

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNELL COLE,

Defendant-Appellant.

UNPUBLISHED

February 9, 2001

No. 216354

Wayne Circuit Court

LC No. 98-002776

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

PER CURIAM.

Defendant Donnell Cole appeals as of right his conviction of second-degree murder, MCL 750.317; MSA 28.549, following a jury trial. We affirm.

Defendant first claims that he was deprived of the effective assistance of counsel because his trial counsel failed to present an alibi defense or request an evidentiary hearing regarding the truthfulness of a key prosecution's witness. We disagree.

This Court reviews a claim of ineffective assistance of counsel by determining whether trial counsel's performance was so deficient that it was reasonable to conclude that, but for the deficiency, the factfinder would not have convicted the defendant. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). For this Court to find such a deficiency, trial counsel's behavior must have been below an objective standard of reasonableness and must have caused the defendant to be deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

At a *Ginther*¹ hearing, defense counsel stated valid reasons why he did not employ an alibi defense. Among these was his claim that defendant admitted guilt and therefore, counsel was fearful an alibi witness would have offered perjured testimony. An ineffective assistance claim cannot be based on trial counsel failing to present perjurious testimony. *People v LaVearn*, 448 Mich 207, 217-218; 528 NW2d 2d 721 (1995). Another reason was the alibi defense would have placed defendant in the presence of another black male at the time of the murder. Because a

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

witness for the prosecution testified he observed two black males at the crime scene shortly before the crime, counsel believed the disputed alibi testimony would have incriminated defendant. Furthermore, another prosecution witness testified to seeing defendant at the crime scene with a butcher knife shortly before the attack. Based on this evidence, it is apparent trial counsel used sound trial strategy when he recommended to defendant that an alibi defense not be pursued.

Additionally, trial counsel was not ineffective for failing to request an evidentiary hearing because such a request would have been futile. It is for the factfinder to determine the truthfulness of a witness, not the court. Trial counsel had no obligation to advocate meritless positions. *Snider, supra* at 425. Because there is no indication from the trial court record or from the *Ginther* hearing that trial counsel's performance was so deficient the jury would not have convicted defendant but for that deficiency, we find that defendant was not deprived of the effective assistance of counsel.

Defendant next claims the trial court erred when it ruled the prosecution had exercised due diligence in attempting to locate a witness who had testified at defendant's preliminary examination. Again, we disagree. A trial court's determination of whether due diligence was shown is a finding of fact this Court will not reverse absent clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

At a due diligence hearing, an officer testified he attempted to locate the witness through various means. The officer's testimony indicated good-faith attempts were made and these attempts were unsuccessful. The test for due diligence is not whether increased efforts would have resulted in the witness being available at trial. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). The due diligence determination is well supported by the record and therefore we do not find the trial court committed clear error in ruling the witness' preliminary examination testimony, if relevant and admissible, could be read into evidence as former testimony under MRE 804(b)(1).

Defendant further claims the trial court erred in admitting statements made by the decedent to other witnesses as excited utterances or dying declarations under MRE 803(2) and MRE 804(b)(2) respectively. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

In *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988), our Supreme Court laid out a two-part test that must be met in order to admit evidence under the excited utterance exception. *Smith, supra* at 450. The requirements are: (1) that there be a startling event, and (2) that the resulting statement be made while under the excitement caused by the event. *Id.* In the instant case, there is no dispute regarding the first prong.

In *Smith, supra* at 543, our Supreme Court clarified previous rulings and determined that the key element in determining if a statement was made while under the excitement of the startling event is whether the victim had the capacity to fabricate. *Id.* at 551. The Court further noted, "the question is not strictly one of time, but of the possibility for conscious reflection." *Id.*, citing 5 Weinstein, Evidence (2d ed), § 803.04[4], p 803-23. To this end, this Court stated the following in *People v Verburg*, 170 Mich App 490, 495; 430 NW2d 775 (1988):

MRE 803(2) requires excitement, but not contemporaneity. Obviously, time lapse is a factor bearing on admissibility, but the standard under the latter rule's express language is that time lapse will not alone render an excited utterance inadmissible so long as the declarant is still under the stress of the excitement caused by the event.

The decedent was stabbed on July 3, 1997 and subsequently died on August 16, 1997. Two witnesses testified to hearing the deceased make statements within ten minutes of the stabbing. When arriving at the decedent's side, both witnesses observed his wounds while lying on the porch. Defendant contends that these statements could not be deemed excited utterances because they were made after being asked questions. Specifically, the decedent made statements that incriminated his son after being asked who stabbed him. However, it is evident from the record this question was not suggestive and there is nothing that would indicate the decedent only responded because of the inquiry, rather than because of the stress of the event. *Smith, supra* at 553-554. The decedent's later statements were made the day after the stabbing and immediately after the decedent had gotten out of surgery. Again, the trial court judge determined the time lapse was irrelevant because the decedent was still under stress, excited and therefore did not have any capacity to fabricate. *Smith, supra* at 543.

Based on these facts, we decline to find an abuse of discretion by the trial court in the instant case. *Verburg, supra* at 495; see also *People v Carson*, 87 Mich App 163, 168; 274 NW2d 3 (1978).²

Defendant next claims the trial court erred in admitting photographs of the decedent and of the crime scene. It is apparent the photographs were relevant in order to attack defendant's theory that the stabbing occurred during the course of a robbery. We are not persuaded the trial court abused its discretion in admitting these photographs. *People v Stewart*, 126 Mich App 374, 377-378; 337 NW2d 68 (1983). There is no indication in the record the jury convicted defendant based on emotion that arose after viewing the photographs. *People v Zeitler*, 183 Mich App 68, 69; 454 NW2d 192 (1990).

Defendant's next claim is whether the trial court erred by providing improper jury instruction regarding voluntary manslaughter. Defendant failed to preserve this issue because he did not object to the instructions at trial. *Carter, supra* at 214. In fact, defense counsel affirmatively stated that the defense was satisfied with the instructions as given; therefore the issue was waived. *People v Fetterly*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Nonetheless, the trial court did not commit error in charging the jury and this precise issue was rejected by this Court in *People v Delaughter*, 124 Mich App 356, 359; 335 NW2d 37 (1983).

Defendant further claims the prosecutor committed misconduct by improperly vouching for witnesses and arguing his personal belief in defendant's guilt. This Court reviews claims of

² Since we find that the statements were properly admissible as excited utterances under MRE 803(2) we decline to address whether they are admissible under the dying declaration exception of MRE 804(b)(2).

prosecutorial misconduct for harmless error. *People v Mezy*, 453 Mich 269, 285; 551 NW2d 389 (1996).

There is no indication the prosecutor improperly vouched for the credibility of witnesses. A thorough reading of the closing arguments indicates the prosecutor did not vouch for the credibility of the witnesses and “did not convey a message to the jury that [he] had some special knowledge of facts indicating the witness[es]” truthfulness. *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000); *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Furthermore, it is evident from the context of his statements the prosecutor did not argue personal belief in defendant’s guilt, but rather based his argument on the evidence presented at trial. *Schutte*, *supra* at 721.

With regard to defendant’s last claim, that the cumulative effect of the articulated errors deprived defendant of a fair trial, this Court has found no error. Accordingly, there is no cumulative effect of otherwise harmless errors that may require reversal. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); *People v Morris*, 139 Mich App 550, 564; 362 NW2d 830 (1985).

Affirmed.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ Kirsten Frank Kelly