

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN GALAHAN LONG,

Defendant-Appellant.

UNPUBLISHED
November 7, 1997

No. 193404
Recorder's Court
LC No. 95-007466

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty to forty years in prison for his second-degree murder conviction, and two years in prison for his felony-firearm conviction, with the former sentence to be served consecutively to the latter. We affirm.

Defendant raises seven issues on appeal. In his first issue, defendant claims that the decisions made by his trial attorney concerning the witnesses she called at trial deprived him of effective assistance of counsel. We disagree, finding that all of counsel's decisions were sound exercises of trial strategy. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

I

First, defendant argues that trial counsel provided ineffective assistance when she waived the testimony of defendant's alibi witness. We disagree. The alibi witness failed to appear for trial, despite acknowledging receipt of a subpoena and having been repeatedly reminded by counsel to appear for trial. Counsel also testified at the *Ginther* hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), that each time she spoke to the witness over the phone he seemed "reticent" to testify. Counsel testified that she waived the witness' testimony because she believed he would not support

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

defendant and only waived the testimony with defendant's permission. Further, the trial court correctly found at the *Ginther* hearing that the witness' testimony would not have provided defendant with an alibi. The witness testified at the *Ginther* hearing that defendant left his house at 6:00 p.m. on May 26, 1995, the day of the murder. An eyewitness to the murder testified at trial that the murder occurred near 8:00 p.m. We conclude that defendant has failed to show that trial counsel's waiver of the alibi witness was prejudicial to defendant's right to a fair trial. *People v Tommolino*, 187 Mich App 14, 17, 19-20; 466 NW2d 315 (1991).

Next, defendant argues that trial counsel provided ineffective assistance when she agreed to exclude the testimony of an eyewitness to the murder who could not make a courtroom identification of defendant as the murderer. We disagree. Trial counsel agreed to exclude the witness' testimony after she interviewed him and found that he was not only equivocal about identifying defendant but also angry over having been detained as a material witness. The witness' ability to identify defendant was called into question by his anger over his detainer and by the fact that he had been shown an illegally constituted photo lineup and pressured by Detroit police officers into selecting defendant. Counsel also agreed to the exclusion because she feared that the witness would testify about a fight between defendant and the victim that occurred approximately two weeks before the murder, even though another witness testified regarding the same alleged altercation. We conclude that trial counsel's failure to call the eyewitness did not deprive defendant of a substantial defense and so did not prejudice the outcome of his trial. Cf. *People v Johnson*, 451 Mich 115, 123-125; 545 NW2d 637 (1996); see also *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Finally, defendant argues that trial counsel provided ineffective assistance when she failed to seek and call any of the forty to fifty people supposedly near the murder scene around the time the murder took place. We disagree. Trial counsel had no obligation to subpoena any such "res gestae" witnesses when neither she nor the prosecutor knew their identities. See *People v Burwick*, 450 Mich 281, 287-289; 537 NW2d 813 (1995). Further, counsel's decision not to call any of these potential witnesses was well-considered. See *People v Lawson*, 124 Mich App 371, 374-376; 335 NW2d 43 (1983). Counsel testified at the *Ginther* hearing that she knew the area in which the murder occurred and believed, based on her knowledge, that few of the people supposedly on the scene could be found and that fewer still would agree to testify. Counsel's belief was supported by the suspect nature of the testimony of the "res gestae" witness that appellate counsel subpoenaed for the *Ginther* hearing. The witness' testimony did not corroborate the testimony of the eyewitnesses who testified at trial; further, although the person who brought the witness forward could have brought the witness to the attention of defense counsel during trial, she failed to do so. We conclude that none of trial counsel's contested decisions prejudiced defendant's right to a fair trial or deprived him of a substantial defense that would have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial based on ineffective assistance of counsel. See *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 593 (1996);

II

Defendant's second issue on appeal is that the trial court abandoned its impartiality by its involvement in the trial attorneys' decision to exclude the testimony of the hostile eyewitness. We disagree. The trial court showed no partiality; it merely exercised its discretion in conducting defendant's trial by asking the trial attorneys whether either planned to call the eyewitness to testify. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). Indeed, the court's comments were not of the nature to unduly influence the jury or deprive defendant of his right to a fair and impartial trial. *Id.* The court's questions to the attorneys were only meant to ascertain whether there was any point in continuing a pretrial hearing into the admissibility of the eyewitness' testimony, not to force the attorneys into abandoning the eyewitness' testimony. Further, the court's remark to the jury that it "prodded" the attorneys into agreeing to forgo the testimony could not have affected the impartiality of the jury because the court made the comment after the jury returned its verdict. *Id.* at 698-701. We conclude that the trial court's conduct regarding the hostile eyewitness did not deprive defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 341; 543 NW2d 342 (1995).

III

For his third issue on appeal, defendant argues that the trial court abused its discretion by allowing the prosecutor to present testimony that defendant and the victim had been involved in a fight over a gun a few weeks before the victim's murder. We disagree. The testimony was not prior bad acts evidence barred by MRE 404(b)(1), as defendant contends; rather, the testimony was relevant to and probative of defendant's motive for the murder and intent to commit it. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993); *People v Ullah*, 216 Mich App 669, 674-675; 550 NW2d 568 (1996). After the fight, in which defendant was matched against the victim and two other men, a witness saw defendant run away and heard him yell, "You can't disrespect me like that. I'll be back." Thus, the fight is properly seen as an event so closely linked in time to the murder that they blended into one event such that proof of the fight explained the circumstances of the murder. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Delgado*, 404 Mich 76, 83-84; 273 NW2d 395 (1978).

Further, defendant failed to ask for a limiting instruction regarding use of the testimony. The jury instructions nevertheless fully apprised the jurors of their duties, how to weigh the evidence, the elements of the offenses, and the criteria for evaluating witnesses. See, generally, *People v Mitchell*, 223 Mich App 395, 397-399; 566 NW2d 312 (1997). Reversal is not required as a result of the trial court's failure to give a limiting instruction in light of defendant's failure to request one. *Id.* We therefore conclude that the trial court did not abuse its discretion in allowing the prosecutor to present testimony regarding the fight involving defendant and the victim that occurred before the murder. See *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

IV

Defendant's fourth issue on appeal is that the trial court deprived him of a fair trial by improperly limiting trial counsel's ability to cross-examine the witness who testified regarding the fight between defendant and the victim that occurred before the murder. We disagree. In ruling that the prosecutor could call a previously unendorsed witness as a rebuttal witness if defense counsel, on cross-

examination, materially challenged the credibility of the witness testifying about the fight, the trial court was simply exercising its discretion to control the scope of cross-examination. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). How defense counsel chose to handle her cross-examination after that was purely a matter of trial strategy. *People v Alderete*, 132 Mich App 351, 359-360; 347 NW2d 229 (1984).

Second, defense counsel managed to cross-examine the witness effectively. Counsel established that the witness did not get a clear look at defendant at the time of the fight, that the witness gave the police a different nickname than defendant's in identifying defendant as a participant in the fight, and that the witness was using heroin at the time of the fight. Defense counsel apparently felt comfortable enough with this evidence to argue that the jury should "dump" the witness' testimony because it was not "worthy of anything." We conclude that defendant's constitutional right to confront and cross-examine this witness was not violated by the trial court's provisional grant to the prosecution of the right to call the rebuttal witness. See *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993).

V

Next, defendant argues that the trial court erred in denying his motion for a directed verdict because the prosecution failed to present sufficient evidence to send the issues of premeditation and deliberation to the jury. Defendant also argues that the lack of evidence supporting premeditation and deliberation triggered a "compromise verdict" of second-degree murder when all the evidence was sent to the jury. We disagree.

Our review of the evidence leads us to conclude that the trial court did not err in denying defendant's motion for a directed verdict. The evidence, viewed in a light most favorable to the prosecution, was sufficient to allow the jury to find that the prosecutor had established the elements of first-degree murder, including premeditation and deliberation. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The testimony about the fight involving defendant and the victim described a prior relationship between the victim and defendant and defendant's actions before the murder. *Anderson, supra*. After the fight, defendant fled the area and a witness heard him yell, "You can't disrespect me like that. I'll be back." Further, the testimony of two eyewitnesses who testified at trial established that defendant's acts toward the victim on May 26, 1995, appeared deliberate. Both testified that defendant came out of a building near the murder scene, approached the victim, fired five or six shots at him, and then ran away. One witness testified that defendant fired a few shots at the victim, then stepped closer to the victim and fired a few more shots. Moreover, because sufficient evidence was adduced at trial to support an inference of first-degree murder, defendant's argument that the jury's verdict of second-degree murder was a compromise verdict will not stand. *People v Melvin*, 70 Mich App 138, 147-148; 245 NW2d 178 (1976).

VI

Defendant's sixth issue on appeal is that the prosecutor deprived him of a fair and impartial trial by making improper remarks during her rebuttal argument. We disagree. The remarks were permissible because they were supported by the evidence adduced at trial and

responded to comments made during defense counsel's closing argument. *People v Hart*, 161 Mich App 630, 638; 411 NW2d 803 (1987); *People v Flanagan*, 129 Mich App 786, 795-796; 342 NW2d 609 (1983). First, the prosecutor did not denigrate defense counsel by remarking that counsel was "scared" by the testimony of one of the eyewitnesses. The remarks were made in response to defense counsel's strenuous efforts during her closing argument to discredit this witness. Cf. *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991) (concurring opinion by Wahls, P.J.); see also *Hart, supra*. Second, the prosecutor did not impermissibly vouch for the witness' credibility. The witness' testimony was well supported by the other evidence at trial. *People v Rosales*, 160 Mich App 304, 309; 408 NW2d 140 (1987); *Flanagan, supra* at 795-796. We conclude that the prosecutor's remarks thus did not deprive defendant of a fair and impartial trial. *McElhaney, supra* at 283.

Finally, defendant argues that the cumulative weight of all the errors committed during his trial requires us to reverse his convictions and order a new trial. Having found that no error occurred during defendant's trial, we must disagree. *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 515 (1995).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan