STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 13, 2004
v	No. 246271 Oakland Circuit Court
DAVID ALLEN CAMPBELL, Defendant-Appellant.	LC No. 2001-179936-FC

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of alternative counts of first-degree premeditated murder and first-degree felony murder, MCL 750.316(1)(a) and (b), being a felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment without the possibility of parole for the murder convictions, and three to five years' imprisonment for the felon in possession conviction, to be served consecutive to three concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting a transcript of a 911 call that the victim's mother made after the victim's body was found.

We agree that the trial court erred in admitting the transcript of the tape where there was an inadequate foundation concerning the transcript's accuracy. Nonetheless, a preserved error does not warrant reversal unless the defendant demonstrates that it is more probable than not that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999). The effect of the error must be evaluated by reviewing the improperly admitted evidence in the context of the weight and strength of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id*. Here, as argued by the prosecutor, the transcript is cumulative of the tape recording of the 911 call, which was admitted without objection. Defendant does not assert that the transcript inaccurately reported the actual 911 call. Further, neither the tape recording nor the transcript implicated defendant. Under these circumstances, defendant has failed to show that it is more probable than not that a different outcome would have resulted had the transcript not been admitted. Therefore, this issue does not warrant reversal.

Next, defendant argues that the trial court erred in allowing a police officer, who was not qualified as an expert, to give testimony concerning blood evidence found at the scene. We disagree.

Although the witness was asked questions that seemed to elicit expert testimony, he testified only to his personal observations of the blood found in the victim's truck. The testimony was permissible lay opinion testimony under MRE 701. The trial court did not abuse its discretion in allowing it.

Defendant next argues that the trial court erred in denying his motion for a directed verdict on the two alternative murder counts. Defendant asserts that there was insufficient evidence of premeditation to support a conviction of first-degree premeditated murder, and insufficient evidence of a robbery to support a conviction of first-degree felony murder. See *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). We disagree.

A trial court's decision on a motion for a directed verdict of acquittal is reviewed de novo on appeal. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). In deciding a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution up to the time the motion is made and, viewing that evidence in the light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

Here, there was evidence that defendant was aware that the victim had recently received a tax refund, that defendant borrowed a loaded gun intending to rob the victim, and that defendant encountered the victim at his workplace. The victim was subsequently found shot to death and money that the victim received from his employer was missing. According to one witness, defendant told the witness that he shot the victim because the victim refused to turn over his money. Another witness testified that defendant said he shot the victim because he did not want "any witnesses to tell." Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant shot the victim after having sufficient time to take a second look at his contemplated actions, and that the victim was killed during the commission of a robbery. *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Therefore, the evidence was sufficient to support defendant's convictions under each alternative theory of first-degree murder. The trial court properly denied defendant's motion for a directed verdict of acquittal.

Next, defendant argues that his convictions must be reversed because the prosecutor committed misconduct during closing argument by appealing to the court's sympathies and emotions, and by referring to facts not in evidence. We disagree.

Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995).

As argued by defendant, a prosecutor may not appeal to the sympathies and emotions of the trier of fact. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However,

"[u]nlike a jury, a judge is presumed to possess an understanding of the law, which allows [her] to understand the difference between [evidence] . . . and statements of counsel," *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992), and to be able to "decide the case solely on the evidence properly admitted at trial," *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001), quoting *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Thus, while the prosecutor's remarks could be characterized as an improper appeal to the court's sympathies, it is unlikely that the remarks affected the trial court's decision, particularly in light of the overwhelming evidence of guilt introduced below.

Although a prosecutor may not make a statement of fact that is unsupported by the evidence, *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992), he is free to argue the evidence and reasonable inferences therefrom, and need not state his arguments in the "blandest of all possible terms," *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Here, in arguing that defendant was the person who was described as tall, thin, and scruffy, the prosecutor was merely drawing reasonable inferences from the evidence introduced at trial, including how defendant looked in 1996 as compared to 2002. The comment was not improper.

Lastly, defendant argues that he is entitled to a new trial because defense counsel was ineffective. Defendant argues that trial counsel failed to investigate and present exculpatory evidence, failed to file necessary pretrial motions, improperly persuaded defendant to waive his right to a jury trial and his right to testify, failed to subpoena records, failed to file a motion for a speedy trial, failed to object to the admission of defendant's letters to a witness, failed to file a motion for the appointment of a private investigator, and failed to "communicate much" with defendant before trial. Defendant additionally argues that the trial court erred in denying his motion for a new trial without conducting an evidentiary hearing. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he has been prejudiced by the error in question. *Id.* at 312, 314. That is, the defendant must show that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Where counsel's conduct involves a choice of strategies, it is not deficient. *Id.*

As the trial court observed, the affidavit submitted by defendant in support of his motion for a new trial is devoid of any factual allegations in support of defendant's claims of ineffective assistance of counsel. For example, it does not identify what exculpatory evidence allegedly existed that counsel failed to discover or present. Additionally, defendant has not shown how any of the alleged errors might have affected the outcome. Against this backdrop, the trial court did not err in refusing to hold an evidentiary hearing. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973); see also *People v Hill*, 257 Mich App 126, 139; 667 NW2d 78 (2003).

Regarding defendant's claims that trial counsel was ineffective for persuading him to waive his right to a jury trial and to exercise his right not to testify, we conclude that defendant's statements in open court acquiescing to these matters waived both issues. A party may not seek

redress on appeal by taking a position contrary to that argued in the trial court. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997); see also *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (a defendant may not seek reversal on the basis of an error to which he contributed by plan or negligence). An "apparent error that has been waived is 'extinguished'" and, therefore, is not susceptible to review on appeal. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

Regarding the failure to file a motion for a speedy trial, given the substantial lapse of time between the crime and defendant's arrest, defense counsel may well have made a strategic decision not to file such a motion and, instead, allow witnesses' memories to fade even more, perhaps to defendant's advantage. Further, the delay between defendant's arrest and trial was less than eighteen months and, therefore, prejudice is not presumed. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). Additionally, although defendant suffered personal prejudice by remaining in jail awaiting trial, he has not shown that his defense was prejudiced by the delay. For these reasons, we reject defendant's claim that defense counsel was ineffective for failing to file a motion for a speedy trial. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

Concerning the admission of defendant's letters to a witness, the record discloses that there was no genuine question regarding their authenticity. Therefore, defense counsel was not ineffective for failing to object to their admission. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

With regard to defendant's remaining claims of ineffectiveness, we note that "[d]ecisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Defendant has not shown what evidence existed that counsel should have uncovered and presented at trial, what motions he should have filed, and what evidence a private investigator could have uncovered. Nor has he shown how any such evidence, or further communication with defendant, might have changed the outcome. Additionally, defendant has not shown how the outcome might have been changed if counsel had impeached a witness concerning how long he remained in the home following an alleged threat. Accordingly, we agree with the trial court that defendant failed to show that counsel committed a serious error that may have affected the outcome of the proceedings.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White