

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FAHMI L. MUBAREZ,

Defendant-Appellant.

UNPUBLISHED

October 5, 2001

No. 221909

Wayne Circuit Court

LC No. 98-013769

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

The jury convicted defendant of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant to eight to twenty years' imprisonment for the second-degree murder conviction, the sentence to be served consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant erroneously argues that the trial court violated his Sixth Amendment right to confront witnesses testifying against him by restricting his examination of critical witnesses. As an initial matter, we note that, in support of his argument, defendant cites only to portions of defense counsel's direct examination of defendant's own witnesses and not to counsel's cross-examination of prosecution witnesses. Accordingly, this issue involves the trial court's decisions to exclude evidence rather than defendant's right to confront witnesses against him. A trial court's decision to admit or exclude evidence is within the sole discretion of the court and will be reversed only for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification or excuse for the decision. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

Defendant cites to a portion of defense counsel's direct examination of Denise Bostic in support of his argument. However, the record reveals that the trial court did not deny defense counsel the opportunity to question Bostic. While the trial court initially did not allow counsel to ask Bostic if her testimony was true, the court subsequently permitted defense counsel to ask the question and allowed Bostic to answer. In addition, although the court may have initially sustained objections by the prosecutor to some of defense counsel's previous questions of Bostic,

the court subsequently permitted defense counsel to ask Bostic whatever questions he desired. While counsel at first declined the opportunity to continue questioning Bostic, he resumed questioning her after a lunch break. Therefore, defense counsel was not denied his opportunity to question Bostic during trial.

Defendant also argues that he was improperly restricted from questioning Leslie McDonald regarding Steve Lewis' physical description. While the trial court initially sustained the prosecutor's objection regarding the relevancy of the question, the court subsequently allowed defense counsel to ask the question, but counsel declined to do so. In any event, the trial court correctly determined that Lewis' physical description was irrelevant. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. Lewis' identity was not a contested issue at trial. The witnesses who testified about Lewis both knew him and identified him by name. Because his identity was not an issue in the case, his physical description would not have made any fact of consequence to the case more or less probable and therefore was irrelevant. MRE 401. In any event, as the record shows, defense counsel was not deprived of an opportunity to question McDonald regarding Lewis' physical description.¹

Defendant also says that his second-degree murder conviction was against the great weight of the evidence. We disagree. Because defendant failed to preserve this issue for appellate review by raising it in a motion for a new trial in the trial court, we review his claim only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Furthermore, a verdict may be vacated only if it is not reasonably supported by the evidence and is more likely attributable to causes outside the record, such as passion, prejudice, sympathy, or some extraneous influence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). This Court may not attempt to resolve credibility questions anew, but rather, credibility questions should be left to the trier of fact. *Lemmon, supra* at 646; *Gadomski, supra* at 28.

Defendant contends that his second-degree murder conviction was against the great weight of the evidence because the evidence tended to show that Lewis was the true killer. Contrary to defendant's argument, the overwhelming evidence established that defendant killed Arafat Souhauba. Numerous witnesses testified that they saw defendant pointing a gun at Souhauba's Jeep Cherokee and firing the weapon. In fact, Reginald Tidmore was able to identify

¹ Defendant's remaining citations to the record in an attempt to provide a factual basis in support of his argument do not merit discussion.

the weapon as an AK 47 rifle. While Ali Souedan saw Lewis pointing a gun at Souhauba inside the store prior to the shooting, no evidence was presented that Lewis fired at Souhauba. Further, the medical examiner testified that Souhauba's gunshot wounds were caused by a high-velocity weapon. Thus, contrary to defendant's argument, no evidence was presented which tended to show that Lewis, rather than defendant, was the actual killer, and defendant's second-degree murder conviction was not against the great weight of the evidence.²

Further, defendant argues that prejudicial comments by the trial court denied him his right to a fair trial and a fair and impartial jury. We disagree. Because defendant failed to preserve this issue for appellate review by objecting to the trial court's remarks in the trial court, we will review his claim of error only for plain error affecting substantial rights. *Carines, supra* at 761-762; *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996).

A criminal defendant is entitled to a neutral and detached magistrate. *People v McIntire*, 232 Mich App 71, 104; 591 NW2d 231 (1998), rev'd on other grounds, 461 Mich 147 (1999); *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The test is whether a trial court's partiality could have influenced the jury to the detriment of a defendant's case. *McIntire, supra* at 104; *Cheeks, supra* at 480. In addition, partiality is not established by expressions of annoyance, impatience, dissatisfaction, and anger by the trial court that are within the bounds of what imperfect people sometimes display. *McIntire, supra* at 105.

Defendant cites to three separate portions of the trial transcript in support of his argument. One citation concerns defense counsel's attempt to ask Bostic whether she was testifying truthfully. The record reveals that none of the trial court's comments made to defense counsel in this regard were prejudicial. In fact, the record shows that the trial court attempted to allow defense counsel every opportunity to present his case, including allowing counsel to ask questions which had previously been objected to by the prosecutor and sustained by the court. While the trial court may have been somewhat annoyed or impatient with defense counsel, the record does not establish partiality by the court. *McIntire, supra* at 104; *Cheeks, supra* at 480.

Defendant also cites to Tapria McDonald's cross-examination testimony in support of his argument. Again, the record shows that the trial court's comments were not prejudicial. The trial court simply asked counsel to state the basis for his objection, just as the trial court asked the prosecutor to do elsewhere during trial. Defense counsel failed to do so and instead began arguing with the court in the presence of the jury. The trial court's expression of annoyance or impatience with defense counsel was understandable and does not support a claim of partiality.³ *McIntire, supra* at 104-105.

² Defendant also contends that the trial court failed to address defense counsel's arguments made in his motion for judgment notwithstanding the verdict and found that it did not have the power to take the verdict away from the jury. A review of the record, however, reveals that defendant's argument is unfounded.

³ Defendant further contends that the trial court interjected that a witness was lying, however, a review of the record establishes that defendant's claim is wholly unfounded. He also argues that the trial court failed to instruct the jury, as requested by defense counsel, that the court's rulings

(continued...)

Defendant also alleges that the trial court violated his right to a fair trial by refusing the jury's request to provide it with footnote four to the standard jury instruction on second-degree murder. We disagree. Because defendant failed to preserve this issue for appeal by objecting in the trial court when the trial court declined to provide the jury with the requested footnote, we will review defendant's claim of error only for plain error affecting substantial rights. *Carines, supra* at 761-762; *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000).

In lieu of reading the footnote to the jury as requested, the trial court instructed the jury that the footnote was not relevant to its decision. The trial court's failure to provide the requested footnote was not error. The language of the footnote clearly shows that it was included as part of the standard jury instruction for the benefit of trial courts in determining whether to include paragraph four of the instruction. CJI2d 16.5 n 4.⁴ Defendant was not prejudiced by the court's failure to instruct the jury on the contents of the footnote. The court may have declined the jury's request in order to avoid confusing the jury with irrelevant issues and distracting it from its function as the finder of fact. The trial court instead informed the jury that the footnote was not pertinent to its decision, and such a response to the jury's request was appropriate. Therefore, the trial court's failure to provide the jury with the requested footnote did not constitute plain error affecting substantial rights.⁵ *Carines, supra* at 761-762.

Finally, defendant contends that trial counsel was ineffective for failing to call Lewis as a witness at trial. We again disagree. To preserve the issue of ineffective assistance of counsel for appeal, a defendant must move for a new trial or an evidentiary hearing before the trial court. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Defendant's failure to request an evidentiary hearing limits this Court's review of his claim to errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced to the extent that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must show that but for trial

(...continued)

on objections did not reflect the court's attitude toward the case. Defendant fails to cite to any specific portion of the transcript in support of his argument. In any event, the trial court instructed the jury as such at the end of trial along with the other jury instructions.

⁴ The footnote provides:

4. Paragraph (4) may be omitted if there is no evidence of justification or excuse, and the jury is not being instructed on manslaughter or any offense less than manslaughter. Justification or excuse instructions may be inserted here, but they are more commonly given at a later time.

⁵ Defendant next contends that the trial court erred when it refused to admit into evidence his exculpatory statements. Because defendant failed to cite to any authority in support of his position, he has waived this issue on appeal. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id.* at 687. An attorney's failure to call a particular witness is presumed to be trial strategy, and this Court will not substitute its judgment for that of trial counsel on matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defense counsel's failure to call Lewis to testify at trial constituted trial strategy. *Avant, supra* at 508. Also, the record is silent as to what Lewis would have testified, and no evidence was presented that he would have testified favorably to defendant. *Pickens, supra* at 327; *Avant, supra* at 508. While defendant argues that Lewis stole a gun out of Souhauba's Jeep after the shooting, Leslie testified only that she saw Lewis walking away from the Jeep with a black gun after the Jeep had crashed. No evidence was presented that Lewis actually took the gun out of the Jeep. Given that Lewis threatened Souhauba with a gun prior to the shooting, the gun which Leslie saw in Lewis' possession may have been the same gun that Lewis had prior to the shooting. Therefore, if called to testify, Lewis may not have testified that he took the gun from the Jeep as defense counsel argued in his closing argument. In addition, during Souedan's testimony, he referred to Lewis as a "crackhead." Given this characterization of Lewis in front of the jury, defense counsel may have determined that Lewis' testimony would not have helped defendant's case. Accordingly, on the basis of the record, defendant has failed to establish that Lewis' testimony would have altered the result of the proceeding, and, as such, defendant was not denied the effective assistance of counsel at trial. *Pickens, supra* at 327; *Avant, supra* at 508.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck