

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAHEED M. MUHAMMAD, f/k/a ERIC
FRENCH,

Defendant-Appellant.

UNPUBLISHED

January 29, 2002

No. 224083

Wayne Circuit Court

Criminal Division

LC No. 93-011714

Before: White, P.J., and Whitbeck, C.J., and Holbrook, J.

PER CURIAM.

Defendant was convicted, following his second jury trial,¹ of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of forty to eighty years' imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant's convictions stemmed from the October 9, 1993, shooting death of Siraylafa "Minnie" Lovejoy. Ms. Lovejoy and defendant were involved in a romantic relationship

¹ Defendant's first conviction was reversed by this Court. Defendant filed a notice of insanity defense prior to the first trial. He was examined by Dr. Dexter Fields of the Recorder's Court Psychiatric Clinic; Dr. Fields concluded that defendant was not insane. Defense counsel requested an independent examination. The court agreed, but required that the new report be filed within five days. When defense counsel requested a continuation to allow the second doctor more time to conduct the examination, the request was denied and trial proceeded with defendant pursuing a mitigation/manslaughter defense, rather than an insanity defense. A panel of this Court found that the trial court abused its discretion in denying the continuance. The Court remanded for the appointment of an independent expert to evaluate and provide a report regarding defendant's criminal responsibility. *People v French*, unpublished opinion per curiam of the Court of Appeals, issued 8/30/96 (Docket No. 176703). On remand, defendant obtained a report concluding that he was not responsible and moved for a new trial. The trial court denied the motion, concluding that the report would not have made a difference. On appeal, this Court reversed and ordered a new trial, finding that the court invaded the province of the jury. *People v French (After Remand)*, unpublished opinion per curiam of the Court of Appeals, issued 3/12/99 (Docket No. 176703).

beginning in October 1991. Ms. Lovejoy became pregnant and had a son, Edarius. The relationship ended in May 1993. On the day in question, defendant went to Ms. Lovejoy's home. The two had a confrontation and defendant shot and killed her.

Defendant first argues that reversal is required because the trial court erroneously excluded as hearsay proposed testimony that his trial lawyer advised him that he could not present an insanity defense at his first trial. We disagree.

At his first trial, defendant testified that the victim was his girlfriend and that Edarius was born in January 1993. He admitted having conflict with the victim and that she had obtained an injunction against him. He testified that he went to the victim's house on the day in question, and that when he went inside the house and attempted to talk to the victim about their child, she told him to leave. He testified that the victim's brother pushed him and another family member grabbed him. Defendant admitted that he then pulled out a gun. According to defendant, everyone ran and he and the victim stood in the room. He put the gun away and asked the victim why he was being treated this way. Defendant testified that the victim told him for the first time that Edarius was not his child and that he had no right to see him. Defendant testified that the next thing he knew "it happened." He said that he then left, went to a family member's house and then turned himself in to the police.

At the second trial, defendant pursued an insanity defense, relying on the testimony of Dr. Steven Miller. At the beginning of trial, the prosecution obtained the court's permission to read defendant's testimony from the first trial to the jury. The prosecutor argued that the evidence would tend to show that the insanity claim was fabricated. The prosecutor argued that when defendant was questioned by Dr. Miller concerning the incident, he claimed memory loss, hallucinations, voices ringing and that he had a blackout, but, at his first trial, defendant was able to give an account of the crime, so his prior testimony would tend to show that the insanity claim was a fabrication.

The matter was revisited after jury selection when defense counsel asked for clarification of the court's ruling. The court clarified that the evidence could be used in the prosecutor's case-in-chief. Defense counsel raised the issue whether defendant, if he took the stand, would be able to testify that the reason he did not bring up the matters recently reported to Dr. Miller when he testified in his first trial was "because of a legal issue that was going on at the time." Defense counsel clarified that he wanted defendant to testify that his lawyer had told him that he could not testify about what he told Dr. Miller. The court ruled that defendant could not testify about what his lawyer told him because it would be hearsay.

