

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH CHASE,

Defendant-Appellant.

UNPUBLISHED

December 21, 2001

No. 223721

Oakland Circuit Court

LC No. 98-159521-FC

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of one count each of assault with intent to murder, MCL 750.83, felony-firearm, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 25 to 50 years' imprisonment on the assault with intent to murder conviction, five to fifteen years on the felon in possession of a firearm conviction, and two years on the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

This case arises out of the March 13, 1997, shooting of defendant's girlfriend of twelve years in a residence shared by defendant, his girlfriend and their minor son. The victim was struck by five bullets from a handgun and sustained wounds to the right side of her torso, her left eye, her right arm, and two wounds to her left arm. The bullet which entered the victim's left eye remains lodged in her head because of the danger in removing the bullet. The victim survived the shooting.

The victim testified that defendant shot her when she threatened to leave him and take their child after defendant resumed aggressive and abusive behavior towards her. The victim had returned to the residence the day before the shooting after leaving for an extended period of time because of the stormy relationship. The victim struggled with defendant while he was shooting her and attempting to drag her to the upstairs of the home; however, the victim was able to free herself and obtain help at a neighbor's residence. Several witnesses, including the neighbor, police officers, and medical personnel, testified regarding the shooting injuries suffered by the victim. The victim testified that the minor child was present in the room when the shooting occurred.

Defendant testified that he could not recall the shooting, and that he blacked out after an argument erupted between himself and the victim. Defendant testified that his next memories were of him contacting his attorney. However, on cross-examination, defendant testified that the minor child was not in the room during the shooting. Defendant fled the scene, and he was arrested months later after turning himself in to authorities through efforts of defense counsel.

II

Defendant first contends on appeal that the trial court improperly allowed testimony indicating that defendant had engaged in previous violent behavior against the victim, and that the evidence was not offered for any legitimate purpose under MRE 404(b), nor was such evidence offered in conformity with the procedural requirements of MRE 404(b).

The decision to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

A

Defendant objected to the evidence regarding his prior violent behavior, and the objection was sustained. Notwithstanding the trial court's ruling and contrary to defendant's arguments on appeal, we find that the evidence regarding the prior bad acts was not improperly introduced at trial. MRE 404(B).

Defendant's theory of defense was that he "snapped" or lost control based on events occurring at the time of the assault and blacked out. On cross-examination of the victim, defense counsel attempted to elicit testimony that defendant's actions on the day of the shooting were out of character, and that he had never become so angry in the past that it escalated to the violent extreme it did on March 13, 1997. On redirect, the prosecutor simply sought testimony to rebut defendant's position and to show that defendant's actions on March 13, 1997, were in character, and that his anger had escalated to violence in the past. In other words, defense counsel opened the door to this line of questioning and the prosecutor permissibly followed up. In addition, when the prosecutor again referenced the prior bad acts on cross-examination of defendant, the questioning followed defendant's assertion that he had a good relationship with the victim before the assault. Therefore, there was no violation of MRE 404(b). *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992).

B

Defendant next argues that the trial court, in violation of the Sixth Amendment, curtailed defendant's right to cross-examine the victim, where defendant was not allowed to question her about her drug use history and misdemeanor embezzlement conviction. Initially, we note that the trial court ruled that defendant could reraise the issue of the victim's prior misdemeanor embezzlement conviction during trial, at which time the court would reconsider its earlier denial, and make a ruling dependent upon the circumstances. Defendant never raised the issue during cross-examination of the victim. Therefore, it cannot be said that the trial court erred in denying the request to introduce the conviction evidence because there was no outright denial, and defendant never renewed the issue.

The evidence of the victim's prior drug use had no relevance to any fact of consequence, i.e., to the issues at trial. MRE 401. Defendant contends that the evidence of prior drug use was relevant to the victim's veracity regarding her identification of defendant as the shooter which, according to defendant, was at issue because of defendant's testimony that he did not remember the shooting. However, defendant did not testify that he was not the shooter; he merely testified that he "blacked out" after arguing with the victim. Therefore, defendant's right to confront witnesses was not implicated or violated. The right to confrontation does not include the right to cross-examine witnesses in whatever way and to whatever extent a defendant wishes. *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998). The trial court did not abuse its discretion in excluding the evidence.

III

Defendant next contends that the trial court made improper statements to the jury during voir dire which indicated a bias by the court against defendant, and suggested that the court believed that defendant and defense counsel were delaying the trial process. The issue was not preserved for appeal; therefore, we review for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant in a criminal trial is entitled to a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The test is whether partiality could have influenced the jury to the detriment of the defendant's case. *Id.* Partiality is not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. *Id.* The trial court's statements should not be taken out of context. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

The trial court's comment was, at worst, an expression of impatience and dissatisfaction within the bounds of what imperfect people sometimes display. When viewing the trial court's statement in context, it is clear that any impatience by the judge was because he had to call more prospective jurors to the courtroom resulting in delay, and not any actions on the part of defendant or defense counsel. There was no plain error.

IV

The parties entered into a stipulation concerning the felon-in-possession charge so that the jury would not learn the particular felony of which defendant was previously convicted. Nonetheless, the trial court, during opening remarks, inadvertently disclosed the offense, possession with intent to deliver heroin, to the jury array. Defendant now argues that the trial court erred in failing to grant a mistrial or provide any curative instruction, although it indicated that such an instruction would be given. Defendant claims that disclosure of the drug felony conviction biased the jury against him, and denied defendant's right to a fair trial.

The grant or denial of a motion for mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *Id.*

We first note that the trial court did instruct the jury not to consider any prior felony committed by defendant in deciding the assault and felony-firearm charges. In addition, defendant was not prejudiced by the identification of the previous conviction as being a drug offense.

It is clear from defendant's opening statement, that his prior drug use provided part of his defense strategy. Counsel attributed defendant's actions, in part, to "many years" of drug use as well as drug use on the day of the offense. The reference to the particular prior felony did not relate to an assaultive crime, but a drug crime, which further reduced any prejudicial effect. In addition, the brief reference by the trial court to the actual crime does not require reversal where there was a stipulation placed on the record and a proper instruction. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). The trial court did not abuse its discretion in denying defendant's motion for mistrial based on the court's remarks specifying the nature of defendant's prior conviction.

V

Defendant next contends that there was objectionable testimony from Officer Jeff Jogan regarding the victim's medical condition and from Officer Mark Means, who said that defendant had fled and eluded arrest for months, and that defendant directly told Officer Means that he was tired of running. Defendant argues that these errors required an order declaring a mistrial. We disagree.

Regarding the testimony of Officer Jogan concerning the victim's medical condition, based on his observations of the x-rays, we agree with defendant that the testimony was not within the knowledge of a layperson, and that it was error to allow the officer to testify on the matters. However, the evidence was clearly not prejudicial. There was sufficient testimony, besides the officer's, to establish that the victim had been shot in the head through the eye, three times in both arms, and in the side of the torso, and defendant never denied the shooting or the location of the bullet wounds.

As to Officer Means' testimony regarding flight, the officer testified that defendant fled and eluded police for approximately two to three months. Defendant objected to the questioning regarding flight on relevance grounds; however, the trial court overruled the objection. This testimony was proper pursuant to *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), in which this Court stated:

It is well established in Michigan law that evidence of flight is admissible. See, e.g., *People v Cammarata*, 257 Mich 60, 66; 240 NW 14 (1932); *People v Cutchall*, 200 Mich App 396, 398-401; 504 NW2d 666 (1993); *People v Clark*, 124 Mich App 410, 413; 335 NW2d 53 (1983). Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction. *Cutchall*, *supra* at 399, 401; see CJI2d 4.4.

In addition, the trial court, in the present case, instructed the jury regarding flight, and that flight did not prove guilt.

Officer Means' testimony that defendant and defense counsel were present at a local restaurant for a meeting, in which defendant stated that he was tired of running and wanted to turn himself in drew an objection from defense counsel. The objection to the testimony was sustained, and the evidence was stricken with the jury being instructed, after all proofs were submitted, not to consider any stricken evidence.

Officer Means' testimony did not require a mistrial. The testimony itself did not specifically indicate that defendant was guilty of a crime, but only that he was tired of authorities searching for him and having to avoid arrest, which did not necessarily mean that defendant turned himself in because he was guilty. Regardless, any error was harmless based on the overwhelming evidence of defendant's guilt. MCR 2.613(A); MCL 769.26.

The trial court did not abuse its discretion in denying defendant's motion for mistrial based on the officers' testimony. *Wells, supra* at 390.

VI

Defendant next contends that defense counsel was ineffective for failing to request instructions on felonious assault, MCL 750.82, and assault with intent to commit great bodily harm less than murder, MCL 750.84.

The standard of review regarding a claim of ineffective assistance of counsel is whether trial counsel's performance was deficient, and whether there was a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000).¹

In *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995), this Court stated that "[t]he elements of the crime of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." The *Lugo* panel also stated that "[t]he elements of the crime of assault with intent to do great bodily harm less than murder are (1) an attempt or offer with force or violence to do corporeal hurt to another (an

¹ The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 668, 688; 104 S Ct 2052; 80 L Ed 2d 674, on remand 737 F2d 894 (CA 11, 1984). In *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994), our Supreme Court adopted the test in *Strickland* for purposes of analysis of a claim of ineffective assistance of counsel under the Michigan Constitution. This 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 Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

assault), (2) coupled with an intent to do great bodily harm less than murder.” *Id.* In *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), this Court stated that “[t]he elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.”

Felonious assault and assault with intent to do great bodily harm less than murder are lesser offenses of assault with intent to murder. *People v Ross*, 73 Mich App 588, 592; 252 NW2d 526 (1977). However, counsel’s decision to request instructions on lesser included offenses falls within the purview of trial strategy which should not be second-guessed. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). An all-or-nothing defense can be legitimate trial strategy. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982).

However, even if the failure to request instructions on lesser-included offenses was ineffective assistance of counsel in this case, there was no reasonable probability that the result of the proceedings would have been different. The victim was shot five times before she was able to escape, and one bullet was lodged in her head. The evidence was overwhelming that defendant was guilty of assault with intent to murder, and an instruction on the two lesser offenses would not have, in all probability, changed the result. *Strickland, supra* at 688. Reversal is not warranted based on ineffective assistance of counsel.

VII

Finally, defendant contends that the sentence of twenty-five to fifty years amounts to a life sentence to defendant, who was fifty-five years old; therefore, the sentence was cruel and unusual punishment. Defendant argues that a term of years must be something reasonably possible for defendant to serve within his lifetime; therefore, the sentence must be reduced.

At the sentencing hearing, defendant requested mercy based on his age and asked the trial court not to sentence defendant to a term of years that would amount to a life sentence. However, defendant also stated “[w]e would ask that the Court follow the guidelines in this case and that Mr. Chase not be sentenced to 30 to 50 years, as is recommended by the prosecution.” The sentencing guidelines provided for a minimum sentence range of fifteen to twenty-five years. Therefore, defendant was sentenced within the guidelines as requested. A criminal defendant may forfeit a right by failing to timely assert it, but a forfeited right may still be reviewed for plain error, while the intentional relinquishment of a known right constitutes a waiver which extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Therefore, defendant waived his right to challenge any sentence that was within the sentencing guidelines.

Affirmed.

/s/ William B. Murphy

/s/ Janet T. Neff

/s/ Joel P. Hoekstra