

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAHIR JABOW,

Defendant-Appellant.

UNPUBLISHED

March 25, 2008

No. 275721

Wayne Circuit Court

LC No. 04-011314-01

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault against Nathaniel Moore, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ The trial court sentenced defendant to 1 to 4 years in prison for the felonious assault conviction and 2 years in prison for the felony-firearm conviction. This Court initially denied defendant's delayed application for leave to appeal. *People v Jabow*, unpublished order of the Court of Appeals, entered October 6, 2006 (Docket No. 269954). In lieu of granting leave to appeal, the Supreme Court remanded this case to this Court for consideration as on leave granted. *People v Jabow*, 477 Mich 996; 725 NW2d 668 (2007). Because we conclude that the trial court's conduct at the bench trial did not demonstrate bias or antagonism toward defendant, that the evidence produced below supports defendant's convictions, and that defendant was not denied the effective assistance of counsel at trial, we affirm.

Defendant first argues that the trial court demonstrated bias during its questioning of two of defendant's character witnesses, thereby violating his due process rights. This Court reviews unpreserved challenges of judicial bias for plain error. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To establish plain error, defendant must demonstrate that there was error, and that the error was plain or obvious and affected his substantial rights. *Id.* at 763; *People v Grant*, 445 Mich 535, 548-549, 552; 520 NW2d 123 (1994).

No person may be deprived of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10

¹ Defendant was acquitted of a second count of felonious assault against Robert Jenkins, as well as two counts of assault with intent to murder, MCL 750.83.

(2001). The Due Process Clause requires a “fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case.” *Bracy v Gramley*, 520 US 899, 905; 117 S Ct 1793; 138 L Ed 2d 97 (1997) (citation and internal quotation marks omitted). Thus, a criminal defendant is entitled to a “neutral and detached magistrate.” *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (citation and internal quotation marks omitted). However, “[a] trial court has wide, but not unlimited, discretion and power in the matter of trial conduct.” *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court may interrogate witnesses to clarify testimony or elicit additional relevant information. *Cheeks, supra* at 480; MRE 614(b). A party claiming bias “must overcome a heavy presumption of judicial impartiality.” *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Bias or prejudice is defined as “an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.” *Cain v Dep’t of Corrections*, 451 Mich 470, 495 n 29; 548 NW2d 210 (1996) (citation and internal quotation marks omitted). Generally, “[c]omments critical of or hostile to counsel or the parties” do not pierce the veil of impartiality. *Well, supra*. Furthermore,

[w]here a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. [*Id.* at 391.]

However, trial courts should ensure that questions are not “intimidating, argumentative, prejudicial, unfair, or partial.” *Cheeks, supra*.

Defendant first claims that the trial court demonstrated bias when questioning defense character witness Jeffrey Gates about the inferences to be drawn from the fact that defendant conducted business at his store, in which the circumstances of the assault at issue began, behind bullet-proof glass and while in possession of a firearm. We disagree.

The trial court had wide discretion to clarify testimony or elicit additional relevant information. *Cheeks, supra* at 480. Defendant’s attorney called six character witnesses who testified that defendant had a reputation for peacefulness and as a law-abiding citizen. The trial court’s questions regarding the witness’s impressions of the safety of defendant’s market and defendant’s practice of carrying weapons were relevant to the witness’s candor and knowledge of defendant’s peacefulness and law-abiding nature. Therefore, we conclude that the questions properly elicited relevant information and did not pierce the veil of judicial impartiality. *Id.*; *Cain, supra* at 495 n 29.

Defendant also claims that during an exchange with defense character witness Michael Atkins the trial court demonstrated bias against persons of Arab descent, like defendant. Atkins testified that in preparation for a job in Saudi Arabia many years ago, he was required to take a cross-cultural class about Arab culture. He learned that, historically, the culture loved children and family and was respectful. He also learned that Arab peoples were often merchants and traders. On appeal, defendant asserts that the trial court demonstrated bias following this testimony by asking Atkins whether the trading history of these peoples included the trading of slaves. Our review of the record, however, demonstrates that the trial court merely sought with this line of questioning to clarify Atkins’s testimony and understanding of the historical nature of

the Arab people's trading activities. Further, even if the trial court believed that defendant's cultural heritage included slave trading, the court did not demonstrate an aversion, hostility or deep-seated antagonism toward defendant specifically, or that any aversion toward defendant's cultural heritage could not be set aside when deliberating the charges against defendant. *Wells*, *supra* at 391; *Cain*, *supra* at 495 n 29. To the contrary, as evidenced by the trial court's express reliance upon defendant's good character in rendering its verdict, its query regarding slave trading did not prejudice defendant's trial. The trial court's conduct did not demonstrate bias, and defendant's due process rights were not violated.

Defendant next argues that the prosecutor produced insufficient evidence to convict him of the charged offenses. Specifically, defendant argues that there was insufficient evidence to show that it was he who shot at the vehicle in which Moore was riding with Robert Jenkins. This Court reviews sufficiency of the evidence claims *de novo*, viewing the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

As an essential part of its case, the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). A positive identification by a witness or circumstantial evidence and reasonable inferences arising from that evidence may be sufficient to support a conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Further, the credibility of identification testimony is to be determined by the trier of fact. *Id.* at 699-700; see also *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Sufficient evidence existed for a reasonable trier of fact to conclude beyond a reasonable doubt that it was defendant who fired at the vehicle in which Moore was riding with Jenkins. When viewed in a light most favorable to the prosecution, the evidence shows that defendant and his family had a history of disputes with Moore. Shortly before the shooting, Moore argued with defendant, damaged merchandise in defendant's store, and hit defendant's brother, Bahir Jabow, in the head with a beer bottle. Defendant told Moore, "I'm going to get you. I'm going to get you." When Moore escaped from the store, he jumped into Jenkins's vehicle. Soon after, defendant drove up to Jenkins's vehicle. Both Jenkins and Moore testified that defendant was armed with a black pistol. As Jenkins sped away, Moore watched defendant shoot a bullet at Jenkins's vehicle, which broke its back window. Later, during the police investigation, defendant told Officer Matthew Wysocki that "he followed the vehicle outside on foot and had fired one shot from his Smith and Wesson."

Defendant's argument regarding inconsistencies in eyewitness testimony is unpersuasive. Generally, conflicting testimony and witness credibility are issues for the trier of fact. *Davis*, *supra* at 700. All conflicts in the evidence must be resolved on appeal in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Here, the trial court weighed testimony that defendant and his brother looked like twins against testimony that the brothers wore different clothing on the day of the shooting, had different noses and heights, and that defendant, not his brother, shot at Jenkins's vehicle. Accordingly, we find that there was sufficient evidence for a trier of fact to conclude beyond a reasonable doubt that defendant possessed a gun and shot at Jenkins's vehicle.

Defendant next raises several claims of ineffective assistance of counsel. Because an evidentiary hearing on defendant's claims of ineffective assistance has not been held, this Court's review is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether the facts in the record suggest that defendant was deprived of his right to the effective assistance of counsel presents a question of constitutional law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To overcome this presumption, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and so prejudiced the defendant that he was deprived of a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); see also *People v Efinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant's first claim of ineffective assistance of counsel is that his trial counsel failed to call an expert witness regarding the untrustworthiness of eyewitness testimony. "Decisions regarding what evidence to present and whether to call or question witnesses 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). Here, trial counsel reasonably may have believed that an expert would have been unnecessary considering the number of witnesses to the shooting. Further, defendant's trial counsel likely recognized that the trial court was already familiar with the potential limitations and weaknesses in eyewitness identification. Therefore, this Court concludes that defendant's trial counsel's strategy fell within the objective standard of reasonableness on this claim. *Pickens*, *supra* at 302-303.

Defendant's second claim of ineffective assistance of counsel is that his trial counsel failed to object to the trial court's biased questions and comments. However, counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). This Court has already concluded that the trial court's conduct did not demonstrate bias. Thus, an objection to this conduct would have been futile, and trial counsel's failure to object did not constitute ineffective assistance.

Defendant's third claim of ineffective assistance of counsel is that his trial counsel failed to object to the prosecutor's cross-examination of character witnesses Gates and Atkins regarding whether they were aware of another incident during which someone from defendant's store shot at or pursued a store patron. However, MRE 405(a) permits cross-examination of character witnesses regarding "relevant specific instances of conduct" as a test of the witness's knowledge and candor. *People v Vasher*, 449 Mich 494, 508 n 2; 537 NW2d 168 (1995). Here, defendant put his character at issue when he questioned Jones and Officer James Coss regarding his reputation as a peaceful person and a law-abiding citizen. Therefore, pursuant to MRE 405(a), the prosecutor was entitled to interrogate those witnesses regarding specific instances of defendant's conduct to test their candor and knowledge of defendant's reputation. *Vasher*, *supra*; see also *People v Dobek*, 274 Mich App 58, 101; 732 NW2d 546 (2007). Thus, an

objection to this conduct would have been futile and defendant's attorney was not, therefore, ineffective for having failed to object. *Ackerman, supra* at 455.

Finally, defendant claims ineffective assistance of counsel because his trial counsel failed to interview Officer Wysocki in advance of trial. Consequently, defendant alleges that trial counsel was surprised by the officer's testimony that defendant admitted that "he followed the vehicle outside on foot and had fired one shot from his Smith and Wesson." However, defendant fails to cite factual support on the record demonstrating his trial counsel's surprise. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), citing *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Accordingly, defendant has abandoned this issue on appeal.

Affirmed.

/s/ Deborah A. Servitto

/s/ Joel P. Hoekstra

/s/ Jane E. Markey