

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO V. JONES,

Defendant-Appellant.

UNPUBLISHED

October 5, 1999

No. 206963

Recorder's Court

LC No. 95-013733

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, three counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to fifteen to twenty-five years in prison for the second-degree murder conviction, five to ten years in prison for each of the assault convictions, and two years in prison for the felony-firearm conviction, with the second-degree murder sentence to run concurrently with the assault sentences, and consecutively to the felony-firearm sentence. We affirm.

Defendant first claims on appeal that the prosecutor improperly argued that defendant's attempts to contact alibi witnesses several months prior to his arrest demonstrated defendant's consciousness of guilt. Because defendant did not object at trial to the alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair trial. *Id.*

Our review of the record shows that the challenged argument was proper because it was reasonably based upon inferences drawn from evidence presented at trial. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Moreover, any prejudice that resulted from the prosecutor's argument could have been eliminated by a curative instruction.

Defendant also argues that the trial court's failure to take judicial notice of the date his arrest warrant was issued, which preceded his attempts to contact alibi witnesses, constitutes error requiring reversal. Although defendant did not request that the court take judicial notice of this date at trial, he contends that the trial court was obligated under MRE 201(c) to take judicial notice on its own initiative. Because defendant failed to raise this issue in the trial court and fails now to cite relevant authority for the proposition that failure of the court to take judicial notice on its own initiative is grounds for reversal, we deem this argument waived. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

Defendant next claims that his convictions must be reversed because the court's instructions to the jury, which was deadlocked, were unduly coercive. Because defendant did not object to the court's instruction, any error in this regard is waived unless relief is necessary to avoid manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997). Our review of the record shows that, when viewed in their entirety, the trial court's instructions to the deadlocked jury were not unduly coercive. The court's statements were not the type that would pressure a dissenting juror to change his mind to break a deadlock. See *People v Pollick*, 448 Mich 376, 385-386; 531 NW2d 159 (1995). Thus, relief is not necessary to avoid manifest injustice.

Defendant also argues that the trial court committed numerous errors when it instructed the jury before they began deliberations. We disagree. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected a defendant's rights. *Id.* at 252-253. Again, failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. *Swint, supra*.

Except for defendant's final claim of error regarding the trial court's jury instructions, defendant failed to preserve his claims of error in this regard by objecting at trial. However, upon review of the record, we conclude that the jury instructions fairly presented the issues to the jury and protected defendant's rights; thus, relief is not necessary to avoid manifest injustice. We briefly address each claim of error.

Defendant claims the trial court erred in failing to instruct the jury on the dangers of misidentification discussed in *People v Franklin Anderson*, 389 Mich 155; 205 NW2d 461 (1973). However, our review of the record shows that the trial court did instruct the jury on identification, cautioning the jury to consider the witness's state of mind and the circumstances at the time of the identification in deciding how dependable the identification was. Defendant also claims that the trial court should not have instructed the jury on the doctrine of transferred intent. However, our review of the record reveals that evidence presented at trial was sufficient to support giving the instruction. The jury could infer from the evidence presented that defendant intended to kill Curtis Williams, see *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), and that intent could be transferred to the murder victim, who stood next to Williams. See *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). Defendant's next claim is that the trial court's use of the term "inadvertence" when instructing the jury on assault with intent to murder could have confused the jury, leading them to believe that negligence or reckless disregard could satisfy the elements of assault with intent to murder.

However, the record shows that the trial court clearly stated, twice, that the jury must find that defendant had the intent to kill. Furthermore, the jury had just been extensively instructed on the concept of transferred intent, which instruction included the term “inadvertance.” Defendant also claims that the trial court’s instruction on reasonable doubt was erroneous because it did not use the term “moral certainty.” This claim of error is without merit as this Court has expressly held that the failure to include the term “moral certainty” when instructing a jury on the concept of reasonable doubt does not warrant reversal. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Defendant’s final and only preserved claim of error regarding jury instructions is that the court improperly instructed the jury that it may infer defendant had consciousness of guilt when he gave the police a false name at the time of his arrest. We disagree. Although the instruction given by the court did not specifically address the concerns raised by this Court in *People v Thompson*, 101 Mich App 609, 613; 300 NW2d 645 (1980), the instruction informed the jury that a person may hide his identity for reasons other than consciousness of guilt. We find that this instruction fairly presented the issue to the jury and protected defendant’s rights.

Defendant next claims that the trial court erred in denying his motion to exclude evidence of weapons, body armor vests, and assorted ammunition that was found at his brother’s residence. Defendant contends that the evidence was irrelevant because it was not linked to him or the charged offenses and was highly prejudicial. The admission of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). There is an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

As a general rule, relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Starr, supra* at 497. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin*, 223 Mich App 530, 536; 566 NW2d 677 (1997). Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Crawford, supra* at 389.

The prosecutor in this case elicited testimony at trial that a search of the home of Nathaniel Jones, defendant’s brother, and a vehicle outside that residence, produced numerous weapons, including a number of rifles and handguns, as well as two body armor vests and an assortment of ammunition. Neither defendant nor his brother was present when the home was searched. However, testimony established that spent casings, a bullet jacket fragment, and a spent bullet recovered from one of the shooting scenes matched either of two of the handguns recovered during the search. Although defendant argues that no link exists between him and the guns that were scientifically connected to the shootings, one of the victims of the shootings identified defendant and his brother as the two shooters.

Arguably, then, the evidence of those guns is relevant to show that defendant had access to the weapons ultimately linked to the crime. Thus, we find no abuse of discretion in admission of testimony regarding their discovery and testing.

With regard to testimony concerning discovery of the weapons and other items not scientifically linked to the charged offenses, we find that there was nothing to connect that evidence to defendant or the charged offenses. See *People v Hall*, 433 Mich 573, 582 n 7; 447 NW2d 580 (1989). Many of the weapons seized during the search of Nathaniel's residence were rifles, clearly not the sort of weapon alleged to have been used to commit the charged offense. Furthermore, much of the ammunition seized was not of the caliber used in weapons such as those used to commit the charged offense, and there was no evidence presented that the shooters in this case were wearing body armor vests. Citing *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), the prosecution argues that evidence of other crimes is admissible as res gestae evidence where the evidence is so blended with the crime charged that it makes it necessary to show the entire transaction. However, the prosecution does not explain how discovery of the arsenal of weapons and other items was essential to showing "the entire transaction," other than to say that testimony established that there were multiple defendants with multiple weapons. We conclude, therefore, that because there was no evidence to connect the guns, aside from those matching the spent casings, and other challenged items found at Nathaniel's residence with the charged offenses, evidence of those guns and items was not relevant and admission of testimony regarding their discovery constituted an abuse of discretion.

However, given the strength of the untainted evidence, particularly the eyewitness identification of defendant as the shooter at both scenes, defendant has not affirmatively shown that "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Therefore, we deem the error harmless and conclude that reversal is not required.

Defendant next claims that he did not receive effective assistance of counsel at trial. We disagree. Defendant did not move for an evidentiary hearing or new trial based on ineffective assistance of counsel in the trial court. Therefore, this Court's review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Pickens*, *supra* at 314.

Defendant's first claim of ineffective assistance of counsel is that his trial counsel failed to move to reopen the proofs to introduce evidence of the date defendant's arrest warrant was issued, or request that the trial court take judicial notice of the date defendant's arrest warrant was issued. Defendant claims that "[p]roof that the warrant issued in May, could have persuaded some jurors that defendant could well have learned from relatives and acquaintances contacted by the police in May and June that

he was being sought.” Defendant contends that such information would have effectively negated the prosecutor’s argument that defendant’s efforts to locate alibi witnesses in June and July could only be explained as evidence of consciousness of guilt. However, because no testimony was presented at trial regarding when defendant *learned* that an arrest warrant had been issued, evidence of when it issued would not necessarily counter the prosecution’s argument. The jury would, nonetheless, have been faced with deciding whether defendant’s efforts to secure alibi witnesses indicated a consciousness of guilt. On this record, we cannot conclude that the result of the proceedings would have been different had the jury learned of the date the warrant issued.