We agree with defendant that the court erred in concluding that the testimony would constitute hearsay. Nevertheless, we conclude that the error was harmless. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c). In this case, defendant sought to explain why he did not give certain testimony at trial. The statement attributed to his first counsel, that he could or should not give the testimony, was not offered for the truth of the matter asserted, but rather to explain why defendant did not give the testimony. It is irrelevant whether as a legal matter defendant was in fact precluded from giving the testimony. Thus, the truth of counsel's statement is not at issue. The relevance of the testimony rests on the truth of defendant's testimony, i.e., whether counsel, in fact, told him that he could or should not testify to those

matters, and whether that was the real reason he did not so testify. These matters were not hearsay.

Defendant was not, however, prejudiced by the error. Dr. Miller testified that defendant explained to him that he did not have an independent psychological examination at the first trial and so the defense presented was one of passion. Defendant reported to Dr. Miller that on the advice of counsel, defendant emphasized the elements that supported the defense asserted and “did not bring into his defense or his testimony elements that related to the psychiatric defense.” Defendant reported that he had, in fact, lied when he testified that the victim said that Edarius was not his son. Thus, the substance of the testimony precluded by the court’s ruling was presented through the testimony of Dr. Miller and defendant suffered no prejudice.

To the extent defendant argues that this ruling affected his decision to testify, we reject the argument as having no support. Even before this issue arose, defense counsel stated that defendant’s intent was to remain silent in the second trial. Further, we are not persuaded that had defendant intended to testify to address issues beyond that covered by Dr. Miller’s testimony regarding defendant’s reasons for testifying as he did at the first trial, he would have forfeited that right simply because of the court’s ruling that he could not testify regarding counsel’s advice.

Next, defendant argues that the court abused its discretion by arbitrarily refusing to provide him with a preliminary evaluation of his sentence pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). Although our Supreme Court in *Cobbs* recognized a trial judge’s authority to participate in the plea negotiation process by providing a preliminary evaluation of a defendant’s sentence, it did not require a judge to do so. *Id.* at 283. Here, the record reveals that defense counsel never made an explicit request for a *Cobbs* evaluation and, as indicated, the court was under no legal obligation to do so, even on request. Accordingly, we find no merit to this claim.

Next, defendant argues that reversal is required because the clerk administered a defective oath to the jury. Because defendant failed to object to the oath that was administered at trial, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Here, the oath that was given was sufficient to impress upon the jurors the duty to try defendant in accordance with the evidence and the law. Thus, even though it did not exactly comport with either MCR 2.511(G) or MCL 768.14, we are satisfied that defendant’s substantial rights were not affected.

Next, defendant argues that a mistrial should have been granted because, during jury voir dire, information was disclosed concerning numerous crimes committed against the prospective jurors or their close friends or relatives. Because defendant failed to object to the challenged voir dire or request a mistrial in the trial court, this issue is not preserved and, accordingly, our review is limited to plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764. Here, the challenged information was necessary to enable the parties to intelligently determine whether the individual jurors could fairly decide the case and, contrary to what defendant argues, there is no indication that the experiences biased the jurors against defendant. Plain error has not been shown.

Defendant next argues that the trial court erred in denying his request for disqualification of the trial judge. We disagree. Absent actual personal bias or prejudice against either a party or a party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). A judge's opinions that are formed on the basis of facts introduced or events that occur during the course of the current proceedings, or prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Id.* at 496. Further, judicial rulings alone rarely establish disqualifying bias or prejudice. *Id.* A party who challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Id.* at 497.

Here, the record fails to show actual bias or prejudice on the part of the trial judge. *Cain, supra*. Nor has defendant identified any circumstances where a showing of actual bias is unnecessary, because the probability of bias is too high to be constitutionally tolerable. *Crampton v Department of State*, 395 Mich 347; 235 NW2d 352 (1975). Thus, this issue does not warrant appellate relief.

Next, defendant argues that the trial court erroneously instructed the jury on flight. We disagree. The instruction was proper in light of evidence that defendant fled the crime scene after the shooting. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The jury was properly permitted to determine whether defendant's conduct in leaving the house immediately after the shooting showed consciousness of guilt.

Defendant also argues that the court erroneously instructed the jury on reasonable doubt. Because defendant did not object to the court's instructions on reasonable doubt, we review this issue for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). A reasonable doubt instruction, "when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Although due process requires the prosecution to prove a defendant's guilt beyond a reasonable doubt, the United States Constitution neither prohibits nor requires a trial court to define the concept of reasonable doubt, provided the court instructs the jury that a defendant's guilt must be proved beyond a reasonable doubt. *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994). Moreover, the United States Constitution does not require a trial court to utilize any particular language in informing the jury of the government's burden of proof. *Id.* Rather, the instructions, viewed in their entirety, must correctly explain the concept of reasonable doubt to the jury and must ensure that there is no reasonable likelihood that the jurors applied the instructions in a manner that violated the Constitution. *Id.* at 5-6, 22-23.

Viewed in their entirety, we are satisfied that the trial court's instructions on reasonable doubt sufficiently informed the jurors of the prosecution's burden and what constituted a reasonable doubt, and that there was no reasonable likelihood that the jurors applied the instructions in a manner that violated the Constitution. Defendant has failed to show that court's instruction constituted plain error.

Defendant also contends that the cumulative effect of several errors deprived him of a fair trial. However, having failed to demonstrate error on any single issue, defendant's cumulative error argument must fail. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Next, defendant argues that he was denied the effective assistance of counsel at trial. Because this issue was not raised in an appropriate motion in the trial court,² our review is limited to alleged deficiencies that are sufficiently contained in the record to permit this Court to reach and decide the issue. *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985).

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal, defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment. Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, defendant must show that the deficient performance prejudiced his defense. To demonstrate prejudice, defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because defendant bears the burden of demonstrating both deficient performance and prejudice, he necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant contends that trial counsel should have objected to the introduction of a copy of an injunction that the victim had obtained against defendant. Apparently the injunction included the allegation that defendant had threatened to kill the victim. We agree that there is no explanation for counsel's failure to attempt at least to have the allegation redacted from the document as prejudicial hearsay. However, we are unable to conclude that this allegation within the exhibit affected the outcome of the trial, where defendant's primary defense was insanity.

Defendant also contends that counsel should have objected on the basis that the evidence was substantially more prejudicial than probative under MRE 403. Under MRE 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Here, the evidence was relevant to show the context of the crime, *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Accordingly, defendant has failed to show that defense counsel was ineffective for failing to object.

Defendant also argues that counsel erred in failing to object to evidence that defendant punched the victim in April of 1992, and evidence that defendant failed to acknowledge paternity and failed to support the child. We conclude that this evidence had no effect on the outcome of the trial and therefore defendant cannot establish the requisite prejudice to support his claim.

Defendant also argues that counsel was ineffective for failing to preserve the various

² A different panel of this Court previously denied defendant's motion to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

other issues addressed in this opinion with an appropriate objection at trial. However, in light of our resolution of the foregoing issues, we conclude that defendant has failed to demonstrate that trial counsel was ineffective, or that defendant was prejudiced. *People v Torres (On Remand)*, 222 Mich App 411; 425; 546 NW2d 149 (1997).

Lastly, defendant argues that the trial court's sentence deprived him of due process because it was meant to deprive him of any parole consideration. We disagree. A sentence of a term of years is not invalid simply because it is so lengthy that parole eligibility is precluded. *People v Merriweather*, 447 Mich 799, 808-811; 527 NW2d 460 (1994). The Supreme Court has held that a court may impose a sentence of imprisonment for a term of years that has the effect of avoiding eligibility for parole if it is appropriate to the offense and the offender. *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997). Here, defendant's sentence is proportionate to the offense and offender and, therefore, this claim does not merit reversal.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.