

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MEDRICK J. RASHAD,

Defendant-Appellant.

UNPUBLISHED

February 9, 2001

No. 212133

Wayne Circuit Court

Criminal Division

LC No. 97-502196

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, 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), arising from a drug-related shooting in Inkster, Michigan that resulted in the death of an alleged drug dealer and the wounding of the deceased's girlfriend. Defendant was sentenced to concurrent terms of thirty to sixty years' imprisonment on the second-degree murder conviction and six to ten years' imprisonment on assault with intent to do great bodily harm less than murder, consecutive to the mandatory two-year term for felony-firearm. Defendant now appeals by right. We affirm.

I

Contrary to defendant's claim, he was not denied the effective assistance of counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

There is no merit to defendant's claim that his trial counsel was ineffective on the ground that he did not move to suppress defendant's custodial statements. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Attorneys for both defendant and his codefendant, Gregory Edison, moved before trial to suppress custodial statements by and a *Walker*¹ hearing was held at which Detective Charles Hines gave testimony. Moreover, contrary to defendant's

¹ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

claim, the trial court did not err in finding that his custodial statements were voluntarily given, and that defendant waived any right to counsel. *People v Paintman*, 412 Mich 518; 315 NW2d 418 (1982). A review of the record shows that before giving the oral and written statements, defendant made a written request to speak with Detective Hines without his attorney present, and that after Detective Hines advised defendant of his constitutional rights under *Miranda*, defendant signed a written waiver and then wrote out and initialed a note, signed by his mother and Detective Hines as witnesses, stating that he wanted to talk with Detective Hines without his attorney present. Then, after defendant again signed the advice of rights form, with his mother present in the room, he orally related to Detective Hines what happened on the night of June 3, 1997 when the shooting occurred, and thereafter prepared a written statement.

Moreover, contrary to defendant's claim, he was not denied the effective assistance of counsel when his trial counsel failed to call his mother at the *Walker* hearing to testify that defendant's statements were induced by implied promises of leniency by Detective Hines. The decision not to call Mrs. Rashad as a witness at the *Walker* hearing is presumed to be a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Thus, to establish ineffective assistance of counsel, defendant has to show that he was deprived of a substantial defense, namely, one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902; 554 NW2d 899 (1996). However, given that Detective Hines flatly denied that he made any promises of leniency in exchange for defendant's statements, defendant cannot show that the trial court would have concluded that defendant's statements were involuntary. Thus, defendant has failed to show that he was deprived of a substantial defense by his counsel's failure to call Mrs. Rashad as a witness at the *Walker* hearing.

Next, defendant was not denied the effective assistance of counsel when his counsel failed to object to testimony about the bulletproof vest. Although defendant claims that trial counsel committed error by not objecting to the evidence on the ground of relevancy because there was no testimony that the shooter was wearing a bulletproof vest, Detective Hines stated in his supplemental police report that defendant told him that he (defendant) purchased "the vest and bullets" for \$100. Trial counsel was not required to advocate a meritless position because an objection based on relevancy would have been overruled. *Snider, supra*. Further, there is no merit to defendant's claim that his trial counsel was ineffective in eliciting testimony from Mrs. Rashad that linked the bulletproof vest to defendant. As a review of the record shows, Mrs. Rashad made it clear that although the bulletproof vest was probably defendant's, he did not bring it back with him on the night of the shooting because it was old and covered with cob webs when she found it in the basement. In any case, even assuming that trial counsel erred by not objecting to the testimony, defendant has failed to show that he was denied a substantial defense because it would not have made a difference in the outcome of the trial. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Defendant also claims that his counsel was ineffective for failing to request an alibi instruction. We disagree. Defense counsel filed a notice of alibi and his two alibi witnesses provided testimony that defendant was with them consummating a drug deal in Westland when the shooting occurred. However, as the prosecutor points out, neither witness was a true alibi witness because neither one could remember when the alleged drug deal took place. In any case,

trial counsel's failure to request an alibi instruction, even if error, did not prejudice defendant because it would not have altered the outcome of the trial.

Defendant was also not denied the effective assistance when his trial counsel failed to seek a cautionary instruction concerning evidence of his drug-dealing that was introduced by defendant to establish his alibi defense. Defendant has failed to show that he was denied a substantial defense by his counsel's failure to request a limiting instruction with regard to this evidence, especially because ample evidence was admitted at trial, including defendant's own custodial statements, establishing that he was a drug dealer. *Caballero, supra*.

Finally, there is no merit to defendant's claim that he was denied the effective assistance when his counsel failed to move in limine to prevent the jury from learning that his step-father was an Inkster police detective and the original officer assigned to this case. Defense counsel's decision in this regard was a matter of trial strategy, and defendant has failed to show that he suffered any prejudice therefrom.

II

Next, the trial court did not abuse its discretion in allowing into evidence Detective Hines' supplemental report of his interview of defendant as a past recollection recorded pursuant to MRE 803(5). *People v Hoffman*, 205 Mich App 1, 16; 518 NW2d 817 (1994) All three foundational requirements were satisfied. First, Detective Hines' supplemental police report pertained to a matter of which he once had knowledge, namely, defendant's statements to him about the shooting. Second, Detective Hines had "insufficient recollection" about defendant's statements to him. Third, the evidence established that Detective Hines prepared the report immediately after obtaining the oral and written statements from defendant. Contrary to defendant's claim, MRE 803(5) does not require a showing that the witness was totally unable to recall the memorandum's contents, but only that the witness "now has insufficient recollection to enable him to testify fully and accurately." *People v Missias*, 106 Mich App 549, 554-555; 308 NW2d 278 (1981).

III

We also do not agree with defendant's claim that the trial court abused its discretion in limiting cross-examination of Detective Hines. MRE 611(b); *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). MRE 611 grants broad power to a trial court to control the manner in which a trial is conducted, including the examination of witnesses. *People v Mixon*, 170 Mich App 508, 514-515; 429 NW2d 197 (1988), rev'd in part on other grounds 433 Mich 852; 443 NW2d 167 (1989); *People v Claybon*, 124 Mich App 385, 397; 335 NW2d 493 (1983). A review of the record reveals that the trial court properly intervened to prevent defense counsel from cross-examining Detective Hines about an irrelevant matter.

IV

Next, defendant was not denied a fair trial on the basis of prosecutorial misconduct. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Defendant claims that the prosecutor, over defense objection, improperly attempted to elicit hearsay evidence from the

surviving victim of the shooting that defendant might have done the shooting. Given that defendant's objection was sustained and that the jury was instructed to disregard the improper testimony, he cannot show that the prosecutor's conduct denied him a fair trial. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). Defendant also contends that the prosecutor improperly cross-examined a witness about whether she planned to marry defendant. Because defendant did not object, he must show plain error affecting his substantial rights. *People v Schutte*, 240 Mich App 713, 720-722; 613 NW2d 370 (2000). Defendant has made no showing that the prosecutor's cross-examination constituted plain error or that the alleged error affected his substantial rights. Finally, defendant claims that in rebuttal closing argument, the prosecutor improperly suggested to the jury that it would have to find that Detective Hines lied in order to find defendant not guilty. Even assuming that the prosecutor's statements constituted improper rebuttal argument, defendant has not shown that it resulted in a miscarriage of justice because the trial court gave the curative instruction defendant requested. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *Brownridge (On Remand)*, *supra*.

V

The trial court also did not err in scoring defendant ten points at OV 9 for his leadership in the shooting. Appellate review of challenges to the sentencing guidelines is very limited. *Mitchell, supra* at 454, 175-178. "The instructions state that the entire criminal episode should be taken into account in determining whether the offender is a leader." *People v Johnson*, 202 Mich App 281, 289; 508 NW2d 509 (1993). At trial, the evidence, based upon defendant's statements to the police, established that defendant picked up codefendant Edison and drove by the house where the shooting later occurred. After Edison stated that he wanted to kill the decedent because the decedent presented stiff competition in the local drug trafficking, defendant procured a gun and provided dark clothing for Edison. Defendant then drove them back to the house where the decedent lived. Defendant and his codefendant crawled up to the front of the house, and shots were fired. After the shooting, defendant drove them away from the scene. However, at the preliminary exam, evidence from codefendant's statement indicated that defendant was the actual shooter in this case, and that it was his idea to kill the deceased. Given that a sentencing court may consider all record evidence before it when scoring the guidelines, including preliminary examination and trial testimony, it cannot be said that the trial court abused its discretion in scoring defendant ten points at OV 9. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993); *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984; 525 NW2d 454 (1994).

VI

Finally, defendant's sentence for second-degree murder is proportionate. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Here, defendant's sentence for second-degree murder was within the guidelines, and thus presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Further, defendant has failed to identify any unusual circumstances as to overcome the presumptive proportionality of his sentence. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Although defendant claims that his sentence is

disproportionately harsh because his codefendant received a lesser sentence of ten to fifteen years' imprisonment for his plea-based conviction for second-degree murder, the sentence imposed on a codefendant is not a valid sentencing consideration because "[s]entences must be individualized and tailored to the circumstances of the defendant and the case." *In re Dana Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). The trial court articulated its reasons for imposing this particular sentence, noting that "[t]his was a very vicious crime" involving "the elimination of a drug competitor, a murder," which was "a product of an apparent territorial dispute over the sales of drugs on a particular street in the city of Inkster." Accordingly, the trial court did not abuse its discretion in sentencing defendant to thirty to sixty years' imprisonment for second-degree murder.

We affirm.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ Kirsten Frank Kelly