

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANDREA CALVIN,

Defendant-Appellant.

UNPUBLISHED

November 22, 2002

No. 227333

Wayne Circuit Court

LC No. 99-006944

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of first-degree premeditated murder, MCL 750.316(a), possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced him to mandatory life imprisonment for the murder conviction, a concurrent term of thirty-eight to sixty months for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first challenges the admission of alleged hearsay testimony. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). An abuse of discretion exists if an unprejudiced person, considering the facts on which the trial court acted, would find no justification for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

During the prosecutor's direct examination of an eyewitness, the witness testified that she "had heard there were conflicts" between defendant and the decedent. Defendant contends that this statement constituted inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Bartlett, supra* at 159, quoting MRE 801(c). Hearsay is not admissible as substantive evidence unless an exception applies. MRE 802; *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993).

We conclude that any potential error in admitting the testimony in question was harmless. In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, during trial, another witness testified that defendant and the decedent did not get

along. The erroneous admission of hearsay evidence is harmless if the same facts are shown by other competent evidence. *Bartlett*, *supra* at 159-160; see also *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996), and *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). In addition, there was strong evidence of defendant's guilt, including the testimony of eyewitnesses who identified him as the assailant. Because defendant has not established that it is more probable than not that the alleged error was outcome-determinative, reversal is not warranted. *Lukity*, *supra* at 495-496.

Next, defendant argues that he was denied a fair and impartial trial because of prosecutorial misconduct. We disagree. Because defendant failed to object to the alleged improper remarks below, this Court reviews this claim for a clear or obvious error that affected defendant's substantial rights, i.e., that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Our review of the record reveals that defendant was not denied his right to a fair trial because of the prosecutor's remarks. Rather, the challenged remarks, which were made during closing and rebuttal arguments, were responsive to defense counsel's arguments and were based on the evidence produced at trial. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). A prosecutor need not state his arguments or inferences in the blandest possible terms. *Ullah*, *supra* at 678. Moreover, to the extent that any of the challenged remarks could be viewed as improper, the trial court's instructions that the jury should only consider the evidence and that the lawyers' statements and arguments are not evidence were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001). Finally, at no point did the prosecutor improperly comment on defendant's refusal to testify. Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights and is not entitled to appellate relief.

Next, defendant argues that the trial court erred by informing the jury that it was "required" to instruct on second-degree murder. Because defendant failed to object to this instruction, we review this issue, too, under the plain error doctrine, and reversal is warranted only if a clear or obvious error occurred that affected the outcome of the case. See *Carines*, *supra* at 763, and *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Defendant has not established plain error requiring reversal with respect to this claim. Indeed, while the statement was not necessary, we conclude that its inclusion did not affect the outcome of the case. *Carines*, *supra* at 763.

Defendant further argues that the trial court erred in simply reading CJI2d 3.2(3), the instruction dealing with reasonable doubt, without including language requiring the jury to find "proof of guilt to a moral certainty" and defining reasonable doubt as a doubt that would cause a "juror to hesitate in making an important decision in life." However, it is well-established that the moral certainty language is not required as part of the instructions on reasonable doubt. *Snider*, *supra* at 420-421; *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Moreover, this Court has held that an instruction based on CJI2d 3.2(3) adequately defines the

concept of reasonable doubt. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *Hubbard, supra* at 487-488. Accordingly, this issue, which was not preserved with an objection below, does not warrant reversal.¹

Next, defendant claims that the trial court erred by allowing evidence concerning his flight from the police because this flight occurred two weeks after the shooting in connection with a different offense. We disagree.

“It is well established in Michigan law that evidence of flight is admissible” to support an inference of “consciousness of guilt.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); see also *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Nonetheless, evidence of flight, alone, is insufficient to support a conviction. *Coleman, supra* at 4. “The term ‘flight’ has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.” *Id.*

Here, contrary to defendant’s assertion, his actions of fleeing the police could properly be considered evidence of “flight.” *Id.* Although the flight occurred two weeks after the killing and might have involved flight from guns and narcotics, we conclude that these concerns affected only the weight, and not the admissibility, of the evidence. See, generally, *Compeau, supra* at 598. In addition, during trial, witnesses identified defendant as the shooter and, thus, this was not a situation in which the evidence of flight was the sole evidence of defendant’s guilt. Accordingly, the trial court did not abuse its discretion in admitting the evidence. We also note that, because the evidence of flight was properly admitted, the trial court did not err in instructing the jury in accordance with CJI2d 4.4. See, generally, *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992).

Next, defendant argues that his trial attorney rendered ineffective assistance of counsel. Because defendant failed to make a testimonial record in the trial court with respect to this issue and because his motion for a remand was denied earlier by this Court, our review is limited to mistakes apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing norms and that counsel’s error or errors likely affected the outcome of the case. *Id.*; *People v Pickens*, 446 Mich 298, 302-

¹ We reject defendant’s contention that this Court’s holding with respect to the reasonable doubt instruction in *Snider* is inconsistent with a statement by our Supreme Court in *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997), that reasonable doubt requires “moral certainty.” An examination of *Justice* reveals that the language cited by defendant is a portion of a quotation taken from a 1973 District of Columbia Court of Appeals case, quoted by our Supreme Court in order to clarify the differences between “probable cause” and “reasonable doubt.” *Id.*; *Coleman v Burnett*, 155 US App DC 302, 316-317; 477 F2d 1187 (1973). There is no support in *Justice* for defendant’s contention that the *Snider* ruling is inconsistent with Supreme Court case law on the issue.

303; 521 NW2d 797 (1994). A defendant must overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first argues that trial counsel failed to object to the introduction of certified documents and related arguments concerning his prior conviction of and timed served for felonious assault. However, it is undisputed that defendant was charged with being a felon in possession of a firearm. In order to prove defendant's guilt with respect to this offense, the prosecution was required to establish that defendant had been convicted of a felony as set forth in MCL 750.224f, see *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999), and the amount of time since the expiration of defendant's previous term of imprisonment was an element of the offense. MCL 750.224f. There is no evidence on the current record that defendant offered to admit to or stipulate to his prior felony conviction and sentence, and thus the prosecutor properly introduced the challenged evidence. *Nimeth*, *supra* at 627. Defense counsel was not required to make a meritless objection. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Moreover, even if the evidence of defendant's prior conviction and sentence for purposes of MCL 750.224f had been introduced in a different manner, i.e., through a stipulation by counsel, we cannot conclude that the outcome of the case would have differed. Accordingly, this claim is without merit. See *Effinger*, *supra* at 69.

Defendant also argues that trial counsel improperly failed to object to testimony that the police seized a gun during their arrest of defendant. Defendant asserts that this evidence was inadmissible under MCR 404(b) and that counsel should have objected on the basis of this rule. However, as discussed previously, evidence of defendant's flight from the police was properly admitted. Further, it is apparent, after reviewing the entire context of defense counsel's questions and argument, that counsel was using the evidence of the gun to attempt to provide a motive for defendant fleeing from the police, apart from his having committed murder. Indeed, trial counsel made clear during examination of the police witness and in closing argument that the handgun found incident to defendant's arrest was not the murder weapon. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id.*

We also reject defendant's contention that trial counsel improperly failed to object to an eyewitness' testimony that defendant knocked on her door approximately ten to fifteen minutes after the shooting incident. Defendant contends that this evidence essentially demonstrated an "other bad act" because it implied that defendant tried to harm or intimidate the eyewitness. This contention is patently without merit. The testimony in question did not establish an other bad act by defendant but instead merely demonstrated that defendant visited an eyewitness to the killing minutes after it happened. The testimony thus was relevant to the prosecutor's theory of the case, and defense counsel was not required to make a meritless objection. *Knapp*, *supra* at 386. Moreover, defense counsel cross-examined the witness regarding the statements she made to the police and argued that the witness was not credible during closing argument. Defendant's ineffective assistance claim is without merit.

Defendant next argues that trial counsel improperly failed to impeach a witness, James Henry, with a prior inconsistent statement in which the witness allegedly could not identify defendant as the assailant. Defendant relies on a police report in which an officer wrote that

Henry and another witness, Aliya Moore, “heard several shots and saw unknown poss. male” pursuing the decedent down the street. Initially, we note that defendant points to no place in which the police report in question was made part of the lower court record; therefore, the report is not properly before this Court. See MCR 7.210(A)(1). In any event, even if we considered the contents of the police report as recited by defendant, it is unlikely that, but for counsel’s alleged inaction, the result of the proceedings would have been different. Indeed, it is not clear that the statement was attributable to both witnesses. During trial, Henry testified that he knew defendant from the neighborhood, identified him as the shooter, and recounted that the decedent told him “[defendant] shot me.” However, Moore testified that she heard shots and saw someone chasing the decedent but did not recognize the shooter. Moreover, a police officer who questioned Henry at the scene testified at trial that Henry identified defendant as the shooter. Accordingly, it is unlikely that, but for counsel’s inaction, the result of the proceedings would have been different. *Effinger, supra* at 69.

Defendant also argues that trial counsel improperly failed to object to the alleged prosecutorial misconduct discussed above. However, the prosecutor did not commit misconduct in this case, and an objection by defense counsel would not have likely affected the outcome of the case. *Id.*

We reject defendant’s final argument that the cumulative effect of several errors requires reversal of his convictions. “This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial.” *Knapp, supra* at 387. “The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal.” *Id.* at 388. “In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence.” *Id.* “In other words, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.” *Id.* Defendant has failed to establish that the alleged errors seriously prejudiced him. He was not deprived of a fair trial.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter