STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 6, 2007
v	No. 267900 Macomb Circuit Court
WAYNE ARTHUR SEID, Defendant-Appellant.	LC No. 2005-000925-FC

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree murder, MCL 750.316(1)(a), and one count of possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to life in prison without the possibility of parole for the murder conviction, and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I Sufficiency of the Evidence

A. Standard of Review

When reviewing a claim regarding the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B. Analysis

MCL 750.316(1)(a) states that a person is guilty of first-degree murder if he or she has committed a "willful, deliberate, and premeditated killing." Further,

> [f]irst-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the

> defendant to take a second look. Premeditation and deliberation may be established by evidence of "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. Proof of motive is not essential. [*People v Abraham*, 234 Mich App 640, 656-657; 599 NW2d 736 (1999) (Citations omitted)].

The prosecution presented sufficient evidence for a rational jury to conclude beyond a reasonable doubt that defendant committed first-degree murder. On the night in question, defendant and the victim were together in defendant's motel room drinking alcohol and watching television. Defendant claimed at trial that, at around 2:30 a.m., the victim stood to leave, but then attacked defendant, pinning him to the bed with his forearm across his throat while wielding his knife in defendant's face. Defendant testified that the victim pushed his knife through defendant's ear, and laughed that he was going to "cut [him] up." Defendant testified that, at some point, he managed to get out from underneath the victim and onto the floor. While on the floor, defendant grabbed his shotgun from underneath his bed. Defendant stated that he believed the victim was going to stab him again, so he fired a shot from the floor, without being able to see the victim. He thought he had only fired once, but later learned that he had fired three times. The prosecution presented evidence that defendant first shot the victim in the back from one to two feet, and shot him again in the right flank.

Paul Szoke, defendant's neighbor at the motel, testified that he heard noises from the room next door to him at around 2:30 a.m., which he believed were gunshots. He believed the shots were fired in approximately ten second intervals. Szoke had earlier heard voices and laughing earlier in the night, but did not hear any shouting or any sounds signaling a fight or a struggle before hearing gunshots.

At trial, medical examiner and forensic pathologist, Dr. Daniel Spitz, testified that because the victim's blood had only been found pooled on the bed, the victim had been shot on the bed. Further, emergency room physician, Dr. Michael Mattingly, testified that he treated defendant's ear wound and found the wound to be a day old and not consistent with a stabbing wound. In addition, Michigan State Police forensic scientist, Melinda Jackson, found no presence of blood on the victim's knife.

Here, the prosecution presented sufficient evidence for a rational jury to conclude beyond a reasonable doubt that defendant committed first-degree murder. Viewing in a light most favorable to the prosecution, there is evidence that defendant, with a shotgun from one to two feet away, shot the victim in his back as the victim lay in a bed. Defendant then fired two additional shots in the following twenty seconds, one of which struck the victim in the right flank. Further, a rational jury could conclude that defendant concocted his story of self-defense. The knife he claims injured him was found in the victim's pocket with no blood on it. Dr. Mattingly testified that defendant's ear wound was a day old and not consistent with a stabbing wound. Therefore, the prosecution presented sufficient evidence for a rational jury to conclude beyond a reasonable doubt that defendant committed first-degree murder.

II Right to Remain Silent

Defendant next claims that the trial court erred in allowing the prosecution to present evidence violative of defendant's right to remain silent.

A. Standard of Review

A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). This Court reviews constitutional questions de novo. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

B. Analysis

Defendant claimed self-defense at trial. During trial, the prosecutor asked witnesses that had contact with defendant around the time of his arrest whether defendant told them he was attacked. Specifically, the prosecutor elicited evidence that when Detective Myers asked defendant what happened, defendant stated that he had "had a nightmare" and that he "[couldn't] believe I shot him." The prosecutor also elicited evidence that, once in custody at the police station, the booking officer, Michael Pettyes, overheard defendant "talking to himself," saying things like "this must be a bad dream; I can't believe I just killed somebody. . . . He's like, I'd [sic] kill once and I'll kill again." Pettyes further stated that when another officer walked in the room where defendant was being held, defendant told him "yeah, I'm the guy that killed somebody" in a tone of voice that Pettyes considered to be "cocky" and "arrogant." According to Pettyes, the explanation defendant offered for killing Jordan was that "the guy got in my face. He . . . tried to choke me, so I shot him and I shot him and I shot him and I shot him again."

Defendant testified that he did not tell the witnesses that he had killed the victim while defending himself because he had been advised to remain silent. During his examination, the following colloquy occurred:

> *Q*. Did anyone – did anyone – a police officer or anyone talk to you while you were in custody?
>
> *A*. Yes
>
> *Q*. Okay. And where was that?
>
> *A*. It was in the squad car on the way to the police station.
>
> *Q*. From the hotel to the police station?
>
> *A*. Yes, sir.
>
> *Q*. Okay. And what were you told at the time, if anything?
>
> *A*. They told me that I shouldn't say anything.
>
> *Q*. Okay. And did anyone ever subsequently ask you what happened here?

A. When I got to jail and was handcuffed. I don't know how long it took, they asked me what happened to my ear.

Q. And you were there approximately five hours between the time you were taken to the station to the time you were taken to – for medical?

A. I believe so.

Q. Now, when the doctor was talking to you and asking you about this wound, do you recall him asking you how it happened?

A. I really don't, no. It was – I don't.

The prosecutor then began his cross-examination of defendant by asking:

Q. Are you suggesting that you wanted to tell the police your version of what occurred, but they told you not to say anything?

A. No.

Q. Did you tell them your version of what occurred?

A. No.

Q. Were you given an opportunity?

A. Yes.

Q. By the police?

A. By the detectives when they arrived in the morning.

* * *

Q. But you chose not to?

A. I did.

The prosecutor then asked defendant whether he told any of the witnesses that he acted in self-defense. After defendant testified, defense counsel moved for a mistrial arguing that the prosecution improperly used defendant's silence as evidence against him. The trial court denied the motion and agreed with the prosecutor that defendant had "opened the door" because defendant indicated that he was not given an opportunity to tell his side of the story.

Upon review of the record, we affirm the trial court's decision. Initially, we agree with the trial court that defendant's testimony on direct examination suggests that he would have told witnesses his version of events had they only asked. Thus, it was not improper for the prosecutor to ask defendant whether he was afforded an opportunity to tell others his version of events.

However, the prosecutor's later questions, in regard to whether defendant actually told the witnesses his version of events, presents a separate question. In *People v Cetlinski*, 435 Mich 742, 749; 460 NW2d 534 (1990), our Supreme Court stated that,

> when an individual has not opted to remain silent, but has made affirmative responses to questions about the same subject matter testified to at trial, omissions from the statements do not constitute silence. The omission is nonverbal conduct that is to be considered an assertion of the nonexistence of the fact testified to at trial if a rational juror could draw an inference of inconsistency. To be sure, the witness may explain the omission by a desire not to implicate himself or because of a lapse in memory. Such explanations, however, do not remove the relevancy of the inconsistency.

Here, a rational juror could draw an inference of inconsistency between defendant's post-arrest statements to witnesses and defendant's trial testimony. None of defendant's post-arrest statements suggest that his actions were justified. Indeed, defendant's statement that "the guy got in my face. He . . . tried to choke me, so I shot him and I shot him and I shot him and I shot him again," expressly contradicts defendant's claim that the victim attacked him with a knife. Therefore, the trial court did not err in denying defendant's motion for mistrial.

Moreover, the prosecutor's cross-examination of defendant did not impair his ability to get a fair trial. The trial court gave the jury defense counsel's proposed instruction in regard to defendant's right to remain silent. Further, defendant's self defense claim contradicts undisputed evidence that he shot the victim three times, once in the back, and that the victim's knife was found folded up in his pocket without blood. Accordingly, because there is an independent evidentiary basis to reject defendant's self-defense claim, any error with regard to the prosecutor's use of defendant's post-arrest silence was harmless.

Defendant also argues that he was entitled to an adverse inference instruction, and that his due process rights were violated under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), due to the prosecutor's alleged failure to produce exculpatory evidence in time for trial.

Our Supreme Court has observed that "[i]t is well settled that missing evidence gives rise to an adverse presumption only when the complaining party can establish intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth." *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005) (quotation marks and citations omitted). While the loss of the paper towel is arguably suspicious, as is the failure to test defendant's shirt, these failures, without more, are not evidence of the prosecutor's intentional commissions of fraud or a desire to suppress the truth by destroying the evidence. The prosecutor stipulated that the blood on the shirt was defendant's. Although this may not have had the same effect as the actual shirt and its ability to show the pattern of the blood spatter, it was still useful to proving defendant's intended point: his contention that the victim attacked him with a knife and stabbed his ear. The paper towel could arguably have emphasized this point, but it does not seem that it was necessary in order to prove it.

Further, defendant has not shown that he was denied due process by the prosecutor's alleged withholding of exculpatory evidence. This Court outlined four factors a defendant must

prove to show that the prosecutor violated defendant's due process rights under *Brady* in *People v Fox* (*After Remand*), 232 Mich App 541, 549; 591 NW2d 384 (1998), including:

> (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

The first two factors are not in dispute. Defense counsel asked that defendant's shirt be analyzed during a pretrial proceeding, and the officer in charge agreed that the shirt was probably in evidence. Defendant does not offer any proof to show that the prosecution suppressed the evidence. It is possible that the state was negligent in not providing the DNA or blood typing in time for trial, but as previously discussed, this would arguably only have added the element of a physical prop to an argument that was made despite the absence of the shirt. Thus, any error in failing to produce the shirt and the results of any tests performed on it was ultimately harmless. Similarly, defendant has not shown that the result of the trial would have been different had the shirt, towel, and the test results been produced other than to claim that "[c]learly, the suppressed or negligently lost evidence would have been exculpatory." This assertion is not sufficient to meet the fourth element of the *Brady* test.

III Effective assistance of Counsel

A. Standard of Review

B. Analysis

Defendant's ineffective assistance of counsel claim fails because the failure of defendant's arguments based on the non-production of evidence and adverse presumption instruction indicates that defendant cannot show that his counsel's performance "fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial," or that his "right to the effective assistance of counsel was so undermined that it justified reversal of an otherwise valid conviction." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

IV Right to Fair and Impartial Trial

A. Standard of Review

B. Analysis

Turning to defendant's final issue regarding the statement of one of the jurors on the first day of trial, the prosecutor read to the jury the list of witnesses he thought he might call to testify including the name of the victim's sister. The trial court asked the jury whether any of them "know anything at all about this case or anyone involved in this case and if so, please, raise your hands? Not - - none of you are familiar with anything about the case or any of the potential witnesses, the prosecutor, defense attorney, the court? I see no hands going up." None of the

jurors apparently responded to the court's inquiry as to knowledge of the potential witnesses, although several jurors responded with other various possible conflicts and issues that they wanted to disclose to the court. However, following the testimony of the victim's sister, an unidentified juror stated, "I believe I know this young lady." The court responded that there was "not much we can do about that at this point in time," and then proceeded to swear in the next witness. The court did not suggest further voir dire either at that time or later in the proceedings. There is no indication in the record that either defense counsel or the prosecutor requested any further action with respect to either of the jurors.

In *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998), this Court held that "when information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause."

This Court dealt with a similar situation in *People v Graham*, 84 Mich App 663; 270 NW2d 673 (1978), where a juror did not recognize the name of a prosecution witness when the prosecutor read a list of prospective witnesses, but did recognize a witness for the prosecution as a former classmate when he testified at trial. *Id.* at 665. The witness did not disclose his acquaintance with the witness to the court or to either party during trial, and continued to sit on the jury until the conclusion of the proceedings. *Id.* The juror later disclosed that "he was prejudiced in favor of the prosecution and against the defendant because of his familiarity with the witness. He felt that under the circumstances he was not an impartial juror." *Id.* The *Graham* Court held in accord with the later ruling in *Daoust* that in order

> to mandate a new trial[,] more than the discovery of an error by way of the nondisclosure of facts is necessary. The party moving for a new trial must present proof of actual prejudice or must establish to the satisfaction of the trial court that the moving party would have successfully challenged for cause or otherwise dismissed the juror in question had the truth been revealed prior to trial. [*Graham, supra*, 84 Mich App at 668.]

It is not clear that the juror's "belief" that he or she knew the victim's sister hampered the juror's ability to be a fair and impartial trier of fact, nor does defendant allege how he was prejudiced by the juror's presence, or claim that the juror would properly have been excused for cause. Defendant argues only that the trial court should have either questioned the juror or that defense counsel should have done so, and that defendant is entitled to a hearing on the issue at this point in the litigation. Because defendant does not satisfy the test set forth in *Daoust*, defendant is not entitled to relief based on the denial of his right to an impartial jury.

Defendant also claims that he was denied the right to the effective assistance of counsel based on his attorney's failure to question the juror and to request voir dire after the juror's disclosure. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). This Court has observed that "[o]ur research has found no case in

Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would so hold . . . ." *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). A reviewing court generally views decisions related to jury selection as a matter of trial strategy which the court "declines to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Accordingly, we conclude that defendant has not established an ineffective assistance of counsel claim in this regard.

Affirmed.

/s/ Brian K. Zahra
/s/ Karen M. Fort Hood