STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 5, 2001
v	No. 224493 Hillsdale Circuit Court
TIMOTHY WILLIAM SOUTHWORTH, Defendant-Appellant.	LC No. 98-228229

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, assault with intent to rob while armed, MCL 750.89, and felon in possession of a firearm, MCL 750.224f. The trial court subsequently vacated defendant's second-degree murder and assault with intent to rob convictions on double jeopardy grounds, and set aside the felon in possession conviction. Defendant was sentenced to prison terms of life with no possibility of parole on the felony murder conviction, two years on the felony-firearm conviction, 40 to 60 months on the felon in possession conviction, and 50 to 75 years for being an habitual offender, fourth offense, MCL 769.12. We affirm.

This case arises out of the fatal shooting of Thomas Sattler. Sattler was killed by a single shotgun wound to the head. Defendant raises several issues that were not properly preserved at the trial. Each of these issues will be reviewed under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

Defendant's first unpreserved argument is that he was denied a fair trial by an impartial jury because of extensive pretrial publicity. However, defendant neither motioned the court for a change of venue, nor did he object to the impaneling of his jury. See *People v Tubbs*, 22 Mich App 549, 558; 177 NW2d 622 (1970). In essence, defendant is asserting that the trial court should have sua sponte ordered a change of venue.

After reviewing the record we find no error. *Carines, supra.* We find no evidence that pretrial publicity of the case "was either extensive or prejudicial." *People v Jendrzejewski*, 455 Mich 495, 502; 566 NW2d 530 (1997). We cannot conclude that a community has been saturated by publicity when, as defendant acknowledges in his brief on appeal, seven of the twelve impaneled jurors indicated they had not seen or heard news accounts of the crime. Further, there is no evidence that the coverage was invidious or inflammatory, as opposed to simple factual news reporting. *Id.* at 504.[1]

In a related argument, defendant asserts that his counsel was ineffective for failing to move for a change of venue.[2] We disagree. As we have just noted, our review of the record[3] shows that the pretrial publicity of the case was neither prejudicial nor inflammatory. Counsel cannot be faulted for failing to bring a motion that could not be sustained. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

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[1] Defendant also refers to the "small-town character of the area," and the fact that some jurors were acquainted with counsel, witnesses, and other jurors. Although he never explicitly so states, it appears to us that defendant raises these observations for two reasons. First, defendant seems to be arguing that the size of the community is a circumstance that should be considered when evaluating the pervasiveness of any pretrial publicity. While we agree, we reiterate that our review of the record fails to uncover any evidence that the pretrial publicity was extensive and inflammatory. Indeed, if the town is as characterized, the fact that a majority of the impaneled jury reported that they were not exposed to media coverage of the killing only further supports the conclusion that such coverage had not saturated the community.

Second, defendant seems to be asserting that the existence of these relationships is a separate circumstance indicating that he was not tried by an impartial jury. This argument is waived because defendant has neither included it in the questions presented, nor has he cited any supporting authority. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

[2] "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[3] Because defendant failed to move for either a new trial or a *Ginther*[3] hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant's second unpreserved argument is that he was denied a fair trial when the prosecutor said in his opening statement, "I will explain to you what happened basically in chronological order." Defendant claims that the prosecutor expressed a personal belief in what happened and in defendant's guilt by using the word "explain." We disagree.

We see no nefarious implication in the prosecutor's choice of the word "explain." Rather than conveying an expression of personal belief, the term simply put the jury on notice that what was to follow was the prosecutor's theory of the case, which he was free and duty bound to vigorously present. *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

In his third unpreserved argument, defendant contends that he was denied a fair trial because the prosecutor improperly questioned a lay witness about his opinion regarding defendant's guilt. Specifically, defendant asserts that because his theory of defense was one of accident, when the prosecutor asked witness Rick Allwardt whether Allwardt thought the shooting was accidental, the prosecutor was asking the witness to speculate on the ultimate issue of guilt. We reject this reasoning. The prosecutor was within his right to question Allwardt, who witnessed the shooting, about his opinion of the shooting. Allwardt's testimony was rationally based on his perception of the shooting, and was helpful to a clear understanding of the determination of a fact in issue, i.e., whether the shooting was intentional or accidental. MRE 701. This testimony was not "objectionable because it embrace[d] an ultimate issue to be decided by the trier of fact." MRE 704.

Defendant's final unpreserved argument is that he was denied a fair trial because the prosecutor improperly introduced bad acts evidence. We disagree. This issue involves the testimony of Michael Butler. Butler testified that defendant talked about future plans to commit armed robberies of stores and people. Such testimony does not involve other acts, and thus MRE 404 is not implicated. *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989)(observing that "a prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act").

Further, we reject defendant's assertion that this testimony was irrelevant and that its probative value is substantially outweighed by the danger of unfair prejudice.[4] Butler's testimony was clearly relevant under MRE 401 as to the issues of motive, plan, and absence of accident. The testimony supported the prosecutor's assertion that defendant went to the victim's home to commit a robbery and to counter defendant's argument that he was merely seeking to hunt on the victim's property and that the gun accidentally fired when the victim opened the door. In addition, while the danger of prejudice was real, we do not find it to be unfairly so. We also find the probative value to be significant, especially in light of the fact that defendant stated at trial that he originally planned to go to the victim's home in order to commit a robbery but then changed his mind.

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[4] Defendant acknowledges in his brief on appeal that if this was bad acts evidence, it was offered for a proper purpose, i.e., to show a scheme, plan, or system.

We also reject defendant's related assertion that his counsel was ineffective for failing to object to Butler's testimony. Counsel cannot be faulted for failing to raise a frivolous objection. *Gist, supra* at 613.

Finally, defendant contends that the trial court erred in failing to instruct the jury on careless, reckless, or negligent discharge of a firearm, MCL 752.861, as requested by defense counsel. We disagree. In *People v Beach,* 429 Mich 450, 462-463; 418 NW2d 861 (1988), our Supreme Court stated that reckless discharge of a firearm is a cognate lesser included offense of second-degree murder. We "review[] the record adduced at trial to determine whether the evidence was sufficient to convict the defendant of a cognate lesser included offense." *People v Sullivan,* 231 Mich App 510, 517; 586 NW2d 578 (1998).

MCL 752.861 provides: "Any person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor . . . ." After reviewing the record, we conclude that insufficient evidence was adduced at trial to support a conviction of this cognate offense. The only evidence of carelessness, recklessness, or negligence on behalf of defendant was his statement to the police that the shooting was an accident. We agree with the trial court that this testimony alone does not justify instructing the jury on the charge of reckless discharge of a firearm. Defendant asserts that in addition to his statement, "there was police testimony that while being tested by officers, the gun in fact discharged 3 separate times, without the trigger being pulled." Defendant mischaracterizes the police testimony. At trial, Detective Benzing testified that during testing of the gun, when the gun hammer was cocked and the gun slammed to the ground, the gun only discharged the third time it struck the ground. Additionally, there is no evidence or claim by defendant that the gun struck the ground when Sattler was shot.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter