STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2002
v	No. 226740 Wayne Circuit Court
BENNIE IRVIN, Defendant-Appellant.	LC No. 99-007417

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted 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 eighteen to thirty years' imprisonment for the murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was charged in the shooting death of Tyrus Chipp, which occurred outside Chipp's home. As Chipp turned to go into the home, defendant shot him five times, striking Chipp in his back, the back of his neck, and the back of his head. Defendant claimed that he and Chipp had an ongoing feud, and that he shot Chipp in self-defense because he believed Chipp was reaching for a gun.

I. JURY EXPOSURE TO EXTRANEOUS INFORMATION

Defendant argues that the trial court erred by failing to inquire into the possibility that the jury was exposed to extraneous information which may have affected its verdict. Defendant refers to a courtroom incident that led the judge to admonish spectators outside the jury's presence. At the conclusion of testimony by a prosecution witness, the court excused the jury and the following exchange occurred:

> *The Court*: If you could step up, just up to here with your client.
>
> The situation in the court at this time is that this defendant is on trial for second degree murder and the court has heard the opening statements and first witness, and also seen the situation in this courtroom.

> First, I'm going to address the audience and state that this jury must decide this case and must decide it without any in-put other than the testimony under oath. For that reason, if anyone becomes emotional and feels that they must cry out or make any noise that would be distracting to the jury, you must leave the courtroom during that time.
>
> Also, comments of any kind will absolutely not be allowed. You will be taken out of the courtroom if you make audible comments that could be heard by the jury.
>
> Second, the court has accessed [sic] this situation and I believe that it is in the best interests and safety of all involved, and the fair and efficient running of this trial, that the defendant be remanded during the pendency of this case.
>
> [*Defense counsel*]: Why, your honor?
>
> *The Court*: Because this is a second degree murder case. There has been a lot of emotion. It's clear by the testimony that the court hears at this time, this is a dangerous situation. The witnesses are close to the defendant, and family members, and the court is concerned for the safety of all, and the running of this trial with no communication between the defendant and any witnesses and that's what the court is going to do.

A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). The jury is required to consider only the evidence received in open court, and is not permitted to consider extraneous facts not introduced in evidence. *Id.* A defendant must show that the jury was exposed to extraneous influences and that the extraneous influences "created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 88-89. Because defendant failed to preserve this issue, our review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We are not persuaded from this record that the jury was exposed to extraneous facts. Audience interruptions do not necessarily rise to the level of extraneous facts or "evidence." See *People v Duby*, 120 Mich App 241, 250-251; 327 NW2d 455 (1982); *People v Van Epps*, 59 Mich App 277, 284-285; 229 NW2d 414 (1975). The record does not establish that a disruption actually occurred. The trial court's admonition to the spectators may have been a preventative warning rendered with knowledge that audience interruptions may occur in emotionally-charged trials. The court expressed concern generally, and made no reference to any particular outburst or extraneous information. Even if the jury was exposed to a disruption, defendant has not shown that the jury was affected by it. Defendant offers no basis for concluding that any "input" overheard or overseen by the court – if indeed any occurred – was prejudicial to the defense. We note that the trial court instructed the jury before and after the proofs to consider only the evidence properly presented in court. *Van Epps*, *supra*. Defendant has not demonstrated plain error.

II. ALLEGED PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor engaged in misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 267 n 7; 531 NW2d 659 (1995); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Defendant asserts fifteen alleged errors. Defendant preserved review of only two of these allegations by objecting at trial. Defendant's remaining claims of prosecutorial misconduct are not preserved because defendant either failed to object at trial or objected on a different basis than he asserts as error on appeal. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). We review these instances of alleged misconduct for plain error. *Carines, supra* at 763, 774; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The prosecutor asked three questions in a short period of time in which defendant's legal counsel was mentioned. Contemporaneous with those references, the prosecutor inquired of a police officer whether defendant had filed a complaint stating that the victim had threatened him. No objection was raised. We do not view these questions as denigrating defendant's right to remain silent or his right to legal counsel.

Defendant argues the prosecutor improperly stated that the defense obstructed the investigation. The prosecutor's comment that the gun was never produced was a fair comment on the evidence and defendant's assertion that he had nothing to hide. We disagree with defendant's contention that the prosecutor told the jury that she knew the truth surrounding this crime, or that she attempted to testify.

We also are not persuaded that the prosecutor's closing arguments denigrated the concept of self-defense or shifted the burden of proof. In fact, the prosecutor told the jury that he had the burden of proof. As discussed in part IV of this opinion, the witness' prior testimony under oath was not limited to impeachment purposes, so the prosecutor did not err when she asked the jury to consider the testimony as substantive evidence.

We agree that the prosecutor's reference to Jeffrey Dahmer's insanity defense in her closing argument was improper. However, this was an isolated remark and the trial court instructed the jury that the arguments of counsel are not evidence. We do not find plain error affecting defendant's substantial rights. *Schutte, supra* at 720.

Defendant asserts that the prosecutor "intruded" on defendant's attorney-client relationship and that the prosecutor testified when she picked up a defense file from the defense table. The record does not indicate that the prosecutor touched a file from the defense table. The prosecutor referred to a file marked "self-defense" and asked defendant if he had looked at the file, which defense counsel stated contained his notes. The trial court sustained defense counsel's objection and defendant denied looking at the file. On the basis of this record, we find no error requiring reversal.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel because (A) his trial attorney did not object to the prosecutor's remarks discussed in part II of this opinion; (B) counsel failed to request that the jury be instructed to consider the lesser offense of

manslaughter; (C) counsel did not request an instruction on "imperfect self-defense"; (D) counsel did not request a modification of CJI2d 4.4 to instruct that defendant's disposal of the gun was equivalent to flight, which could be considered only as consciousness of guilt and not an admission of guilt; and (E) counsel did not pursue the matter of the audience disruption discussed in part I of this opinion.

Defendant is entitled to the protection of the Sixth Amendment's guarantee of the effective assistance of counsel. *Cuyler v Sullivan*, 446 US 335; 100 S Ct 1708; 64 L Ed 2d 333 (1980); *Evitts v Lucey*, 469 US 387; 105 S Ct 830; 83 L Ed 2d 821 (1985). Because defendant failed to moved for a new trial or a *Ginther*[1] hearing, our review is limited to errors apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

In order to establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). 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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). 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. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. Failure to Object to Alleged Prosecutorial Misconduct

For the reasons stated in part II of this opinion, counsel's failure to object did not deprive defendant of a fair trial.

B. Failure to Request Manslaughter Instruction

Defendant argues that his counsel was ineffective for failing to request a jury instruction on manslaughter. Defendant has not overcome the presumption that counsel's decision to pursue an "all-or-nothing" approach to conviction or acquittal was a matter of sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981) (decision not to seek manslaughter instruction in second-degree murder case did not deny defendant the effective assistance of counsel).

C. Failure to Seek Imperfect Self-Defense Instruction

Defendant also claims that counsel failed to request a jury instruction on imperfect self-defense. Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993), citing *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). This defense is implicated where

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

a defendant would have been entitled to invoke the theory of self-defense had he not been the initial aggressor. *Kemp, supra*, citing *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

Defendant was not entitled to an instruction on imperfect self-defense. Defendant pursued a theory of self-defense in which the victim was the aggressor. Defendant testified that he sought to avoid conflict with the victim, and sought to avoid the conversation which led to this shooting. Defendant testified that he thought Chipp was reaching for a gun. Fearing for his life, he pulled his own gun out of his pocket and shot Chipp. Although there was no proof that the victim was armed, defendant's theory of self-defense was that Chipp was the aggressor. It is not consistent with a theory of imperfect self-defense in which the defendant is the aggressor. *Butler, supra* at 67. Thus, counsel was not ineffective for failing to request the instruction. To the extent that defendant argues that his attorney was ineffective for pursuing a theory of pure self defense instead of a theory of imperfect self-defense, we will not second-guess this matter of trial strategy.

