# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

RAMARO A. RICKS, a/k/a RAMANO AKIME RICKS,

Defendant-Appellant.

UNPUBLISHED
December 21, 2001

No. 221282
Wayne Circuit Court
LC No. 98-012430

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

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to consecutive terms of twenty-five to forty-five years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant claims that his convictions must be reversed because the record regarding his waiver of a jury trial is inadequate. An examination of the proceedings with respect to defendant's waiver of a jury reveals that defendant and his attorney signed a waiver of jury trial form[1] on May 11, 1999.[2] The following day, May 12, 1999, defendant, his attorney, and the prosecutor appeared before the trial court for the purpose of placing defendant's waiver of jury trial on the record. At that hearing the following record was made:

[1] Defendant's signature appears on the waiver of trial by jury form dated May 11, 1999, under the following statements:

> I, having had an opportunity to consult with counsel, do hereby in open Court voluntarily waive ansd [sic] relinquish my right to a trial by jury and elect to be tried by a judge of the above named Court, in which this cause is pending.
>
> I fully understand that I have a constitutional right to a trial by jury.

[2] The record is not clear with regard to what occasioned the signing and entry of the waiver form on May 11, 1999. No transcript of the proceedings that day is filed.

*DEFENSE COUNSEL*: Good morning, your Honor. We're here to place a waive [sic] of jury trial on the record.

*THE COURT*: Prosecution have any objection?

*PROSECUTING ATTORNEY*: No, your Honor.

*THE COURT*: Mr. Ricks, you've signed this waiver of your right to a jury trial. Is that correct?

*DEFENDANT RICKS*: Yes.

*THE COURT*: You understand, sir, that as a defendant in this case, you have the right to make a decision of whether you have a trial by me or a trial by jury?

*DEFENDANT RICKS*: Yes.

*THE COURT*: And have you had enough time to think about this and to talk to your attorney about it?

*DEFENDANT RICKS*: Yes, I have talked to my attorney.

*THE COURT*: Okay. You understand that any finding of guilt or innocence by me has the same force and effect as a decision by a jury?

*DEFENDANT RICKS:* Yes, ma'am.

*THE COURT*: And you said you've talked to your attorney, but have you had enough time to think about this?

*DEFENDANT RICKS*: I had basically had my mind set for a jury, but by me talking to my attorney – can I have a little more time to think, a day or two?

*THE COURT*: Okay. You understand your trial is scheduled for tomorrow?

*DEFENDANT RICKS*: Yes.

*THE COURT*: So you can have until tomorrow to think about it.

*DEFENDANT RICKS*: Until tomorrow? Yes, ma'am, that would be fine.

*THE COURT*: Okay. See you tomorrow.

Defendant next appeared before the trial court on May 19, 1999. On that day, the trial court announced that defendant was present for trial by waiver. At the outset of the proceedings on the 19th, no one addressed the issue of defendant's decision to proceed with a bench trial. The case was tried to conclusion before the court, without any further mention of the issue.

On this record, defendant maintains that the trial court failed to comply with the requirements of MCR 6.402(B). Specifically, defendant alleges that when the trial court gave defendant additional time to think about whether he wished to be tried in a bench trial and then failed to revisit that issue before proceeding with the trial itself some days later, the court failed to obtain on the record a statement from defendant that he was voluntarily choosing to relinquish his right to be tried before a jury as required by the court rule. "We review the validity of a defendant's waiver for clear error." *People v Taylor*, 245 Mich App 293, 305, n 2; 628 NW2d 55 (2001), citing *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

MCR 6.402(B) states:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

We agree with defendant that on the facts of this case the trial court failed to comply with the strict requirements of the court rule. When the trial court graciously afforded defendant additional time to consider whether he wished to forgo his right to a jury trial, it allowed for the possibility that a mistake could be made in this process, and a mistake, in fact, occurred. The trial court failed to revisit the waiver issue before proceeding with a nonjury trial. In this context, clearly the trial court failed to address the defendant personally and obtain an unequivocal statement from him that he desired to voluntarily waive his right to a jury trial and to be tried by the court. MCR 6.402(B)

This error, however, does not necessitate reversal of defendant's convictions. The error in this case is constitutional, US Const, Am VI; Const 1963, art 1, § 20, but it is unpreserved. At no time did defendant register an objection to proceeding without a jury. Therefore, defendant's claim on appeal is subject to review as forfeited constitutional error. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). To prevail a defendant must show plain error that affected his substantial rights. *Id.* at 763. If a defendant succeeds in showing plain error affecting his substantial rights, then this Court must exercise its discretion in deciding whether to reverse. *Id.* "Reversal 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.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 LE2d 508 (1993) (internal quotations omitted).

Here, we find that defendant easily establishes plain error affecting his substantial rights. However, we cannot say that defendant is actually innocent or that the error seriously affected the judicial proceedings. Later in this opinion we address and reject defendant's claims that the evidence was insufficient and that the verdict was contrary to the great weight of the evidence. The evidence, in fact, persuasively shows that defendant is guilty.

The analysis regarding whether this error seriously affected the judicial process is more difficult. We are not unmindful of the fundamental constitutional right at stake here. US Const, Am VI; Const 1963, art 1, § 20. Nevertheless, we believe that neither the fairness, integrity nor

public reputation of the judicial process was seriously affected by what happened in this case. We have already alluded to the fact that the circumstances that gave rise to this error were a consequence of the trial court proceeding in a manner intended to benefit defendant. The trial court gave defendant additional time to consider his position. Defendant had already signed a waiver. On May 12, the trial court clearly explained to defendant his rights and the consequences of waiver. The only step left was a statement in agreement in open court. That step never occurred when the proceedings resumed. However, we believe that the fact that the case proceeded without any objection from defendant about the trial being conducted without a jury speaks volumes. The obvious implication is that defendant was either receiving the type of trial he desired or he was harboring error in the record. In either event, he is entitled to no relief. Obviously, if it was his intention to be tried before the court rather than a jury, he has no claim for relief. Regarding harboring error, this Court has stated in other circumstances that a defendant who engages in such a practice is entitled to no relief. See *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998) ("To hold otherwise would allow defendant to harbor error as an appellate parachute."). Under these circumstances, we believe the only possible attack on the fairness, integrity or public reputation of judicial proceeding would be if we held this error to be one requiring reversal. Consequently, we hold this error harmless and grant defendant no relief.

Next, we address an issue raised in defendant's pro se supplemental brief that alleges that the evidence at trial was insufficient to support his conviction for second-degree murder. Specifically, defendant claims that the proofs did not establish that his weapon was used to kill the victim and that the trial court's findings of fact were not supported by the evidence.

Due process requires that the prosecution introduce sufficient evidence that could justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). "When reviewing a claim of insufficient evidence following a bench trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

The elements of second-degree murder are "'(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). In reviewing a sufficiency argument, this Court must not interfere with the trier of fact's role in determining the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

First, we dispense with the notion that the prosecution must prove that defendant's weapon was the murder weapon. Defendant does not challenge on appeal his presence at the scene, nor does he maintain that he was unarmed. What he does claim is that the evidence failed to show that his weapon fired the fatal shot and argues that this fact establishes that the evidence is insufficient to convict him of murder. However, defendant offers no support, nor can he, for the proposition that proof that his weapon fired the fatal shot is an essential element of the crime of murder. To the contrary, the prosecution is not required to produce the actual murder weapon

in order to convict an individual of second-degree murder. *Mayhew, supra*; see *People v Saunders*, 189 Mich App 494, 495-496; 473 NW2d 755 (1991).

Additionally, defendant expends considerable effort pointing out the weaknesses and inconsistencies in the testimony of the three eyewitnesses to the crime. This is not a difficult task. We readily admit that the proofs in this case are littered with contractions, inconsistencies, and gaps in the timeline. Alone, however, such circumstances do not mandate a finding that the evidence is insufficient. These circumstances merely create credibility issues that the fact-finder must resolve and that we will not resolve anew on appeal. MCR 2.613(C); *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

Clearly, the evidence in this case, when viewed in a light most favorable to the prosecution, could lead a rational trier of fact to conclude that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *Hutner, supra*. The thread of the testimony of the three eyewitnesses is that a minor disturbance occurred between the victim and defendant while in a store. They exited the store after the incident together, where the interaction escalated between them, and led to defendant producing a gun and pointing it at the victim. A witness attempted to pull the victim into the store, but at that time defendant shot the victim in the leg. The gunshot severed the victim's femoral artery and he bled to death. This evidence, if believed, proved defendant's guilt beyond a reasonable doubt of the charge of second-degree murder.

We also reject defendant's assertion that the trial court's fact findings were clearly erroneous. Specifically, defendant argues that the trial court erred in finding that defendant shot the victim because the testimony of eyewitnesses was inconsistent with their preliminary examination testimony and with each other's testimony. However, this Court gives deference to the trial court's special opportunity to judge the credibility of the witnesses. MCR 2.613(C). This Court will not resolve questions of credibility anew on appeal. *Givans, supra*. Findings of fact are clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake was made. *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999), aff'd on other grounds 462 Mich 71 (2000). We have reviewed the trial court's findings and, upon review of the record and in light of our deferential standard of review, we conclude that no error exists that would entitle defendant to any appellate relief.

Further, we find without merit defendant's claim that the verdict in this case was against the great weight of the evidence. Defendant predicates this argument on the confusing and contradictory testimony of George Jones, an eyewitness, and, relying on *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998), asserts that this testimony has so little probative value that it would be a miscarriage of justice to allow the verdict to stand.

Conflicting testimony or questions of credibility are sufficient grounds for granting a new trial only if the impeached testimony was deprived of all probative value. *Lemmon, supra*. Here, after reviewing the evidence that defendant maintains is without probative value, we are not persuaded that the verdict in this case is based upon evidence that is devoid of probative value. Again, although there were weaknesses in the witness's testimony, we do not find them to be exceptional. This incident transpired rapidly and unexpectedly. It is not surprising that the witness had difficulty reconstructing the events and that his testimony was somewhat inconsistent, or even that his trial testimony varied in some respects with his preliminary

examination testimony. Nevertheless, taken as a whole, this witness's testimony, along with all the other evidence in the case, establishes defendant's guilt. Further, and most importantly to this claim, we believe that this witness's testimony was not impeached to the point of being without any probative value. Although his testimony was impeached, the prosecution rehabilitated his testimony through prior statements and testimony that were consistent with his testimony at trial. Additionally, the other witnesses provided testimony that was predominantly consistent with Jones' testimony. Also, the location of the gunshot wound was consistent with his testimony that he tried to pull the victim into the store and that the victim was shot as they tried to do so. Consequently, the evidence does not preponderate heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *Id.* at 627.

Defendant's final claim, raised in his supplemental pro se brief, is that the trial court admitted false and perjured testimony. Defendant maintains that much of the testimony of George Jones should have been excluded for this reason. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). We categorically reject defendant's argument. Merely because defendant vigorously attacked this witness's testimony at trial regarding its credibility is not a sufficient basis to say that the testimony is perjured and must be excluded. The trial court did not abuse its discretion in admitting the challenged testimony of this witness.

Affirmed.

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