

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DEVAULE GOODNIGHT-BEY,

Defendant-Appellant.

UNPUBLISHED

August 11, 1998

No. 192014

Calhoun Circuit

LC No. 94-002789

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with a dangerous weapon, MCL 750.82; MSA 28.277, and was sentenced to two to four years in prison. He now appeals as of right. We affirm in part and remand.

This case arose from an incident of domestic violence between defendant and his girlfriend at the house that they shared. The victim testified that defendant twice hit her with a two-by-four board during the argument. On appeal, defendant raises four issues for our review.

Defendant first argues that he is entitled to a new trial because he was denied his right to an impartial jury. Specifically, defendant claims that one of the jurors knew the victim from school, and that the juror waved to the victim during voir dire and the victim waved back.

The granting of a new trial on the ground that a juror was biased in favor of a particular party is discretionary with the trial court, and this Court reviews such a decision for an abuse of discretion. *Hunt v CHAD Enterprises, Inc.*, 183 Mich App 59, 64; 454 NW2d 188 (1990). At the evidentiary hearing on remand, defendant testified that one of the jurors waved to his girlfriend during voir dire and that the juror told his attorney that he knew defendant's victim from school. Defendant claims that his attorney ignored his request to dismiss the juror. In contrast, defendant's trial attorney testified that he neither personally recalled nor do his trial notes reflect that a juror waved to the victim, that a juror went to school with the victim, nor that defendant requested him to dismiss a juror. At the conclusion of the hearing, the trial court stated that it found defendant's testimony incredible and did not grant defendant a new trial. This Court must defer to the lower court's resolution of factual issues, especially where it

involves the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Therefore, the trial court's decision was not an abuse of discretion.

Next, defendant argues that that he was denied a fair trial because there was no proper purpose for the admission of certain photographs in violation of MRE 404(b). At trial, defendant argued only that the evidence was improper because it was unrelated to his assault charge, not that the evidence was impermissible character evidence admitted to show defendant's propensity to commit the assault. Therefore, this issue is unpreserved for our review because an appeal based on one ground is not preserved where the objection at trial was on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Next, defendant argues that that he is entitled to a new trial because he was denied the effective assistance of counsel. When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). To prove ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, defendant must show that, absent counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* at 314. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Defendant argues that he was denied effective assistance of counsel because his trial counsel ignored his request that a juror be dismissed because of the juror's relationship with the victim. However, because we defer to the lower court's determination that defendant's testimony at the evidentiary hearing was incredible, defendant has not met his burden of overcoming the presumption that his counsel was effective.

Finally, defendant argues that the requirement under MCR 6.433(D)¹ that he demonstrate "good cause" to receive a transcript of jury voir dire denies him the equal protection of the law. This Court rejected defendant's argument in *People v Bass (On Rehearing)*, 223 Mich App 241, 255-260; 565 NW2d 897 (1997), vacated in part on other grounds, 456 Mich 851 (1998), but held on other grounds that the trial court must order the preparation of a transcript of voir dire in all cases, such as the instant one, where appointed appellate counsel was not the indigent defendant's trial counsel. *Id.* at 260. In denying leave to appeal in *Bass*, our Supreme Court stated that its decision was "based on the understanding that the Court of Appeals determined that the impediments of the court rule constitute state interference with appellate counsel's ability to provide effective assistance." 457 Mich 865. Accordingly, because defendant is entitled to a transcript of voir dire under *Bass*, we remand for production of the transcript and an opportunity for defendant to raise claims of error involving voir dire.

We affirm in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

¹ MCR 6.433(D) provides an exception to the general requirement that the trial court order the preparation of trial transcripts on request of an indigent defendant unless the transcript has already been ordered as provided in MCR 6.425(F)(2):

The court shall not order the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause.

MCR 6.425(F)(2)(a)(i) provides that the trial court must direct in the order appointing a lawyer for an indigent defendant that the court reporter prepare and file the following:

[T]he trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause.