

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVEL DANIEL,

Defendant-Appellant.

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UNPUBLISHED

December 15, 2005

No. 257658

Wayne Circuit Court

LC No. 03-013809-01

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of second-degree murder, MCL 750.317. We affirm.

Derrick Mitchell was shot and killed on July 12, 2003, at approximately 9:30 p.m., while in his automobile on Novara Street in Detroit. Mitchell, a known drug dealer, was shot by an unknown assailant, who was observed exiting from the passenger side of defendant's gray conversion van during the incident. After shooting Mitchell, defendant's passenger removed a gray case or object out of Mitchell's car. There was testimony that it was common knowledge in the neighborhood that Mitchell hid his drugs in stereo equipment in his car. One witness testified that defendant was driving his van at the time of the shooting. Two other witnesses also testified that defendant was driving his van at the time of the shooting, but they equivocated on this point at trial, stating that they assumed defendant was driving because they recognized the van as belonging to him. One of the prosecution's witnesses, Darius Scott, testified that, shortly after the shooting, defendant contacted him by telephone and simply stated, "yep, yep, yep, yep." Before that time, Scott and defendant had discussed the shooting death of another drug dealer, Shawn, who sold drugs with defendant out of a house on Novara Street. Scott testified that he believed Mitchell was involved in Shawn's shooting. Defendant was arrested five months after the shooting.

Defendant offered an alibi defense. His girlfriend testified that he was at her home from 2:00 p.m. until approximately midnight on the date Mitchell was shot. During this timeframe, she had the keys to defendant's gray conversion van, and the van remained parked nearby. She testified that defendant's van could not have been near Novara Street at the time of the shooting.

On appeal, defendant first argues that he was denied his right to the effective assistance of counsel. To prevail on a claim that counsel was ineffective, a defendant must show that

counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant argues that counsel did not engage in any reasonable pretrial investigation and, therefore, a new trial is warranted. Specifically, defendant argues that counsel should have hired an investigator, hired an expert in close-range gunfire, checked telephone call records to determine if defendant made a telephone call to Scott on the evening of the shooting, called all of the alibi witnesses, obtained LEIN information for the prosecution's witnesses, and called two other eyewitnesses to the incident. In support of his claims, defendant produced an affidavit asserting that he was at his girlfriend's house at the time of the offense, that an investigator could have discovered evidence to support this fact, and that he had other alibi witnesses who defense counsel did not call. Defendant also produced three identical affidavits from two friends and his brother, indicating that, on July 12, 2003, from 2:00 p.m. until 1:00 a.m., defendant was at "Brain house" on Allendale and Beechwood, and these witnesses would have testified to that fact if called to testify.

At a *Ginther*<sup>1</sup> hearing, defense counsel stated reasons for his actions in this case, explaining that he believed one strong alibi witness was better than several witnesses, who may contradict each other; that he believed that the two other alleged eyewitnesses, who he decided not to call, would have bolstered the prosecutor's case based on their police statements; and that he did not hire an investigator because of the circumstances of the crime, including that defendant's arrest was so far removed from the offense. Defense counsel noted that defendant had a friend, who was going to find the alleged alibi witnesses and connect them to defense counsel. Counsel met with this person and had a number of telephone contacts with her. Defendant's girlfriend was located and testified as an alibi witness. Defense counsel also testified that there was no reason to hire an expert with respect to close-range gun firing. The parties stipulated that the medical examiner found no evidence of close-range gunfire. This stipulation cast doubt on one witness' testimony that the shooter was close to the victim's car when he fired the gun. With respect to failing to obtain telephone records, defense counsel explained that "based on the nature of some of the witnesses and the parties involved here, being in the narcotics business where cell phone records and cell phones themselves are sometimes used interchangeably and discarded, I thought it would be fruitless to try to obtain those." Defense counsel met with defendant on many occasions before trial. Counsel's strategy was to attack the reliability of the prosecution's witnesses and produce the alibi witness. Defense counsel testified that he included defendant in every aspect of the trial strategy and that defendant had input with respect to all aspects of that strategy. Defense counsel testified, and the record bore out, that counsel ably attacked the credibility of the prosecution's witnesses and their motives for testifying. Further, while defense counsel did not obtain LEIN information about those witnesses' past criminal histories, he obtained their criminal histories through the court's

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

computers. Defense counsel admitted that he did not interview the strongest witness for the prosecution, but the record revealed that the witness was difficult to locate and bring to trial. In fact, trial was adjourned entirely on July 21, 2004, because the witness could not be found. Nothing in the record supported that counsel would have found the witness on his own and obtained an interview that would have led to the discovery of facts supportive of defendant's case.

On the record before us, we agree with the trial court that defendant has failed to establish that he was deprived of the effective assistance of counsel. The record does not support defendant's claim that an expert in close-range gunfire would have added any relevant information or affected the outcome of trial. Defendant has not articulated any specific information an expert could have offered, and he has not explained how such testimony would have cast any more doubt on eyewitness testimony regarding the proximity of the shots than the medical examiner's finding that there was no evidence of close-range firing. Additionally, defendant has not established that an investigator would have discovered any facts useful to the defense at all. Defendant has not disclosed any relevant or useful information that was not presented but could have been if it had been discovered earlier by an investigator.

Moreover, defendant has not shown that the LEIN information for any witness was different from the information obtained by defense counsel before trial. Nor does the record support that defense counsel failed to investigate the case. He clearly provided a defense by attacking the credibility of the prosecution's witnesses and calling an alibi witness. While defense counsel did not present more than one alibi witness, this was a matter of sound trial strategy and conscious choice. Nothing in the record supports that the three alibi witnesses, who submitted identical alibi affidavits after trial, were credible with respect to their statements. Only one of these witnesses, defendant's brother, testified at the *Ginther* hearing. He testified with specificity as to defendant's location at the time of the crime, which occurred almost two years before the *Ginther* hearing, but claimed to know nothing about defendant's van. Moreover, he contradicted the alibi testimony provided by defendant's girlfriend at trial. She testified that there was no party at her house on the day the victim was killed. Rather, people were present because they always hung around there. Defendant's brother, on the other hand, testified that a party was given for defendant at his girlfriend's home on the date of the shooting. Defendant's brother also claimed that there were no fights at her home on the date of the party. Conversely, defendant's girlfriend testified that she was sure defendant was with her on the date of the crime because she remembered an altercation that occurred during the gathering at her house.

The decision not to call defendant's brother or the other alibi witnesses at trial is presumed to be a matter of trial strategy. See *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). We will not second-guess trial counsel's choice not to call the other alibi witnesses. See *id.* Nor will we second-guess counsel's decision not to call two eyewitnesses, who counsel believed would actually bolster the prosecution's case if called. Defendant's counsel provided a sound defense, casting sufficient doubt on the elements of premeditated murder and felony murder to spare defendant from being convicted of those crimes. Defendant has not met his burden of proving that the outcome of his case would have been different if his

counsel had hired an investigator or expert, checked LEIN information, or called other witnesses to testify. See *Stanaway, supra*. We therefore reject defendant's claim that he was deprived of the effective assistance of counsel.<sup>2</sup>

Defendant also argues that counsel was ineffective for failing to move to disqualify the trial court from hearing the case when the court was aware that defendant had another murder conviction.

Before trial, defendant specifically waived his right to a jury trial. He also expressed, during questioning from the trial court, that he wanted his case tried before the specific judge, whose disqualification is now being challenged. Defendant stated on the record that he was making the decision of his own free will after consulting with his lawyer. At the *Ginther* hearing, defense counsel testified that he believed the bench trial was defendant's idea. Defendant was convicted of second-degree murder in an unrelated jury trial shortly before this case went to trial. Defendant was surprised by the conviction, and he raised the issue of a bench trial for this case. Defense counsel believed that a bench trial was a good idea. At the *Ginther* hearing, counsel stated that he had agreed with defendant's decision. Defense counsel was confident of the trial court's ability to set aside information about the other case on which defendant was convicted. He noted that judges have hundreds of cases on their dockets and that the trial court could separate other factors and facts involving defendant's background and decide the case based on the evidence or lack thereof. After the *Ginther* hearing, the trial court agreed that there are many cases where defendants have multiple contacts with the criminal justice system.

MCR 2.003(B)(2), the court rule on which defendant relies, provides that a judge is disqualified when he cannot impartially hear a case because of his personal knowledge of disputed evidentiary facts concerning the proceeding. In general, a judge is disqualified when he cannot hear a case impartially. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). However, a judge is presumed to possess an understanding of the law, which allows him to decide a case based solely on the evidence properly admitted at trial. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). The trial court is presumed to be fair and impartial, and the defendant has a heavy burden when challenging this presumption. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992); *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810-811; 286 NW2d 34 (1979).

Defendant's unrelated conviction was not *a disputed evidentiary fact concerning the proceeding before the trial court* in this case. MCR 2.003(B)(2). The fact of that prior jury conviction before the same trial judge did not relate to defendant's guilt or innocence in this case

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<sup>2</sup> We note that defendant also makes a cursory argument that trial counsel was ineffective for failing to "make proper objections when the prosecutor argued facts not in evidence and vouched for the credibility of his witnesses." Defendant does not make any argument, however, to support that counsel's conduct in this regard fell below an objective standard of reasonableness and that, but for counsel's conduct, the outcome of his trial would have been different. *Stanaway, supra*; *Pickens, supra*. Therefore, defendant's argument is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

and was not admitted as evidence at defendant's trial. Defendant cannot rebut the heavy presumption that the trial court was fair and impartial and decided this case based on the evidence properly before it. The trial court's factual findings do not reveal that it considered defendant's past conviction at all in arriving at a verdict.

In *People v McLeod*, 107 Mich App 710, 714-715; 310 NW2d 31 (1981), this Court held that a defendant waives the issue of disqualification if he does not move to disqualify the trial court, unless the grounds for disqualification are not known to the defendant or there is some basis which gives the trial judge knowledge of some fact or circumstance directly relating to the defendant's guilt on the charged offense. In that case, like the case at hand, the defendant was convicted at a bench trial before a trial judge, who presided over the defendant's previous criminal trial. *Id.* at 711. Here, defendant made a conscious choice to have this case tried before the specific trial judge, who had no personal knowledge of disputed evidentiary facts related to this case. The record does not support that the trial court was incapable of being impartial. Therefore, defendant has not demonstrated that counsel's failure to move for a judicial disqualification fell below a reasonable standard that deprived him of the effective assistance of counsel. See *Stanaway*, *supra*.

Defendant additionally argues that he was denied his state and federal constitutional rights by the prosecutor's improper closing argument. Although defendant moved for a new trial based on prosecutorial misconduct, the issue is not preserved because defendant failed to make contemporaneous objections at trial. See *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Unpreserved allegations of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first argues that the prosecutor mischaracterized testimony when he argued that the victim's killing was an act of revenge for the death of another drug dealer and that the victim was present or involved in that death. There was evidence on the record that the other drug dealer, Shawn, was killed on July 4, 2003, on the same block where the victim was killed. Darius Scott, one of the witnesses at trial, testified that there was "word in the street" about Shawn's killer. Scott believed that the victim was involved in Shawn's murder, and he and defendant had discussed the circumstances of Shawn's murder. Scott also testified that Shawn had lived with a woman named Janese, and defendant and Shawn sold drugs together out of Janese's house. On this record, the prosecutor's arguments were proper. The prosecutor argued the evidence and reasonable inferences drawn from that evidence. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). There is no plain error requiring reversal. See *Watson*, *supra*.

Defendant also argues that the prosecutor improperly vouched for the credibility of witness Prentice Graham in closing argument. The record does not support this claim. At trial, Graham wavered with respect to his identification of defendant as the driver of the van at the time of the shooting. During closing argument, the prosecutor did not argue that Graham's statement to the police, identifying defendant as the driver, was the true statement. Rather, the prosecutor argued that Graham had admitted on the witness stand "that his statement to the police was the truth." The prosecutor then acknowledged that, after admitting that his police statement was true, Graham changed his testimony and claimed to have only seen the van, not the driver. The prosecutor argued that the "[c]ourt can make the credibility question on that."

While the prosecutor may not vouch for the credibility of a witness, *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998), the prosecutor's argument was not impermissible vouching. The prosecutor argued the evidence, specifically Graham's statements from the witness stand, and properly recognized that the trial court needed to determine Graham's credibility. The challenged argument does not constitute plain error requiring reversal. See *Carines, supra*.

Defendant also argues that his constitutional rights were violated because defense counsel failed to object to the scoring of prior record variable (PRV) 6, MCL 777.56 (relationship to criminal justice system), offense variable (OV) 5, MCL 777.35 (psychological injury to victim's family), and OV 6, MCL 777.36 (intent to kill or injure another individual). Defendant does not challenge the scoring on the ground that the record does not factually support the scores given for those variables. Rather, he argues that the scoring of these variables was based on factual findings that were not proved to a jury beyond a reasonable doubt, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The issue is preserved because it was raised before the trial court in a proper motion for resentencing. MCL 769.34(10). In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Court indicated that *Blakely* is inapplicable to Michigan's indeterminate sentencing system. We are bound by that decision. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005). See, also, *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005).

Finally, defendant makes a cursory argument that he is entitled to resentencing because the trial court stated, "I see it every other week here. Somehow it's got to stop. Somehow a message has to be sent." Defendant argues that the trial court's comment violated his right to individualized sentencing and that resentencing is required. We disagree. MCL 769.34(10) provides that if a minimum sentence is within the appropriate guidelines sentence range, this Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. Defendant has not demonstrated any error in the scoring of the guidelines or argued that the trial court relied on inaccurate information. Defendant's minimum sentence range under the legislative guidelines was 315 to 780 months. Defendant was sentenced to a minimum term of 600 months, well within the guidelines range. Therefore, we must affirm that sentence. MCL 769.34(10).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper  
/s/ Pat M. Donofrio