D. Failure to Seek Instruction Regarding Disposal of Evidence

Defendant also claims that counsel was ineffective for failing to seek an instruction that defendant's disposal of the gun should be given limited consideration. We disagree. Inviting attention to the disposal of evidence could have compromised defendant's position that he turned himself in as quickly as could be arranged by his attorney. In addition, if the court were to craft an additional instruction to address the disposal of evidence, it is possible that defendant's actions would be afforded greater culpability. Defendant has not shown that counsel was ineffective.

E. Failure to Pursue Audience Interruption Issue

As discussed in part I of this opinion, the nature of the audience interruption (if one indeed occurred) is subject only to speculation. Likewise, the argument that defendant was denied the effective assistance of counsel when counsel failed to pursue this matter further is not supported by the record.

IV. WEIGHT OF IMPEACHMENT EVIDENCE

In a separate brief filed by defendant in propria persona, defendant argues the prosecutor improperly argued to the jury that the impeachment evidence of Tykishe Chipp's prior statement to police as well as her preliminary examination testimony may be considered as substantive evidence. Defendant also contends that the court erred by failing to instruct the jury that impeachment evidence could not be considered as substantive evidence. This argument is without merit.

A. Statement to Police

The record does not indicate that the prosecutor told the jury to consider the witness' statement to police as substantive evidence. Rather, the prosecutor told the jury that it could evaluate her testimony in light of the statement she gave to police. The prosecutor then told the jury that it could consider as substantive evidence the witness' preliminary examination testimony. Further, the court properly instructed the jury that the witness' prior inconsistent

statement to police could not be used to decide whether the elements of the crime had been proven, although it could be used to "help you decide whether you think the witness is truthful." *Avant, supra* at 511.

B. Preliminary Examination Testimony

The prosecutor's argument to the jury that it could "take her testimony under oath as substantive evidence just as if she is sitting here talking to you" was a correct statement of law. MRE 801(d)(1)(A). By definition, the witness' preliminary examination testimony given under oath is not hearsay and may be considered as substantive evidence. MRE 801(d)(1)(A); *People v Malone*, 445 Mich 369, 381-382; 518 NW2d 418 (1994). The court properly instructed the jury that the witness' prior inconsistent statement in the form of sworn testimony at the preliminary examination could be used as substantive evidence. MRE 801(d)(1)(A); *Malone, supra*.

V. CUMULATIVE EFFECT OF ERRORS

We find no cumulative effect of error requiring reversal. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

VI. SENTENCING ISSUES

Defendant raises three allegations of sentencing error. Because the offense occurred in July 1999, the legislative sentencing guidelines apply. MCL 769.34(2).

Defendant argues that the scoring of fifteen points for offense variable 5 was unsupported by the record and that the trial court did not make sufficient findings in this regard. We find no error in the court's conclusion that the victim's sister, who personally witnessed the victim being shot five times in the back and who watched him die, would have suffered the type of injury which required professional treatment. She testified that her family members held her responsible for her brother's death. Although there was no testimony that family members received psychological treatment, that fact is not conclusive. MCL 777.35(2).

Defendant also argues that the trial court "failed to give a critical eye to all of the facts underlying the offense" when it sentenced him within the guidelines range rather than sentencing him below the guidelines range. Specifically, defendant argues that the court should have made allowances for "[a]n inadequate claim of self-defense" and because the victim had a reputation for violence. Defendant has not shown that the court was unaware of its sentencing discretion, *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001), so this claim is rejected.

Defendant argues that because he had no prior criminal history, his sentence violates the principle of proportionality, in reliance on *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). If the minimum sentence imposed is within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the sentencing guidelines or a showing that inaccurate information was relied upon in determining the defendant's sentence. MCL 769.34(10), *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Because defendant's sentence is within the guidelines range, and defendant has failed to show

that it was the product of either a scoring error or inaccurate information, we must affirm the sentence. *People v Hedgwood*, 465 Mich 432, 437; 636 NW2d 127 (2001); *Leversee, supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder