat of passion, that there was adequate provocation, and that there was no lapse of time during which a reasonable person could control his passions. *Pouncey*, *supra* at 388. As defendant argues, a claim of self-defense does not preclude an instruction on manslaughter. *In re Gillis*, 203 Mich App 320, 322-323; 512 NW2d 79 (1994); *People v Young*, 120 Mich App 645, 650-651; 327 NW2d 329 (1982).

Here, defendant testified that he was calm and attempting to be a peacemaker when he left to go to Robertson's house with a gun in his back pocket. He admitted that his decision to take the gun was a deliberate and reasoned act. The only evidence of any provocation in this case was defendant's claim that he shot Robertson because Robertson swung a sledgehammer at defendant's head. Defendant testified that, except for that moment, he was not angry, afraid, or upset. Considered in this light, we do not believe that the trial court erred in failing to instruct on voluntary manslaughter. Even if the court erred, however, it is apparent that the error was harmless. Defendant's testimony that he shot Robertson because Robertson attacked him with a sledgehammer was the basis for his claim of self-defense, and the jury was instructed that if they believed that defendant acted in self-defense, they could not find him guilty of any crime. It is

apparent from the jury's verdict that the jury rejected defendant's claim that he fired the shots, three of which were to the back of Robertson's head, in self-defense because Robertson attacked him with a sledgehammer, and there is no other evidence of provocation. See *Pouncey*, *supra*. Any error in failing to give the requested instruction on manslaughter was therefore harmless beyond a reasonable doubt. See *People v Winans*, 187 Mich App 294, 299; 466 NW2d 731 (1991).

Defendant also argues that he was denied a fair trial because the trial judge was biased. In support of this claim, defendant refers to a number of comments by the trial court, most of which were not preserved with an appropriate objection. We review the unpreserved challenges for plain error affecting defendant's substantive rights. *People v Carines*, 460 Mich 750, 763-766; 597 NW2d 130 (1999).

A trial court has wide, although not unlimited, discretion and power in matters of trial conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A party claiming judicial bias must overcome the heavy presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). "Comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *Id*. Unless the trial court's actions "display a deep-seated favoritism or antagonism that would make fair judgment impossible," "expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish bias or partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 496, 497, n 30; 548 NW2d 210 (1996), citing *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

Here, many of the challenged comments were made outside the jury's presence and were "within the bounds of what imperfect men and women . . . sometimes display." See *id*. For example, in one instance where counsel objected to the trial court's characterization of a witness' testimony, the court immediately corrected its statement. Moreover, the witness' testimony was subsequently reread to the jury, thereby resolving any confusion caused by the court's misstatement. In sum, defendant has not overcome the heavy presumption of judicial impartiality or established plain error affecting his substantial rights. See *Carines*, *supra*; *Wells*, *supra*.

Next, defendant argues that the trial court abused its discretion by departing from the sentencing guidelines recommended minimum sentence range of 96 to 300 months for his murder conviction and sentencing him to life imprisonment.[1] Contrary to what defendant suggests, the record reveals that the trial court did provide reasons for its departure, noting that the guidelines range was "grossly inadequate" in this case where defendant stated that he was going to Robertson's house to "kick his ass," armed himself with a gun, "pumped" three bullets into the back of Robertson's head as he lay on the ground after being shot twice at close range in the chest, and then fled the state. We are satisfied that the trial court did not abuse its discretion in departing from the guidelines range and that defendant's life sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *People v*

[1] Because the offenses were committed before the January 1, 1999, effective date of the statutory guidelines, MCL 769.34(1) and (2), the judicial guidelines properly were used.

Moorer, 246 Mich App 680, 685; 635 NW2d 47 (2001); *People v Crear*, 242 Mich App 158, 170-171; 618 NW2d 91 (2000).

Defendant argues, in propria persona, that he was denied the effective assistance of counsel. Because defendant did not request a *Ginther*[2] hearing below, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient representation prejudiced the defense so as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable and this Court will not assess counsel's competence with the benefit of hindsight. *Id*.; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant argues that counsel was ineffective for failing to call his cousin, Cornell Jones, as a witness at trial. The record does not support defendant's claim that Jones was "at court, in the hallways, awaiting the call to testify." To the contrary, as noted previously, the record discloses that counsel sought assistance from the prosecutor in securing Jones' production, to no avail.

Defendant also claims that counsel was ineffective for failing to adequately cross-examine the medical examiner. Decisions about calling and questioning witnesses are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, defendant has not overcome the presumption of sound strategy with regard to counsel's cross-examination of the medical examiner.

Defendant further asserts that counsel was ineffective for failing to request a limiting instruction regarding other acts evidence that witnesses had seen defendant armed on other occasions. We note that defense counsel initially objected to testimony about defendant's possession of a gun and the trial court ruled that the evidence was relevant, thus making further argument on counsel's part futile. Defendant himself testified that he had "been carrying a gun for awhile." It was part of the defense strategy to show that carrying a gun was normal to defendant and not evidence of premeditation. This strategy was apparently effective, because defendant was acquitted of first-degree premeditated murder. Defendant has not overcome the presumption that counsel's actions were reasonable or shown that any alleged defects detrimentally affected the result of the trial. See *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Defendant also argues, in propria persona, that there was insufficient evidence to present the original charge of first-degree murder to the jury, as well as insufficient evidence to support his conviction for second-degree murder. This Court evaluates a sufficiency of the evidence claim de novo by reviewing the evidence in a light most favorable to the prosecution to 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 Hampton*, 407 Mich 354, 368; 285

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Premeditation and deliberation may be inferred from a defendant's actions before and after the killing and from the circumstances of the crime. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Proof of motive, although relevant, is not essential to a finding of premeditation. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999).

Here, there was evidence that defendant said that he was going to "kick [Robertson's] ass" before he went to Robertson's house, armed with a gun. The evidence also showed that defendant shot Robertson twice in the chest at close range, and then three more times in the back of the head, whereupon he fled. Although defendant claimed that Robertson attacked him with a sledgehammer, witnesses also testified that Robertson dropped the sledgehammer before defendant and Robertson argued, thereby negating a claim of self-defense. Viewed most favorably to the prosecution, there was sufficient evidence of premeditation to support submitting the original first-degree murder charge to the jury and, similarly, to support defendant's conviction for second-degree murder. See *Hampton, supra*.

Finally, defendant argues, in propria persona, that he was denied a fair trial because witnesses were allowed to testify that they had observed him armed on previous occasions. We are not persuaded that defendant's possession of a handgun was irrelevant in this case, where there was evidence that Robertson was shot with a handgun and there was no evidence that the gun was ever found. See *People v Hall*, 433 Mich 573, 580; 447 NW2d 580 (1989); *Rice (On Remand), supra*. Regardless, we are satisfied that any error in admitting the evidence was harmless considering that defendant himself testified that he regularly carried a gun and that he threw the gun down after the shooting. See *Lukity, supra*.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh