STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRON L. JAMES,

Defendant-Appellant.

UNPUBLISHED
May 22, 2001

No. 216069
Wayne Circuit Court
Criminal Division
LC No. 98-006350

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment without parole for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in allowing two police officers to testify about statements made by defendant's grandfather at the crime scene. The statements were admitted, over defense objection, under the excited utterance exception to the hearsay rule. Under MRE 803(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible, regardless of whether the declarant is available as a witness.

The excited utterance exception "allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], pp 803-819. Three criteria must be met before a hearsay statement can be admitted as an excited utterance. "First, the statement must arise out of a startling event; second, it must be made before there has been time for contrivance or misrepresentation by the declarant; and third, it must relate to the circumstances of the startling event." *People v Kowalak (On Remand)*, 215 Mich App 554, 557; 546 NW2d 681 (1996).

Here, the evidence established that Officers Peil and Dekin arrived at the crime scene seconds after the shots were fired. They briefly searched for the shooter, either by circling the block or driving forward about a block and then reversing, before immediately returning to the scene where a number of people had congregated. From the description of both officers, the declarant, Will James, who is defendant's grandfather, was extremely upset and emotional. James described struggling with his grandson, who then shot the victim and fled. James told Officer Dekin, "Officer, my grandson shot him." The evidence sufficiently showed that James' statements arose out of a startling event, i.e., a shooting, and were related to the circumstances of the event. *Id.* Furthermore, the statements were made within minutes of the shooting, while James was still upset and under the "sway of excitement precipitated by [the] external startling event," *Smith*, *supra* at 550, and he had not had time for contrivance or misrepresentation. Thus, the trial court did not abuse its discretion in admitting the statements under the excited utterance exception to the hearsay rule.

Next, defendant argues that reversal is required because of misconduct by the prosecutor. First, defendant contends that the prosecutor deliberately injected issues broader than his guilt or innocence by eliciting testimony that the medical examiner who performed the autopsy on the victim had later been shot to death himself. Defendant also challenges the prosecutor's remarks informing the jury that a trial court was required to give an instruction on second-degree murder when a defendant was charged with first-degree murder. Because defendant did not preserve these issues with an appropriate objection at trial, appellate relief is precluded if any prejudicial effect could have been cured by a cautionary instruction. *People v Cooper*, 236 Mich App 643, 650; 601 NW2d 409 (1999).

The medical examiner's testimony was brief and volunteered and there was no suggestion that defendant was involved with the unrelated shooting death of the medical examiner. Any perceived prejudice could have been cured by a cautionary instruction upon timely request. Further, the prosecutor did not misstate the law in stating that the court must instruct the jury on second-degree murder where a defendant is tried for first-degree murder. See *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975); *People v Curry*, 175 Mich App 33, 40; 437 NW2d 310 (1989). These unpreserved issues do not warrant appellate relief. *Cooper*, *supra* at 650.[1]

Defendant also argues that the trial court's instruction on voluntary manslaughter was confusing and that the instruction on reasonable doubt was inadequate. Defendant's trial counsel did not object to the challenged instructions at trial and expressed satisfaction with the jury instructions as read. Therefore, these issues are not preserved. *People v McCrady*, 244 Mich App 27, 30; ___ NW2d ___ (2000). Unpreserved claims of error, whether constitutional or unconstitutional, are reviewed to determine whether plain error affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999).

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[1] Defendant also argues that the trial court had a statutory duty, pursuant to MCL 768.29; MSA.1052, to correct the prosecutor. Because we find no misconduct, the trial court did not err in failing to correct the prosecutor.

After instructing the jury on the elements of first-degree murder and second-degree murder, the trial court instructed on the lesser offense of voluntary manslaughter. According to the transcript provided to this Court, the trial court stated:

> The crime of Murder may be reduced to Voluntary Manslaughter if the defendant acted out of passion or anger brought on by adequate cause and before the defendant had a reasonable time to calm down. For Manslaughter the following two things must be present: First, when the defendant acted, his thinking must be disturbed by emotional excitement to the point that an ordinary person might have acted on impulse without thinking twice from passion instead of judgment. This emotional excitement must have been the result of something that would cause an ordinary person to act *rationally* or on impulse. The law doesn't say what things are enough to do this, that is for your to decide. Second, the killing itself must result from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and return to reason. The law doesn't say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case. (Emphasis added.)

This instruction is identical to CJI2d 16.9, except that the emphasized word "rationally" was substituted for "rashly."[2]

A trial court is required to instruct the jury concerning the law applicable to the case and to present the case fully and fairly to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). However, jury instructions should be considered in their entirety rather than extracted piecemeal to establish error. *Henry*, *supra* at 151. Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

We conclude that the trial court's instruction on voluntary manslaughter adequately presented the elements of that offense to the jury. Furthermore, the jury was properly instructed on both first-degree murder and second-degree murder and rejected the lesser theory, thus reflecting "an unwillingness to convict of a lesser included offense such as manslaughter." *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997). Therefore, it is apparent that defendant's substantial rights were not affected by any imperfection in the court's instruction on voluntary manslaughter.

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[2] From the record before us, it is unclear whether the trial court erred in reading the instruction or whether the court reporter erred in transcribing the trial court's words. For purpose of our review, we will assume that the trial court misspoke when instructing the jury on voluntary manslaughter.

Defendant also argues that the trial court erred in instructing the jury on reasonable doubt because the instruction did not include language requiring proof to a moral certainty. This argument is without merit. The court instructed the jury on reasonable doubt in accordance with CJI2d 3.2(3). This Court has consistently upheld CJI2d 3.2(3), as amended in November 1990. *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991); see also *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *Cooper*, *supra* at 656; *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Next, defendant contends that the exercise of multiple peremptory challenges before the examination of newly seated jurors during jury selection was a variant of the forbidden "struck jury" method, in violation of MCR 2.511(F), thus requiring reversal.

We review de novo alleged violations of the jury selection process. *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998). MCR 2.511(F), which applies to criminal cases through MCR 6.001(D) and MCR 6.412(A), establishes the procedure for replacing jurors removed for cause or by peremptory challenge. The rule states:

> **(F) Replacement of Challenged Jurors.** After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors.

Relying on *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981) and *People v Colon*, 233 Mich App 295; 591 NW2d 692 (1998), defendant argues that, when "the court rules on jury selection are not followed, reversal is required without the necessity of showing prejudice." In *Miller*, *supra*, a case involving three defendants, the trial court announced before the start of trial that the struck jury method would be used. *Id.* at 323. Defense counsel objected before the jury selection began, but the trial court overruled the objection. At trial, the trial court called and questioned seventy-three jurors. None were excused for cause, and the attorneys exercised peremptory challenges in rotation until eleven jurors remained. An additional thirty-seven jurors were called and questioned, and the peremptory challenge process continued until there were no further challenges. The jury was comprised of the fourteen remaining jurors with the lowest numbers. *Id.* at 324.

The Supreme Court noted that the court rule[3] "contemplates the seating and examination of a panel of potential jurors equal in size to the jury that will hear the case. As a juror is challenged, either peremptorily or for cause, another will be seated before further challenges are exercised." *Id.* at 325-326. Although the Court found no evidence of prejudice to the defendants from the selection process, the Court nonetheless reversed their convictions, stating:

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[3] GCR 1963, 511, which is the predecessor of MCR 2.511(F).

> Where, as here, a selection procedure is challenged before the process begins, the failure to follow the procedure prescribed in the rule requires reversal. The 'struck jury method' or any system patterned thereafter is disapproved and may not be used in the future. *Id.* at 326.

In *Colon, supra*, the trial court announced before jury selection that it would conduct voir dire for nineteen potential jurors and then allow challenges for cause of any of the nineteen. For peremptory challenges, the attorneys could only challenge the thirteen jurors sitting in the jury box. Defense counsel objected to the proposed method at the pretrial hearing where it was announced and again objected before voir dire. During jury selection, defense counsel exercised all of his peremptory challenges except for one. Counsel did not express satisfaction with the jury as impaneled; further, counsel indicated that he found one of the impaneled jurors unsatisfactory and would have removed that juror with his last peremptory challenge but did not wish to replace that juror with the highly objectionable juror that he believed would be called next. *Id.* at 299-300. This Court found that the jury selection procedure utilized was not the procedure contemplated by MCR 2.511(F) and required reversal of the defendant's conviction.

> The jury selection procedure utilized in this case is clearly not the procedure described in and contemplated by MCR 2.511(F). The panel of potential jurors seated and examined was not equal in size to the jury that heard the case, and once a prospective juror was dismissed, a new prospective juror was not selected and examined before further challenges were made. The trial court's procedure examined nineteen prospective jurors at once, and when, after a total of seven challenges were exercised and twelve potential jurors remained, *then* the trial court selected and examined seven new prospective jurors. Although there is no indication that defendant suffered actual prejudice as a result of this procedure, because of the fundamental nature of the right to trial by an impartial jury and the difficulty in examining such claims, prejudice need not be shown. [*Id.* at 303; emphasis in original.]

The jury selection method employed by the trial court in the present case was not the "struck jury" method that requires automatic reversal under *Miller* and *Colon*. The trial court never examined more than fourteen jurors at one time, as occurred in both *Miller* and *Colon*, and did not require the attorneys to exercise multiple peremptory challenges. This case is more analogous to *People v Russell*, 182 Mich App 314; 451 NW2d 625 (1990), rev'd 434 Mich 922; 456 NW2d 83 (1990). In *Russell*, the trial court initially asked, but did not require, the attorneys to excuse up to three jurors at a time by peremptory challenges. *Id.* at 316. On the second day of trial, the court required the attorneys to exercise three peremptory challenges, noting that if they did not exercise three at once the court would treat that as a pass on all jurors not challenged. Defense counsel immediately objected, but jury selection continued under the new rules for three more rounds of challenges before the court announced that it would no longer require counsel to excuse more than one juror at a time. Defense counsel exercised sixteen of his allowed twenty peremptory challenges. *Id.* at 316-317. This Court reversed the defendant's conviction on the ground that requiring defense counsel to exercise multiple peremptory challenges clearly violated MCR 2.511(F). *Id.* at 318-319. Judge Sawyer dissented because, while he agreed that the method of jury selection used was not proper, he did not believe that reversal was required where

the trial court did not use the struck jury method as employed in *Miller*, and the defendant did not exhaust his peremptory challenges, thus impliedly expressing his satisfaction with the jury. *Russell, supra* at 322-326. Our Supreme Court summarily reversed this Court's decision in *Russell* and reinstated the defendant's conviction "for the reasons stated in the dissenting opinion of Judge Sawyer." *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990).

Similarly, in the present case, defendant exercised only six of his allotted twelve peremptory challenges and expressly stated his satisfaction with the jury. Moreover, he did not object to the trial court's method of jury selection. Under these circumstances, and where defendant has not shown any prejudice resulting from the jury selection procedure employed, the struck jury method was not used, and defendant's right to exercise peremptory challenges was not impeded, the trial court's failure to strictly follow MCR 2.511(F) during the jury selection process does not require reversal.

Defendant next contends that he was denied the effective assistance of counsel. For a defendant to establish that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant alleges that trial counsel was ineffective for failing to object to the previously discussed alleged instances of prosecutorial misconduct and to the court's jury instructions on manslaughter and reasonable doubt. We have already discussed these matters and concluded that there was no misconduct by the prosecutor and that the jury instructions were adequate to protect defendant's rights. Therefore, defendant has not shown that counsel was ineffective for failing to object.

Defendant also contends that he was denied the effective assistance of counsel because of counsel's cross-examination of prosecution witness Jimmie Tutt, who was sitting in a car with the victim when he was shot and killed. During the prosecutor's direct examination, Tutt never mentioned defendant. Tutt testified that, after the shooting, he saw what he first described as "some shadow going back towards the street." He later explained that he could see someone running but could not see who it was. During cross-examination, defense counsel elicited Tutt's testimony that he had seen defendant walking around the front of the car before the shooting. Defendant argues that, through this cross-examination, trial counsel "solidified the prosecution's entire case," which amounted to the ineffective assistance of counsel. Defendant relies on *People v Dalessandro*, 165 Mich App 569; 419 NW2d 609 (1988), in support of his claim.

Even assuming that trial counsel made an unprofessional error in his cross-examination of Tutt, the error does not rise to the level of error requiring reversal in *Dalessandro*, a case in which the defense counsel called to the stand a witness whose favorable testimony on direct examination was impeached by the prosecutor with the witness' statements to the police implicating the defendant. These prior inconsistent statements were the only incriminating evidence against the defendant presented at trial and clearly prejudiced the defendant's case. *Id.* at 575-578. Here, apart from Tutt's cross-examination testimony, another eyewitness testified that he saw defendant commit the shooting, and two police officers testified that defendant's

grandfather stated that his grandson had shot the victim. Thus, Tutt's statement was not the most incriminating evidence presented at defendant's trial because Tutt repeatedly denied that he saw the shooter. In order for defendant to establish that he is entitled to a new trial because of his counsel's error, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Pickens*, *supra* at 314, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant has not met this burden here and, therefore, is not entitled to a new trial based on counsel's error.

Next, defendant argues that the cumulative effect of several errors deprived him of a fair trial and requires reversal. The cumulative effect of a number of minor errors may, in some cases, amount to error requiring reversal. *Cooper*, *supra* at 659-660. However, "only actual errors are aggregated to determine their cumulative effect." *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999).

We have identified only three errors committed at defendant's trial. The trial court's misstatement of a word in the jury instructions for involuntary manslaughter was harmless because the jury was properly instructed on second-degree murder but convicted defendant of the greater offense of first-degree murder. The second error is the trial court's mishandling of jury selection. However, the court did not employ the forbidden "struck jury" method, defendant's right to exercise peremptory challenges was not impeded, and defendant did not exercise all of his challenges and expressed his satisfaction with the jury. The third error was defense counsel's misstep in cross-examining Jimmie Tutt. However, this error did not affect the outcome of defendant's trial considering the other testimony presented in connection with this matter. We conclude that the foregoing errors, whether considered singularly or cumulatively, did not deny defendant a fair trial.

Finally, defendant argues that his sentence of life imprisonment without parole is unconstitutional because it violates Const 1963, art 4, § 45.[4] This Court construed this provision of Michigan's constitution in *Cooper*, *supra*, observing that, although it "plainly authorizes indeterminate sentencing, it includes no *prohibition* against a statute *requiring* determinate sentencing as a punishment for crime." *Id.* at 661. In *Snider*, *supra* at 426-427, this Court concluded that "there is nothing in Const 1963, art 4, § 45 requiring indeterminate sentencing for particular crimes, such as Snider's first-degree premeditated murders."

As in *Snider*, defendant does not mention MCL 769.9(1); MSA 28.1081(1), which provides that the provisions of the indeterminate sentencing statute "shall not apply to a person convicted for the commission of an offense for which the only punishment prescribed by law is imprisonment for life." In *Snider*, this Court specifically held that the statute was "not

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[4] Const 1963, art 4, § 45 provides:

> The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences.

unconstitutional, under the binding precedent of *Cooper*." *Id.* at 428. Accordingly, we conclude that defendant's argument is without merit.

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Patrick M. Meter