STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER NEIL BLAIR,

Defendant-Appellant.

UNPUBLISHED
November 12, 1999

No. 203698
Recorder's Court
LC No. 96-502481

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit 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). The trial court subsequently sentenced defendant to consecutive terms of two to ten years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

I

Defendant raises multiple claims of evidentiary error. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find 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 made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

A

First, defendant claims that the trial court erred in striking a portion of Daniel Rushlow's testimony as hearsay. Rushlow testified, "Chris told me that he just got a phone call and someone was coming over to kill him." Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Thus, it appears that Rushlow's testimony was inadmissible hearsay. Even if the court had erred, the

error would be harmless because the substance of the stricken testimony was presented to the jury by both defendant and Ralph Monticello.

B

Defendant next asserts that the trial court erred in excluding Rushlow's testimony that he had been "threatened" by Zoran Sibinovski. We find no abuse of discretion. First, before the prosecutor objected, Rushlow did not indicate that he had, in fact, been threatened by Sibinovski. Moreover, defendant failed to make an offer of proof to establish the substantive nature of the testimony excluded. See MRE 103(a)(2). Accordingly, there is no evidence in the record to indicate that Rushlow was actually threatened by Sibinovski.

Even if Sibinovski had made some sort of threat to Rushlow at the preliminary examination, that threat was not relevant to the instant proceedings. Whether Sibinovski threatened Rushlow at the preliminary examination was not a fact of consequence in determining whether defendant was guilty of assaulting Victor Orban. See MRE 401; *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995). Evidence which is not relevant is not admissible. MRE 402. Therefore, the trial court did not abuse its discretion in excluding the testimony. See *Ullah*, *supra*.

C

Defendant also claims that the trial court erred in refusing to allow defendant to testify that Tonya Jones told him, several months prior to the assault, that Orban was "pretty crazy" and that she was "having problems" with him. However, our review of the record reveals that the trial court did not prevent defendant from testifying that Tonya Jones told him that Orban was "pretty crazy." Nor did the trial court prevent him from testifying that Tonya was having "some problems" with Orban approximately six months prior to the incident in question. The trial court did instruct defendant to limit his answers to the questions asked; however, by this action, the trial court was properly exercising control over the proceedings. See MCL 768.29; MSA 28.1052; MCR 6.414.

D

Next, defendant maintains that the trial court abused its discretion in refusing to allow defendant's mother to testify as to what defendant told her after the shooting. Defendant claims that his statement to Blair constituted an excited utterance and therefore was admissible at trial. The excited utterance exception to the hearsay rule pertains to a "statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition." MRE 803(2).

Here, because defendant did not make an offer of proof, it is impossible to determine from the record what defendant's mother's testimony would have been. Moreover, although defendant now claims that his mother's testimony regarding what defendant told her about the shooting was admissible under the excited utterance exception, he did not make this claim below. Therefore, it is not preserved for appellate review. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Furthermore, there was no evidence in the record to indicate that, at the time defendant made his statements to Blair, he was still under the stress of excitement caused by the event. Consequently, even if defendant were attempting to admit the testimony under the excited utterance exception, he failed to lay a proper foundation. See *People v Kowalak (On Remand)*, 215 Mich App 554, 557-558; 546 NW2d 681 (1996).

E

In addition, defendant argues that the trial court erred in allowing Orban to testify that, after he heard that Tonya was "starting to hang out with" defendant, he became concerned about her safety because he had heard that "people want[ed] to shoot" defendant. On appeal, defendant claims that this testimony was unduly prejudicial. However, because defendant failed to object to the testimony at trial, appellate review is precluded absent manifest injustice. See *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). We find no manifest injustice. Considering the combined testimony of Orban, Sibinovski, Tonya Jones, and Nicole Beason, which indicated that defendant shot Orban without provocation, the passing reference to the fact that unnamed people might have wanted to shoot defendant for reasons that were not explained, and apparently did not relate to the instant case, was not unduly prejudicial.

F

Defendant next contends that Orban's testimony regarding Mike Hawk violated the trial court's pretrial ruling that witnesses could not testify that defendant was allegedly selling marijuana out of his apartment. However, Orban never testified that Hawk bought "drugs" or "narcotics" from defendant; consequently, Orban's testimony did not violate the court's pretrial order. In any event, defendant did not object to Orban's testimony in this regard, and therefore he has waived appellate review of this claim. See *People v Kilbourn*, 454 Mich 677, 685; 563 NW2d 669 (1997).

G

Next, defendant asserts that the trial court erred in allowing Orban to testify during cross-examination that Hawk and "all the youth" think "everything is resolved around a gun." We find no error requiring reversal. First, the challenged testimony was elicited by defense counsel. In addition, the testimony did not specifically refer to defendant. Accordingly, any error in the admission of this rather innocuous testimony was harmless.

II

Defendant claims that the trial court should have, on its own motion, granted a mistrial in this case after Orban's mother allegedly called him a "F---ing animal" and a "dope dealer selling drugs to little children." A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995).

In the present case, defendant did not move for a mistrial, and this issue is therefore not preserved for appellate review. See *Grant*, *supra*. In any case, because the jurors stated that they had not heard the remarks, defendant suffered no prejudice, and his ability to get a fair trial was not impaired. See *Lugo*, *supra* at 704. Consequently, the trial court did not abuse its discretion in failing to sua sponte declare a mistrial. See *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

III

Next, defendant argues that the trial court erred in instructing the jury that he had a duty to retreat. Because defendant failed to object to the jury instructions, our review is limited to the question whether relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Defendant relies on *People v Mroue*, 111 Mich App 759; 315 NW2d 192 (1981), and *People v Paxton*, 47 Mich App 144; 209 NW2d 251 (1973). However, we find these cases to be distinguishable. In both *Mroue* and *Paxton*, there was no dispute that the killings occurred in the respective defendants' homes, whereas in the present case there was conflicting testimony as to whether the shooting occurred in defendant's apartment or in the hallway outside his apartment. Because there was a question of fact regarding whether defendant was in his home when he shot Orban, the trial court did not err in providing an instruction on the general duty to retreat as well as instructing that there is no duty to retreat in one's home. Consequently, as it appears that the jury was properly instructed, relief is not necessary to avoid manifest injustice. See *Van Dorsten*, *supra*.

Defendant also claims that the trial court's reasonable doubt instruction was flawed because it failed to inform the jury that reasonable doubt required a "moral certainty" of guilt. However, the omission of "moral certainty" language from a reasonable doubt instruction does not automatically give rise to error requiring reversal. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Because the trial court's reasonable doubt instruction adequately presented the concept of reasonable doubt to the jury, *id*., relief is not necessary to avoid manifest injustice, *Van Dorsten*, *supra*.

IV

Defendant next argues that instances of alleged prosecutorial misconduct denied him a fair trial. However, defendant's claims of prosecutorial misconduct are not preserved because he failed to object at trial. Accordingly, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. See *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

We have reviewed each of the alleged instances of prosecutorial misconduct and conclude either that the prosecutor's comments were proper or that a curative instruction could have alleviated any prejudice to defendant. We briefly note that a prosecutor is not required to state inferences and conclusions in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor's reference to the loaded gun was based on defendant's testimony

and was therefore a proper comment on the evidence presented at trial. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Contrary to defendant's assertion, the prosecutor did not insinuate that defendant was involved with drugs or gang activity. A prosecutor may comment on evidence that indicates that the defendant fabricated testimony. See *People v Buckey*, 424 Mich 1, 14-16; 378 NW2d 432 (1985). The prosecutor's reference to Detective Johnson's testimony was a proper comment on the evidence presented at trial. See *Bahoda*, *supra*. A miscarriage of justice will not result from our failure to give further consideration to this issue.

V

Defendant further asserts that he was denied the effective assistance of counsel. Because there was no *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

After reviewing the record, we find that defendant has not sustained his burden of proving ineffective assistance of counsel. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The record contains insufficient facts to support defendant's claim that the gun and ammunition were illegally seized from defendant's apartment; accordingly, we may not review this claim. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defense counsel was not required to raise meritless objections to the prosecutor's comments or the trial court's instructions. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). In sum, defendant has failed to show that his counsel's performance fell below an objective standard of reasonableness or that the representation so prejudiced him that it deprived him of a fair trial. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

VI

Lastly, defendant claims that he was denied due process and a fair trial because of the cumulative effect of several alleged errors. However, we have concluded that no errors occurred at trial; thus, we reject the argument that the cumulative effect of the errors requires reversal. See *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).