

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMPSON LEE SMITH,

Defendant-Appellant.

UNPUBLISHED

December 17, 1996

No. 181409

LC No. 94-50068 FC

Before: O’Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (felony-firearm). MCL 750.227b; MSA 28.424(2). He then pleaded guilty to being an habitual offender, second offense. MCL 769.10; MSA 28.1082. He was sentenced to a term of imprisonment of two years with respect to the felony-firearm conviction, to be followed by a term of thirty to fifty years with respect to the habitual offender conviction predicated on the second-degree murder conviction. Defendant now appeals as of right, and we affirm.

Defendant brings several arguments premised on several of the trial court’s evidentiary rulings, all pertaining to the testimony of one witness. Defense counsel called Allen Lee Burrage to the stand with the intention of eliciting testimony to the effect that defendant had reason to fear Jimmy Slaughter, the man defendant was accused of murdering. This testimony was designed to strengthen defendant’s contention that he had acted in self-defense, or was guilty of, at most, only voluntary manslaughter. However, when defense counsel attempted to examine Burrage, the prosecution interposed objections based on hearsay and leading the witness, which objections the court sustained. Defense counsel, though having called Burrage for this specific testimony, ended his questioning of the witness without having elicited it. Counsel then rested his case.

Defendant first contends that the trial court’s refusal to reopen the proofs in light of defense counsel’s feckless attempt to examine Burrage constituted an abuse of discretion. While defendant’s

* Circuit judge, sitting on the Court of Appeals by assignment.

contention is premised on the assumption that his trial counsel did, in fact, move to reopen the proofs, our review of the record indicates that no such motion was brought. Rather, defense counsel, after he rested his case but before the jury began its deliberations, stated that he wished to put something on the record out of the hearing of the jury. He then apprised the court of the substance of the evidence he had intended to introduce through Burrage's testimony. Significantly, he failed to request that the proofs be reopened. Although defendant maintains that his attorney's statements can be interpreted as a motion to reopen the proofs, counsel clearly stated that he only wished the record to reflect the substance of Burrage's intended testimony. We simply cannot fault the trial court for failing to do something that defense counsel did not request. Therefore, we conclude that the court's failure to reopen the proofs was not an abuse of discretion. *People v Keeth*, 193 Mich App 555, 561; 484 NW2d 761 (1992).

Defendant also alleges that his trial counsel's failure to conduct a competent examination of Burrage constitutes ineffective assistance of counsel. In order to preserve this issue for appeal, defendant should have moved for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). However, this Court may still review this issue if the alleged deficiencies in defense counsel's performance are apparent from the record. *Id.*

In order to establish ineffective assistance of counsel, defendant must establish two things. First, that his counsel's performance was so deficient that his attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment, and second, that the deficient performance prejudiced the defense to the extent that defendant was deprived of a fair trial with a reliable result. *People v Johnson*, 451 Mich 115, 121; 545 NW2d 637 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The failure to present evidence can constitute ineffective assistance of counsel only if it deprived defendant of a substantial defense. A substantial defense is one which might have made a difference in the outcome of trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995).

We find that defense counsel's failure to examine Burrage about his warning to defendant was not a matter of sound trial strategy, but a mistake. Apparently, defense counsel prematurely ended his examination of Burrage, thus failing to ask the witness about the alleged warning he had given defendant on the morning of Slaughter's murder.¹ Because defense counsel called Burrage for a specific purpose and then inexplicably failed to elicit the intended testimony from him, we conclude that defense counsel committed error.

However, we also find that defendant suffered no apparent prejudice from his counsel's mistake since defendant was not denied the opportunity to establish that he acted in self-defense when he shot Slaughter. Self-defense requires both an honest and reasonable belief on the part of a defendant that his life was in imminent danger or that there was a threat of great bodily harm when he acted. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). Defendant testified that he held an honest and reasonable belief that his life was in imminent danger when he shot Slaughter. Defendant stated that he argued with Slaughter on the morning of the shooting, that Slaughter later made a

“shooting” gesture toward him with his hand, and that Slaughter was smoking crack prior to the shooting. When defendant approached Slaughter on the street, Slaughter began arguing with defendant. Defendant saw Slaughter reach into his coat and then begin to pull his hand out, as if he were going to produce a weapon. Defendant thought that Slaughter was going to shoot him because Slaughter always carried weapons.

Moreover, Jimmy Robinson testified that he also saw Slaughter reach into his jacket and start to bring his hand out before defendant fired at him. Significantly, Robinson stated that defendant told him he believed Slaughter was “supposed to have been having them hurt or killed or something like that.” Therefore, it is evident from the record that, notwithstanding Burrage’s testimony, defendant submitted evidence to establish that he acted in self-defense when he shot Slaughter, and defendant’s testimony was corroborated by that of Robinson. Had Burrage’s testimony been the only testimony capable of corroborating defendant’s testimony, we would be more inclined to find ineffective assistance of counsel, but as it stands, defendant’s testimony was independently corroborated, though not as well as it might have been. Because defendant failed to establish that his attorney’s mistake denied him a substantive defense, *Hyland, supra*, we conclude that defendant was not denied effective assistance of counsel.

The final argument defendant brings with respect to the court’s evidentiary rulings concerns the rulings themselves. Defendant submits that he is entitled to a new trial because the court abused its discretion in unjustifiably sustaining meritless prosecution objections. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Lugo, supra*. We will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.* A decision on a close evidentiary question cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 290; 531 NW2d 659 (1995).

Defendant argues that the court improperly excluded as hearsay Burrage’s statement that he and the victim of the crime “had a little disagreement” Upon the prosecution’s objection, the court stated, “Yes, let’s not have any of that, if you please,” to which defense counsel responded, “Yeah, Judge, I agree, I’m trying to stay away from that.” Thus, defense counsel conceded that the court’s ruling was proper, thereby failing to preserve this issue for our consideration. *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). Defendant also maintains that the court abused its discretion by sustaining the prosecution’s objections to two leading questions that defense counsel asked Burrage during direct examination. After reviewing the transcript, we find that these questions were, in fact, leading, and the court properly sustained the objections. Moreover, we note that the court gave defense counsel ample opportunity to rephrase his questions in acceptable form.

Defendant raises one final argument on appeal pertaining to his sentence. He contends that the sentencing court impermissibly based the sentence imposed, which exceeded the guidelines recommendation, “entirely” on defendant’s status as an habitual offender. In support of his position, defendant relies on the following statement by the court: “I’m taking into consideration that the guidelines go up to twenty-five years; I’m adding on an additional five years *by reason of your being an habitual offender.*” (Emphasis supplied.)

While defendant's legal position is correct, we find it inapplicable under the facts of the present case. As set forth in *People v Curry*, 142 Mich App 724, 735-736; 371 NW2d 854 (1985), "[i]f a sentence is to be tailored not only to the individual but also to the crime committed then we cannot permit the habitual offender aspect to be the sole factor in arriving at a sentence. The court must keep in mind that it is sentencing the defendant for a particular statutory violation, and it should tailor a sentence that is an appropriate, albeit enhanced, penalty for that particular crime." In the present case, while the quoted words of the sentencing court imply that defendant's status as an habitual offender was the sole reason for the particular sentence imposed, a full reading of the court's words at sentencing reveals that this was not the case. The court expressly considered the particular facts of this case, the effect on the victim's family, the defendant's background – including his lack of education, motivation and achievement – and then stated, "I'm taking into consideration all the factors in the case and the fact that you are a Habitual Second Offender." Thus, while defendant has emphasized one phrase, taken out of context, a complete reading of the court's words indicates that the court's sentence was based on legitimate considerations. We find no abuse of discretion in the sentence imposed. See *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power

¹ This was probably due to the barrage of unrelated objections, most of them sustained, which the prosecutor advanced during Burrage's examination. However, as defendant states, no sustainable hearsay objection could have prevented Burrage from testifying that he warned defendant about Slaughter, because the warning would not be introduced to prove its truth, MRE 801(c), but to prove the existence of the warning itself and that defendant had notice of it. See *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993).