

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY D. DENNIS,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 240747

Wayne Circuit Court

LC No. 00-002397

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The lower court sentenced defendant to life in prison without parole for the first-degree murder conviction, and two years in prison for the felony-firearm conviction. We affirm.

I. Basic Facts and Proceedings

In the early morning of January 16, 2000, several individuals were gathered at the home of LaToya Durrett, located in the city of Detroit, drinking alcohol and watching a movie. At some point, several disturbances, including someone kicking the front door, caused some of the group to go outside. Durrett, while on the front porch, shouted to a group of men located across the street in a profane manner to stop the disturbances. One of the men across the street responded in kind to Durrett's comments. Eric Morgan took exception to this individual swearing and speaking rudely to Durrett, who was fifteen at the time, and asked the unidentified speaker not to address Durrett in that manner. The speaker responded by stating something like, "[s]tep off the porch, and we going to give you something to kick on."

At this point the testimony conflicts. However, there is no dispute that Morgan stepped off the porch and moved toward the men across the street. As Morgan approached the street, someone in the group fired a gun hitting Morgan. Another shot was then fired again hitting Morgan. The group in the street dispersed into several cars, and began to leave. However, one car drove only a short distance before it stopped. An occupant stepped out and approached Morgan, who was on the ground. The person fired a shot at Morgan's head, killing him almost immediately. Testimony at trial indicated that Morgan had been shot with the same gun at least

three times by two persons. The prosecutor contended that either, defendant or co-defendant, Randy Hunter, delivered the fatal shot.

The Detroit Police spoke to defendant on January 17, 2000. Defendant waived his *Miranda*¹ rights and made a statement to Sergeant Gerald Williams of the homicide division. The court admitted this statement and Williams read it into the record. Defendant stated that he followed a friend named Keith to a third friend, Ralu's, house. He said that Keith went across the street, kicked the person's door, and then walked back to where the group of men stood. Defendant claimed that a man came running out of the house with his hand reaching under his coat in his waist area. Defendant stated that when the man reached the bottom of the stairs of the porch, defendant ran over and took a gun from another individual he identified as "Bear." Defendant claimed that he shot Morgan one time "low." He claimed that at that point he gave the gun back to Bear and ran to his gray Chevrolet Caprice. Defendant alleged that when he reached the car he heard two more shots, and that Bear entered the car after these shots. Defendant stated that if the person died, it was the result of the other shots, not his.

The prosecution subsequently charged defendant and Hunter with first-degree premeditated murder and felony-firearm. Defendant and Hunter were jointly tried, though Hunter received a bench trial. The jury convicted defendant of first-degree premeditated murder and felony-firearm. The trial court acquitted Hunter of all charges.

Defendant filed an in propria persona motion for a new trial or an evidentiary hearing, arguing that he received ineffective assistance of counsel. The court dismissed the motion without prejudice and instructed defendant that he needed to provide affidavits supporting his claims. Defendant moved for reconsideration, and at defendant's request, the trial court reviewed the record and the submitted affidavits. The trial court found that decisions made by defendant's trial counsel were based on reasonable trial strategy, and that he would not accept defendant mere assertion that defense counsel threatened to waive the *Walker*² hearing if defendant did not pay him \$500. The trial court denied the motion for reconsideration, and this appeal followed.

II. Prior Recorded Recollection Evidence

Defendant first contends that the trial court erred in admitting Durrett's prior recorded recollection into evidence pursuant to MRE 803(5). We disagree.

A. Standard of Review

The prosecution moved to admit two statements given by Durrett. One statement was given on January 16, 2000, the day of the incident. The second statement was given on January 17, 2000, following a lineup. At trial, defense counsel objected only to the admission of the statement taken following the lineup, the January 17, 2000 statement. On appeal, defendant

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

contends that January 16, 2000, statement should not have been read to the jury for the same reason that the January 17, 2000, statement was not read to the jury. Because there was no timely objection to the admission of Durrett's January 16, 2000, statement, the issue is unpreserved. MRE 103(a)(1). "Because defendant did not object to the admission of the challenged evidence in this case, he must demonstrate plain error affecting his substantial rights, meaning that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004), citing *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999).

In addition, interpretation of a court rule is a question of law reviewed de novo. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

B. Analysis

This Court has stated that there are three requirements for admission pursuant to MRE 803(5): 1) the document must pertain to matters which the declarant once had knowledge; 2) the declarant must now have insufficient memory of the matters; and, 3) the declarant must have made or examined the document when the matters remained fresh in the declarant's memory. *People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1991). Defendant concedes that the January 16, 2000, meets the first and third foundational requirements. Thus, the only issue in dispute is whether Durrett's lack of memory satisfied the second requirement.

Defendant basically argues that the witness must have no memory of the events in order for a prior recorded recollection to be admissible. This is not what is required by the court rule. In interpreting a court rule, this Court applies the same legal principles that govern statutory interpretation. *Phillips, supra* at 589. This Court must apply the plain language of the court rule. When that language is unambiguous, this Court must enforce the meaning expressed, without further judicial construction. *Id.* The language of the court rule merely requires that the witness have "insufficient recollection to enable the witness to testify *fully and accurately*." MRE 803(5) (emphasis added). The rule does not require that the witness be completely unable to testify. It simply requires that she not be able to testify fully.

In this case, Durrett had repeated memory lapses. She admitted that her mind went blank regarding the details of the shooting. She no longer remembered many of the details that she had previously remembered and articulated to the police officer. This was especially true in regard to details relating to identification. Given the state of her memory, Durrett could not testify fully and accurately. Therefore, because her prior record recollection was admissible pursuant to MRE 803(5), defendant failed to establish plain error affecting his rights.

III. Witness' Violation of Sequestration Order

Defendant next argues that the trial court erred in refusing to strike the testimony of a witness who violated a sequestration agreement. We disagree.

A. Standard of Review

This Court reviews the decision to exclude a witness' testimony for violation of a sequestration order for an abuse of discretion. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). An abuse of discretion occurs when the result is so palpably violative of fact and logic that it constitutes not the exercise of will but the perversity thereof, not the exercise of judgment but the defiance thereof. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

B. Analysis

A defendant must demonstrate prejudice in arguing that a witness violated a sequestration order. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996), citing *Solak*, *supra*. In this case, defendant failed to articulate any prejudice to the lower court. Defendant merely noted that Deshawn Smith had stated he was at the preliminary examination while Durrett testified, and then moved to strike Smith's testimony. Given that defendant failed to articulate to the trial court any prejudice resulting from Smith's violation of the sequestration order, the record does not support a decision to exclude the testimony. *Id*; *Solak*, *supra*. Absent a showing of prejudice, the trial court properly denied defendant's motion to strike Smith's testimony based on a violation of a sequestration order. *Hine*, *supra*.

On appeal, defendant asks this Court to assume that Smith heard Durrett's preliminary examination testimony concerning the identification of defendant as the person shooting Morgan in the head and that upon hearing this, Smith tailored his testimony accordingly. Defendant's request ignores that defendant must establish prejudice. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). Regardless, defendant's claim of prejudice was mitigated by defense counsel's extensive cross-examination of Smith concerning inconsistencies between his statement to the police and his testimony. Moreover, defendant had the opportunity to cross-examine Smith about his presence at the preliminary hearing to determine what he heard. Defendant chose not to do this. Under the circumstances, defendant has failed to demonstrate sufficient prejudice to require exclusion of all Smith's testimony. *Solak*, *supra*.

Furthermore, the record indicates that the trial court carefully considered this issue. Indeed, the court even suggested that defense counsel read a portion of the preliminary examination transcript to the jury. Also, the trial court instructed the jury to consider the violation of the sequestration order and facts relevant to that violation when determining Smith's credibility. Because the jury could have found that Smith's violation of the sequestration order favored defendant's defense, the trial court did not abuse its discretion by denying defendant's request to strike all Smith's testimony. *Hine*, *supra*.

IV. Effective Assistance of Counsel

Defendant presents several claims of ineffective assistance of counsel in his supplemental brief on appeal.

A. Standard of Review

This Court reviews a trial court's decision regarding a motion for a new trial for an abuse of discretion, but reviews the underlying issue of ineffective assistance de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). No evidentiary hearing was

conducted, and this Court's review is limited to the facts in the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

B. Analysis

In order to succeed on such a claim, the defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. Second, the 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 Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994)]

i. Failure to Investigate

Defendant argues that the trial court abused its discretion in not granting a new trial or an evidentiary hearing based on allegation that defense counsel failed to investigate the circumstances surrounding Durrett's lineup identification. We disagree.

The record contains no indication of what counsel did or did not investigate prior to trial. Therefore, defendant's claim of ineffective assistance must fail. *Wilson, supra*. Besides, the record reveals that defense counsel effectively cross-examined Durrett in regard to circumstances surrounding that identification. During cross-examination, defense counsel elicited testimony that Durrett felt pressured by comments from her family and other individuals in the room to make an identification and that her mother was shouting at her around the time of the lineup. Given that defense counsel elicited these facts concerning the lineup, defendant's ineffective assistance claim is without merit.

Defendant also implies that it was error for defense counsel not to object to testimony of Durrett's lineup identification. However, defense counsel raised the subject of Durrett's identification to impeach Durrett. The record reflects that Durrett did not identify defendant at the first lineup. She only made an identification after her family and a friend spoke to her and, in her words, pressured her to make an identification. This information could also be used to weaken the in-court identification of defendant by Durrett. Defense counsel's use of this testimony was a legitimate trial strategy. This Court will not second-guess this trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

ii. Waiver of the *Walker* hearing

Defendant argues that defense counsel was ineffective in waiving a *Walker* hearing regarding his statement to police. We disagree.

There is a strong presumption that a counsel's tactics constitute a sound trial strategy. *Rodgers, supra*. Here, defense counsel had the daunting task of confronting numerous eyewitnesses, two of whom testified that defendant shot the victim in the head execution style and the other testified that defendant shot the victim at least twice and then provided the gun to another person to execute Morgan. Defense counsel could have challenged the admission of the statement into evidence and then attempted to impeach the numerous eyewitnesses to the

shooting and convince the jury that they were all mistaken. Or defense counsel could have attempted to use defendant's statement to defendant's advantage and argue that Morgan was the initial aggressor and that defendant reasonably thought Morgan had a weapon and acted accordingly. Both are reasonable trial strategies, and this Court will not second-guess defense counsel on matters of trial strategy. *Id.* at 715. Given that defense counsel employed a legitimate trial strategy in not objecting to defendant's statement, defendant did not receive ineffective assistance of counsel. *Stanaway, supra.*

iii. Failure to Prepare

Defendant next contends that defense counsel failed to familiarize himself with the facts of the case. The record does not support this contention. Defense counsel vigorously and competently challenged each of the witnesses and attempted to impeach their identifications. Defense counsel especially focused on the differences between the witnesses' testimony and their statements to the police. Defense counsel vigorously cross-examined the police officer that took defendant's statement, including questions about defendant waiving his constitutional rights. Based on the record, it is clear that defense counsel thoroughly familiarized himself with the facts of this case. Defendant's contentions are without merit.

Defendant points to differences between defense counsel's opening statement and defendant's statement to the police as evidence that counsel was unfamiliar with the facts. However, we find that these differences are slight when considering the central facts of defendant's statement. Further, defendant fails to argue that these slight differences prejudiced him in any way. As discussed, *supra*, defense counsel demonstrated a thorough knowledge of the case through vigorous cross-examination. Defendant has failed to demonstrate ineffective. *Stanaway, supra.*

iv. Alleged Improper Conduct of Defense Counsel

Defendant further alleges that defense counsel threatened to waive the *Walker* Hearing for non-payment of attorneys' fees. Nothing in the record supports defendant allegation. This Court's review is limited to the facts in the record. *Wilson, supra.* Based on the existing record, there is absolutely nothing to support this contention other than defendant's bald accusation against his counsel. Defendant bears the burden of proving the factual predicate of his claim. *People v Hill*, 257 Mich App 126, 138-139; 667 NW2d 78 (2003). Defendant has failed to meet this burden.

Further, as discussed, *supra*, admission of the statement is consistent with a legitimate trial strategy of attempting to persuade the jury that defendant was acting in defense of others. Not only must defendant evidentially support his claim of ineffective assistance of counsel, he must exclude hypotheses consistent with the conclusion that trial counsel represented him adequately. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has failed to exclude the legitimate explanation for counsel's waiving his challenge to the statement. Therefore, he has failed to demonstrate ineffective assistance. *Id.*

Defendant also raises the claim that counsel pressured him to take the stand and commit perjury. This is inconsistent with his statement below. When defendant decided not to testify, his counsel and the court questioned him on the record to determine if the decision was

voluntary. Defendant stated that he knew he had an absolute right to testify, that the decision not to testify was his own decision, that no one had pressured him in any way regarding this decision, and that he was satisfied with counsel's advice relating to his decision not to testify. This intentional abandonment of a known right constitutes a waiver of this issue. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001). Waiver of the right extinguishes any error, which means defendant may not seek appellate review of a claimed deprivation of the right. *Id.*

v. Other Issues

Finally, defendant raises two issues regarding whether the police had a search or arrest warrant when he was arrested. These issues are not raised nor implied in defendant's questions presented. Thus, the issue is not properly presented before this Court. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Therefore, we need not address them. Moreover, after reviewing the record, we find these issues have no merit.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Brian K. Zahra