Defendant also contends that he was denied effective assistance of counsel because his trial counsel failed to object to the admission of certain testimony at trial. Curtis Williams, one of the assault victims, was asked questions by the prosecutor about prior disagreements among Williams, defendant, defendant’s brother, and the murder victim. Williams asserted that “the brothers” had attempted to kill him and the murder victim two or three weeks earlier. Although defense counsel did not object, he immediately established during cross-examination that the prior disagreements and shooting did not involve defendant.¹ Failure to object may be a matter of trial strategy, which we will not second-guess. *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996); *Stewart, supra*. Defendant also argues that his trial counsel was ineffective because he failed to present expert testimony on the issue of identification. The decision to call a witness also is presumed to be a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Again, we will not second-guess matters of trial strategy. *Stewart, supra*.

Defendant’s final claim of ineffective assistance of counsel relates to trial counsel’s failure to seek proper jury instructions on identification, similar acts and reasonable doubt. We have already concluded that the trial court’s instructions regarding identification and reasonable doubt fairly presented the issues to be tried and sufficiently protected defendant’s rights. With regard to the limiting instruction on MRE 404(b) evidence of other acts, CJI2d 4.11, because defense counsel established during trial that defendant was not involved in the prior shooting, such instruction would not have been appropriate and may even have confused jurors. Therefore, this final claim of ineffective assistance of counsel must fail as well.

Defendant’s next argues that the cumulative effect of errors at his trial denied him a fair trial. Whether the cumulative effect of error requires reversal of a defendant’s conviction depends on whether defendant received a fair trial, not whether there were some irregularities. *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987). Our review of the issues and record in this case revealed only one error: the admission of testimony regarding the weapons and other items found at Nathaniel Jones’ residence that were not connected to the charged offense. As discussed above, we deem this error harmless. Accordingly, reversal on the basis of cumulative error is not required.

Defendant next argues that he must be resentenced because the sentence he ultimately received far exceeded the trial court’s evaluation made pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), leaving the appearance that he was being punished for exercising his constitutional right to a jury trial. We disagree. We review a defendant’s sentence to determine whether the sentencing court abused its discretion by violating the principle of proportionality. *People v St. John*, 230 Mich App

644, 649; 585 NW2d 849 (1998). The principle of proportionality requires that a sentence be proportionate to the seriousness of the crime and the defendant's prior record. *Id.* A sentence that falls within the applicable judicial sentencing guidelines range is presumed proportionate. *People v Lyons*, 222 Mich App 319, 324; 564 NW2d 114 (1997).

Defendant is not entitled to be resentenced. A trial court is not bound by its *Cobbs* evaluation because additional facts may arise throughout the course of the proceedings that affect its decision regarding sentence. *Cobbs*, *supra* at 283. Unless there is something in the record which indicates the higher sentence was imposed as a penalty for the accused's assertion of his right to trial by jury, the sentence will be sustained. *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987). We discern nothing in the record in this case to indicate that the higher sentence was imposed as a penalty because defendant chose to assert his right to trial by jury. Furthermore, defendant failed to present to the trial court any unusual circumstances to overcome the presumption of proportionality. *Lyons*, *supra*. Because defendant has not shown that his sentence is disproportionate to the seriousness of the crime and his prior record, we conclude that he is not entitled to be resentenced.

Finally, defendant argues that the two-year mandatory sentence required by MCL 750.227b; MSA 28.424(2), for his felony-firearm conviction is unconstitutional because it is a determinate sentence which the Legislature has no power to enact. We disagree. This Court recently held that because nothing in the Michigan Constitution or federal law prohibits the imposition of a determinate sentence as a punishment for a crime, the requirement of MCL 750.227b; MSA 28.424(2) that a felony-firearm conviction be punished by imposition of a determinate sentence is constitutional. *People v Cooper*, ___ Mich App ___, ___ NW2d ___ (Docket No. 206970, issued 8/3/99), slip op at 10.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

¹ Defendant also argues this as an MRE 404(b) issue, asserting that the testimony was not admissible as other acts evidence, in part, because the prosecution failed to provide the requisite notice of its intent to elicit such evidence, and that defense counsel erred by not objecting to this evidence. However, it does not appear from the record that the prosecution attempted to elicit other acts testimony. In any event, because defense counsel immediately established on cross-examination that defendant was not involved in the prior shooting, the issue is moot.