

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE SHAWN MURPHY,

Defendant-Appellant.

UNPUBLISHED

February 24, 1998

No. 187818

Oakland Circuit Court

LC No. 95-137217 FC

Before: O’Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Defendant pleaded guilty to being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and was thereafter found guilty by a jury of first-degree (premeditated) murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment without parole for the first-degree murder conviction. He was also sentenced to a concurrent prison term of three to five years for being a felon in possession of a firearm, plus a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant’s convictions stem from allegations that he shot and killed Horace Kelly at about 12:30 a.m. on February 12, 1994. On the night of the shooting, the victim and his fiancée, Felicia Martin, went dancing at a nightclub at the Plaza Hotel in Southfield, Michigan. Afterwards they arranged to get a room in a hotel. Immediately after checking in at the hotel desk, they saw three men and three women enter the hotel. Kelly and Martin then got on the elevator and went up to their room. When they entered the room, the phone was ringing. Kelly answered the phone, said “hello,” and hung up. Kelly then told Martin that they were in danger. The couple returned to the front desk and checked out of the room.

As they started to walk out of the hotel, the same group of men was standing near the exit. One of them put a gun to Kelly’s head. Kelly wrestled with the man, broke free, and ran through the doors. A second man (defendant) reached into his coat and pulled out a pistol. Kelly attempted to flee through the hotel parking lot, but fell to the ground, apparently wounded. The two assailants then stood over

Kelly and shot him repeatedly in the face and chest. Defendant was subsequently convicted of the murder.

I

On appeal, defendant first argues that the trial court erred by allowing the introduction of a hearsay statement made by the murder victim. At trial the prosecutor asked Martin whether she talked with the victim after he received a phone call in their hotel room. Martin testified that the victim told her “we are in danger.” Defense counsel objected to this statement as hearsay. The trial court overruled the objection, noting that the statement was an expression of the victim’s state of mind. The court also noted that the statement was not hearsay because it was not being used to prove the truth of the matter asserted.

On appeal, defendant argues that the statement was inadmissible hearsay, that it was more prejudicial than probative, and that it denied defendant his right to confrontation. However, defendant did not preserve the latter two of these claims. To preserve an issue for appeal, a party must object to the admission of the evidence at trial and specify the same ground for objection as is asserted on appeal. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Since defendant only objected to the statement on the basis of hearsay, we will analyze this claim only. After reviewing the record, we find no abuse of discretion in the trial court’s decision to admit the statement. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

First, we find that the statement was not hearsay because it was not being used to prove the truth of the matter asserted. MRE 801(c). Rather, it was used by the prosecutor to explain the victim’s decision to immediately check out of the hotel. In any case, even if the statement was hearsay, it fell within an exception to the hearsay rule. MRE 803(3) provides that a “statement of the declarant’s then existing state of mind” is not excluded by the hearsay rule. Since the victim’s statement was used to show his belief that the couple was in danger and to explain his somewhat unusual subsequent behavior, it was properly admitted under MRE 803(3). See *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996).

II

Defendant next argues that the trial court erred by failing to require that he expressly waive his right to testify on the record. Initially, we note that this issue is not preserved. Defendant did not argue to the trial court that his waiver must be explicit and on the record, and the court did not address this issue. In any case, were we to analyze defendant’s claim, we would hold that the trial court did not have a duty to ascertain on the record whether defendant knowingly and intelligently waived his right to testify. This point of law has been well established in Michigan. See, e.g., *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995); *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

III

Defendant's next argument is that the trial judge erred by failing to instruct the jury regarding defense of another or imperfect self-defense. However, defendant did not request instructions regarding these issues or object to the instructions given. As our Supreme Court has noted, a verdict shall not be set aside due to the trial court's failure to instruct on any point of law unless the defendant requests such instruction. *People v Pouncey*, 437 Mich 382, 386; 471 NW2d 346 (1991). Furthermore, where no objection is made to the instructions as given by the trial court, appellate review is waived absent manifest injustice. *People v Johnson*, 187 Mich App 621, 627-628; 468 NW2d 307 (1991). Manifest injustice occurs when the erroneous or omitted instructions pertain to a basic and controlling issue in the case. *Johnson, supra* at 628. Since neither the "defense of another" or "imperfect self-defense" theories were basic or controlling issues in the case before us, we find no manifest injustice.

IV

Defendant next argues that his conviction and sentence for being a felon in possession of a firearm should be vacated because the statute violates his right to bear arms under the Michigan Constitution. Once again, this issue is unpreserved because defendant did not raise the issue below. However, we will review this claim of constitutional error because it could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). After reviewing the applicable Michigan law, we would agree with the holding in *People v Swint*, 225 Mich App 353 ; ___NW2d___ (1997), wherein a panel of this Court held that MCL 750.224f; MSA 28.421(6) does not violate the constitutional guarantee of the right to bear arms contained in Const 1963, art 1, §6. Giving this holding, we find no basis in Michigan law for reversal.

V

Defendant's next contention on appeal is that he was denied the effective assistance of trial counsel. We disagree. To show ineffective assistance of counsel, defendant must show that his trial counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious as to deprive defendant of his Sixth Amendment right to representation. *People v Pickens*, 446 Mich 298, 309, 326; 521 NW2d 797 (1994). Defendant must also overcome the presumption that the challenged actions could be considered sound trial strategy, and must prove that the deficient performance prejudiced the defense. *Id.* at 309, 312; *Strickland v Washington*, 466 US 668, 695; 104 NW2d 2052; 80 L Ed 2d 674 (1984). Defendant has not done so.

First, the majority of errors alleged by defendant pertain to matters of trial strategy. Since this Court will not second-guess counsel's decisions, *People v Butler*, 193 Mich App 63, 66-67; 483 NW2d 430 (1992), we find no basis for reversal. Second, we have already discussed a number of defendant's claims (relating to the jury instructions and the constitutionality of MCL 750.224f), and found no error. Finally, we note not only that the evidence against defendant was overwhelming, but that no prejudice was suffered.

VI

Defendant sets forth one final argument in a Rule 11 brief pursuant to Administrative Order 1981-7. Defendant argues that insufficient evidence was presented to prove the premeditation required for a conviction of first-degree murder. According to defendant, the evidence at most showed that he reacted instantaneously in shooting the victim. We disagree. In reviewing this claim, we view the evidence in a light most favorable to the prosecution and determine whether a rational jury could have concluded that the element of premeditation was proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 465-466; 502 NW2d 177 (1993). Our review does not support defendant's contention. Rather than the unplanned, spontaneous encounter claimed by defendant, the evidence strongly suggests that defendant and his companions planned and carried out the premeditated murder of Horace Kelly.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Michael R. Smolenski