STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 30, 2001
v	No. 212868 Wayne Circuit Court
DATRELL L. EFFINGER, Defendant-Appellant.	Criminal Division LC No. 97-007780

Before: Smolenski, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b, MSA 28.424(2). He was sentenced to a term of twenty to forty years' imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first claims that the trial court's comments denied him a fair and impartial trial. However, defendant objected to only one of the court's comments below and, thus, appellate review of the remaining comments is precluded absent manifest injustice. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test is whether the court's comments or conduct were of such a nature as to unduly influence the jury and thereby deprive the defendant of his right to a fair and impartial trial. *Id*.

Viewed in context, the record does not reflect either that the court "thwarted" defense counsel's cross-examination of the sole eyewitness or that it criticized defense counsel excessively. See *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988). Rather, the majority of the challenged remarks constituted a legitimate exercise of the trial court's responsibility to control the proceedings. See MCR 611(a); MCL 768.29; MSA 28.1052. The remaining comments were not of such a nature as to unduly influence the jury and thereby deprive defendant of a fair trial.

II

Defendant next claims he was denied the effective assistance of counsel at trial. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review is limited to the facts contained on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first argues that he is entitled to a new trial because defense counsel failed to subpoena and call an alleged alibi witness to testify. To support this claim, defendant submits on appeal the affidavit of a relative, who averred that defense counsel was aware of the witness and that the witness would have testified at trial that defendant was not at the scene of the crime. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, and an appellate court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant has failed to sustain his burden of proving that he received ineffective assistance of counsel. Initially, we note that the affidavit attached to defendant's brief was not part of the lower court record. MCR 7.210(A)(1) In any event, even assuming that counsel was aware of the witness and had interviewed him, defense counsel could have chosen not to call him for various reasons. Additionally, there is no evidence or affidavit from the actual witness indicating what his testimony would be or that he would have testified. Indeed, the supporting affidavit is from defendant's relative as opposed to the actual witness. Defendant has failed to demonstrate a reasonable probability that the testimony would have altered the outcome of the trial. See *People v Avant*, 235 Mich App 499; 597 NW2d 864 (1999).

Defendant's second claim of ineffective assistance of counsel is that defense counsel failed to timely demand the production of an endorsed police witness, who reported that he was unable to obtain any information from the victim because he was uncooperative. Here, the officer's partner, who was within three feet of the victim, testified at trial that the victim said: "Trell and Bubble Gum had shot him." A second officer, who was also at the scene, testified that he heard the victim say "Terrell" shot him. The officers indicated that the victim was "not too conscious," "not doing too well," and it was difficult for the victim to speak because of his injuries. This description of the victim's condition is not inconsistent with the endorsed officer's report that *he* was unable to obtain a name because the victim was uncooperative. Further, the endorsed officer's testimony would not have likely discredited his partner's testimony, who was within two or three feet of the victim. Moreover, the jury was aware of the contents of the officer's report because it was discussed on numerous occasions throughout trial. In addition, the

trial court allowed defense counsel to use the report, although it was hearsay, because the officer would not be testifying. As such, contrary to defendant's claim, based on the evidence presented, it is unlikely that, but for counsel's failure to timely seek the production of the witness, the result of the proceedings would have been different. *Effinger, supra*.

We likewise reject defendant's claim that defense counsel was ineffective because he should have filed a motion to exclude the out-of-court photographic identification made by the eyewitness because only one photograph was shown. Pretrial identification procedures that are so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification constitute a denial of due process of law. *Simmons v United States*, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968); *People v Anderson*, 389 Mich 155, 168; 205 NW2d 461 (1973).

Here, the record demonstrates that this was not a typical photo lineup for the purpose of identifying an assailant. Rather, the officer wanted to confirm that he had the correct "Trell," because there were other individuals named "Trell" in the neighborhood. The eyewitness testified that he had known defendant for many years because they had lived in the same neighborhood since their childhood. The eyewitness testified that he had seen defendant more than a hundred times over the years, and was certain that defendant was the person who shot the victim. In addition, there was evidence that the victim pointed out the house where the shooters lived, and an investigation revealed that defendant's relatives lived in that house. Hence, there is no reasonable probability that, but for counsel's failure to move to exclude the pretrial identification, the result of the proceedings would have been different. *Effinger, supra*.

Additionally, we reject defendant's claim that defense counsel was ineffective for failing to object to the admission of the victim's "dying declaration" identifying him as the shooter, because the victim was not conscious of his impending death. In order to admit a statement as a "dying declaration" under MRE 804(b)(2), the trial court must be satisfied that the following is established: (1) the declarant must have been conscious of impending death; (2) death must actually have ensued; (3) the statements are sought to be admitted in a criminal prosecution against the individual who killed the decedent; and, (4) the statements must relate to the circumstances of the killing. *People v Parney*, 98 Mich App 571, 581; 296 NW2d 568 (1979). "'Consciousness of death' requires, first, that it be established that the declarant was in fact in extremis at the time the statement was made and, secondly, that the decedent believed his death was impending." *People v Siler*, 171 Mich App 246; 251; 429 NW2d 865 (1988). The declarant need not have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration. *Id*.

Here, the victim was shot four times. When officers arrived on the scene, the victim was laying in the grass next to a vacant lot, bleeding. Officers explained that the victim was "not too conscious," and "not doing too well." The victim's speech was slow, slurred and fainting, but one officer indicated that he was certain that the victim said "Trell" and "Bubble Gum." A second officer testified that the victim was not doing very well and it was difficult for the victim to speak. The victim, however, was able to say who shot him and point towards a house down the street. The victim was taken by ambulance to the hospital and later pronounced dead. These circumstances provide a sufficient basis for the trial court's determination that the victim was

conscious of his impending death when he made the statements to the officers. See, *id*. Accordingly, because the testimony was admissible, defense counsel's failure to move to preclude admission of the dying declaration does not amount to ineffective assistance of counsel. Counsel is not required to make a frivolous or meritless motion. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

We also reject defendant's claim that defense counsel denied him a fair trial because he "opened the door" to defendant's bad acts. During cross-examination, defense counsel asked the eyewitness: "you got bad blood with the Effingers . . . ?" The eyewitness thereafter testified regarding an altercation between his friend and defendant. This was clearly a matter of trial strategy. It is apparent, after reviewing the entire context of defense counsel's questions, that he was attempting to provide a motive for the eyewitness to falsely implicate defendant in this shooting. Indeed, one of defendant's theories was that the eyewitness was the actual shooter. The fact that the eyewitness' friend and defendant had a previous altercation would support such a motive. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel was not effective does not constitute ineffective assistance of counsel. *Id.*

Defendant also argues that defense counsel elicited bad acts testimony about defendant's uncle, Bubble Gum, from the victim's sister. Specifically, on cross-examination, defense counsel elicited the testimony that defendant's uncle had raped the victim's sister. Again, this question was a matter of trial strategy. It appears from reading the exchange in its entirety, that defense counsel was illustrating that there was tension between defendant's uncle and the victim, and attempting to implicate defendant's uncle as the shooter. Indeed, at one point, in response to defense counsel's questions, the victim's sister said: "So you're saying that [defendant's uncle] was the shooter?" Again, the fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id.*

Defendant next claims that defense counsel was ineffective because he failed to object to an officer's testimony that he was "looking for" defendant before this incident. Given the brief and isolated nature of the officer's comment, defense counsel may have determined that an objection would have called more attention to the alleged improper testimony. *People v Bahoda*, 448 Mich 261, 287, n 54; 531 NW2d 659 (1995). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Barnett, supra*.

We also reject defendant's claim the defense counsel was ineffective for failing to object to the prosecution's questioning of an officer regarding defendant's alibi before he actually presented such a defense. Before a defendant actually presents an alibi at trial, the prosecution may not comment on the defendant's filing of an alibi notice or a failure to produce corroborating witnesses. *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989). However, once a defendant presents such a defense, the prosecution is permitted to attack the defendant's alibi by commenting on the weakness of the alibi testimony. *Id*. Here, during defense counsel's opening argument, he discussed defendant's alibi at length on two occasions. Accordingly, any objection in this regard would have been futile. *Gist, supra*.

Defendant also argues that defense counsel failed to object to the several instances of prosecutorial misconduct during trial. However, as hereafter discussed, because the prosecutor's conduct did not deny defendant a fair trial, defense counsel was not ineffective for failing to object. *Id*.

Defendant's final claim of ineffective assistance of counsel is that defense counsel failed to advise him of his right to testify at trial. This issue is without merit. Defendant does not claim that he was ignorant of his right to testify or that he would have testified. He also fails to indicate what testimony he would have provided had he testified. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985). Accordingly, defendant is not entitled to any relief on this basis.

III

Next, defendant raises numerous claims of prosecutorial misconduct. Defendant failed to object to the alleged improper remarks and hence appellate review is precluded unless a curative instruction could not have eliminated any possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *Paquette, supra*, 341-342.

Our review of the record reveals that defendant was not denied his right to a fair trial because of the allegedly improper conduct by the prosecutor. Rather, the challenged remarks and conduct by the prosecutor were either proper responses to defense counsel's arguments or reasonable inferences from the evidence produced at trial. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Wolverton*, 227 Mich App 72,76; 574 NW2d 703 (1997); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Moreover, although a prosecutor may not vouch for the credibility of a witness, she may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor need not state her argument or inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Therefore, defendant is not entitled to relief on this basis.

IV

Defendant next argues that the trial court's instruction that the jury should consider only the evidence presented, as opposed to the lack of evidence, denied him a fair trial. Because defendant did not object to this instruction at trial, our review is limited to the question of whether relief is necessary to avoid manifest injustice. See *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

The trial court's instruction was given directly after the prosecutor's objection to defendant's insinuation that the prosecutor's waiver of a police witness could be considered as evidence. It is apparent that the instruction related only to the prosecutor's waiver of the police witness. Moreover, in its final instructions before deliberations, the trial court indicated to the jury that a reasonable doubt is a fair doubt growing out of the evidence, *the lack of evidence*, or the unsatisfactory nature of the evidence in a case. Viewing the instructions as a whole, defendant has not demonstrated that the trial court's cautionary instruction, given after the

prosecutor's objection, denied him a fair trial or failed to sufficiently protect his rights. Therefore, defendant has forfeited review of this unpreserved issue.

V

We further reject defendant's claim that he was entitled to a mistrial based on the trial court taking judicial notice of the fact that there are at least two types of handguns. This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial. *People v Haywood*, 209 Mich App 217, 227; 530 NW2d 497 (1995).

The court could properly take judicial notice of the difference between a revolver and an automatic handgun because the fact is not subject to reasonable dispute and is capable of accurate demonstration by resorting to easily accessible sources of unquestioned accuracy. See *People v Toodle*, 155 Mich App 539, 547; 400 NW2d 670 (1986); *People v Burt*, 89 Mich App 293, 297-298; 279 NW2d 299 (1979). Further, defendant does not claim that the trial court's description was incorrect, merely that it was "simplistic" and "misleading." Additionally, the difference between the two types of handguns was not material to his case. We note that the trial court did not provide a cautionary instruction pursuant to MRE 201(f), but defendant failed to request such an instruction. See *Haywood*, *supra*, 229. Accordingly, defendant was not entitled to a mistrial.

VI

Defendant next contends that he is entitled to a new trial because there was no on-the-record waiver of his right to testify. There is no requirement that there be an on-the-record waiver of a defendant's right to testify. *Simmons*, *supra*, 684. Further, where a defendant is represented by counsel, the trial court has no duty to determine whether a defendant's waiver of the right to testify is knowing and intelligent. *Id*.; see also, *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Therefore, this issue is also without merit.

VII

We also reject defendant's claim that he is entitled to resentencing because his sentence is disproportionate. A sentence constitutes an abuse if discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant's twenty-year minimum sentence is within the sentencing guidelines recommended range of ten to twenty-five years and, thus, is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Defendant has failed to demonstrate any unusual circumstances to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

VIII

Finally, we reject defendant's argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors were identified that deprived defendant of a fair trial, reversal under the cumulative effect theory is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage