

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED OSCAR BRINSON,

Defendant-Appellant.

UNPUBLISHED

March 22, 2002

No. 228265

Oakland Circuit Court

LC No. 00-171477-FC

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f(2), intentionally discharging a firearm at a dwelling, MCL 750.234b(1), and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of forty to eighty years for the murder conviction, two to ten years for the felon in possession of a firearm conviction, and two to eight years for the discharge of a firearm conviction, to be served consecutively to three concurrent two-year terms for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in giving a second-degree murder instruction that failed to require the jury to find that defendant fired the fatal shot. We disagree. We review jury instructions as a whole, rather than piecemeal. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). The reviewing court must balance the meaning of the instructions as a whole against the potentially misleading effect of an isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1990). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly presented the issue to be tried and sufficiently protected the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Here, defendant failed to object to the instructions in question. Accordingly, we review this issue for a clear or obvious error that likely affected the outcome of the case. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We find no clear or obvious error here. The court instructed the jury as follows:

To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused the death of Joseph Lee. *That is, that Joseph Lee died as a result of a gunshot wound to the head.*

Second, that the defendant had one of these three states of mind: He threatened to kill, or he threatened to do great bodily harm to Joseph Lee, or he knowingly created a very high risk of death or great bodily harm knowing that death or great bodily harm would be the likely result of his actions.

Third, that the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. [Emphasis added.]

While the italicized sentence from the above excerpt is misleading if read in isolation, the instructions as a whole sufficiently protected the defendant's rights. *Gaydosh, supra* at 237; *Freedland, supra* at 766. Indeed, the court clearly stated that the prosecutor had to prove "that the defendant caused the death of Joseph Lee." Moreover, there can be no doubt that, given the facts of this case, the overriding issue at trial was whether defendant fired the particular shot that killed the victim. No plain error occurred. *Carines, supra* at 763.

Next, defendant argues that trial counsel was ineffective in failing to object to the second-degree murder instruction discussed above and in failing to impeach two witnesses with their statements to the police. Again, we disagree.

Because we have concluded that the second-degree murder instruction was not erroneous, counsel was not ineffective in failing to object. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Concerning the impeachment of witnesses, defendant relies on transcripts of police interviews that were not introduced below. However, when a defendant fails to move below for an evidentiary hearing on the issue of ineffective assistance of counsel, our review is limited to mistakes that are apparent *on the record*. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Therefore, the transcripts may not be considered.

Moreover, whether and how to impeach witnesses is a matter of trial strategy entrusted to counsel's professional judgment. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). After carefully reviewing the record, including the substantial scientific evidence, we conclude that counsel did not err in failing to further impeach these witnesses, and, even if he did, the outcome of the case was not affected as a result. *People v Pickens*, 446 Mich 298, 312, 314; 521 NW2d 797 (1994). Defendant has therefore failed to overcome the presumption of sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "The fact that the strategy chosen by counsel did not work does not constitute ineffective assistance of counsel." *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).¹

¹ We note that at the end of his appellate brief, defendant cursorily suggests that this Court remand the case for an evidentiary hearing on ineffective assistance of counsel. Defendant cites no authority in support of his remand request and has therefore waived the issue for appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Moreover, defendant failed

(continued...)

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter

(...continued)

to file a separate motion for a remand with the Court. See generally *People v Bright*, 126 Mich App 606, 610; 337 NW2d 596 (1983).