

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY O. WRIGHT,

Defendant-Appellant.

UNPUBLISHED

June 28, 2002

No. 226743

Wayne Circuit Court

LC No. 99-006103

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

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of thirty to fifty years for the murder conviction and twenty to forty years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand to allow the court to state its reasons for departing from the sentencing guidelines' recommended minimum sentence ranges.

This case involved a drug-related killing. A dispute regarding drugs or the rental of an apartment had occurred between defendant and Hayes Smith. On the evening of the crimes, defendant, who had armed himself with a shotgun in advance, went to the nearby apartment Smith shared and knocked on the door. When the door was answered, defendant walked in and went directly to a bedroom where Smith and others were packaging drugs. Defendant shot Smith, then pointed the gun at a woman in the room. John Cheatham, who also was present inside the room, shot defendant with a handgun. Defendant then shot and killed Cheatham.

I

Defendant first contends that the trial court erred in allowing the prosecutor to read into evidence the prior testimony of witness Terrie Lynn Patterson because the prosecutor had not used due diligence to secure her presence at trial. The court found that the witness was unavailable and that due diligence had been shown, and therefore permitted the prosecutor to use Patterson's preliminary examination testimony pursuant to MRE 804(b)(1).

Although the prosecutor had earlier sought and received a material witness detainer that imposed a bond on Patterson to assure her availability for testimony, we do not believe that this fact put the prosecutor on notice that he must take extraordinary measures such as arrest and detention to assure her availability. Patterson appeared and testified at the preliminary examination. While she failed to appear at one pretrial hearing, she had not yet been served a subpoena. Patterson honored the trial subpoena and appeared at an evidentiary hearing on the first scheduled day of trial, although she did not return for additional trial dates. When a witness voluntarily excludes herself from testifying at trial, it appears questionable whether due diligence need be shown before the witness may be deemed unavailable. See *People v Adams*, 233 Mich App 652, 659 n 5; 592 NW2d 794 (1999) (questioning whether MRE 804(a)(5) and its due diligence standard apply when the prosecution procured the witness' attendance for trial but she left before testifying). Even assuming that the due diligence standard applies to this situation, under the instant circumstances we find no clear error in the trial court's determination that the prosecutor employed due diligence, and we find no abuse of discretion in the trial court's admission of Patterson's prior testimony. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

II

The trial court also permitted the use of preliminary examination testimony supplied by shooting victim Smith, who died before trial. Defendant challenges the trial court's admission of the prior testimony on the basis that the preliminary examination magistrate restricted his cross examination of Smith. Defendant suggests that these restrictions deprived him of his state and federal right of confrontation.¹ See *Pointer v Texas*, 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965).

During the preliminary examination, defense counsel was twice interrupted during cross examination of Smith. The court interrupted once when counsel questioned Smith about a collateral matter, specifically when Smith had moved into a particular apartment unit within the building where the shooting took place. The court's second interruption occurred when defense counsel inquired whether Smith had used any illegal substances on the evening of the shooting. The answer to counsel's question whether Smith had used drugs shortly before the shooting clearly would have tended to affect Smith's credibility with respect to his ability to perceive events accurately. However, defense counsel did successfully inquire of Smith whether he had consumed alcohol before the shooting, to which Smith responded negatively. As the court observed, Smith had explained that he arrived home from a dialysis treatment within a half hour before the shooting occurred. Defense counsel also was permitted before Smith himself testified to inquire of Patterson whether Smith had partied with her on the day of the shooting, whether Smith "had anything to drink in terms of alcohol," and whether Smith was "using crack cocaine on that day as far as" Patterson knew. Patterson denied that Smith had partied with her, and that

¹ The federal constitution provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" US Const, Am VI. In nearly identical language, the Michigan Constitution provides, "In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him" Const 1963, art 1, § 20.

Smith ever used alcohol or illicit drugs. Accordingly, we conclude that neither interruption by the court detracted from defense counsel's ability to cross examine regarding the circumstances of the offense or issues of Smith's credibility.

Defendant argues that while the court's interruptions of his questioning of Smith may not themselves appear significant, they do not present the full picture. Defendant asserts that at the preliminary examination the district court also restricted his cross examination of Patterson in a manner that had a lingering effect on counsel's manner of cross examining Smith. Defendant suggests that his counsel had been rebuked so often during Patterson's testimony that he did not risk the wrath of the court by aggressively cross examining Smith.

We initially note that we do not find particularly persuasive defendant's "chilling effect" argument because we expect parties to build an adequate record from which to argue that their constitutional rights have been violated. A defendant's task on appeal becomes substantially more difficult when he must rely on an indirect implication such as a "chilling effect" allegedly carrying over from one witness' testimony to another's. We will nonetheless examine defendant's claim of a "chilling effect" in greater detail.

During counsel's cross examination of Patterson, the district court prohibited counsel from pursuing several lines of questioning. In response to objections by the prosecutor, the court restricted counsel from inquiring whether the occupants of the shooting scene were legally occupying the apartment or were "squatters;" whether Patterson had used cocaine two days before the preliminary examination; and whether Patterson could characterize deceased victim Cheatham's condition due to drug or alcohol use on the evening of the shooting. In addition, the court interrupted after defense counsel obtained Patterson's concession that she had used cocaine and alcohol on the day of the offense; after Patterson denied using other illegal substances, the court precluded further questions about her use of illegal substances on the day of the killing. The district court reminded counsel that it was conducting a probable cause hearing, and that discovery was not a goal of the proceeding.

A preliminary examination is indeed a probable cause hearing, and appropriate limits can be placed on examination or cross examination consistent with the purpose of the hearing. The district court clearly was within its rights to restrict the testimony. However, the question here becomes whether under the restrictions imposed the preliminary examination testimony is so bare that it no longer serves as an adequate substitute for live testimony by a now unavailable witness. While restrictions on cross examination at a preliminary examination may be proper, they conceivably might also deprive the prosecutor of the ability to use the testimony in later proceedings should any witness become unavailable.

We are mindful of both the district court's legitimate need to focus on probable cause and to avoid lengthy fishing expeditions, and the defendant's right to confront the witnesses against him even after they die or disappear. Under the circumstances of this case, we find no constitutional violation. The district court's admonition and restrictions on cross examination of Patterson did not deny defendant his right to confront the witnesses against him. Three restrictions during Patterson's testimony arose from the prosecutor's meritorious objections. If asked at trial, those identical questions would have been excluded as irrelevant. The fourth restriction came after defense counsel already had elicited from Patterson her use of cocaine and

alcohol on the day of the offense, and her denial that she had used other illegal substances. Any other questions on that specific point would have been repetitious.

Apart from these legitimate restrictions, defense counsel had ample opportunity to cross examine Patterson about a variety of subjects.² The record reflects that defense counsel's cross examinations of both Smith and Patterson occurred at length and involved many different subjects. We cannot say that the restrictions on Patterson's testimony chilled counsel's cross examination of Smith. Accordingly, we conclude that the court did not unduly limit pertinent and fair cross examination.

III

Defendant next argues that there was insufficient evidence to prove the charged offense of first-degree premeditated murder, and that the trial court erred in denying his motion for directed verdict regarding this charge. Defendant explains that by allowing the first-degree murder charge to go to the jury, the court opened the door to a compromise verdict for second-degree murder.

To establish first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the act was premeditated and deliberate. Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). Defendant specifically challenges the elements of premeditation and causation.

We agree with the prosecutor that premeditation may be inferred from the circumstances of this case. Before confronting the victims, defendant armed himself with a shotgun. On gaining entry into the apartment, he directly proceeded to the bedroom where he encountered Smith—the man with whom he had a disagreement—and two other persons. Apparently without being threatened, defendant shot Smith, then pointed his weapon at a woman. Cheatham

² This case appears similar in some respects to *People v Martin #2*, 21 Mich App 667; 176 NW2d 470 (1970). In *Martin*, the examining magistrate had requested counsel to bear in mind that it was not conducting a trial and urged that only those questions essential to the issue of probable cause be asked, although the court also stated that it would not preclude counsel from asking more far reaching questions as part of “a full and complete cross-examination.” *Id.* at 670. Defense counsel asked two innocuous questions of one of the victims, and the defendant later argued that his attorney had been forestalled from engaging in more vigorous cross examination. *Id.* at 670-671. This Court disagreed, stating that the magistrate's admonition did not “taint” the proceedings, and that defense counsel apparently had other reasons for conducting cursory cross examination. *Id.* at 676. This Court concluded that “[t]he remarks of the court were no more than a concise statement of the law and a suggestion to expedite the proceedings.” *Id.*

The examining magistrate in this case did not verbally invite counsel to engage in full cross examination despite the admonition as did the magistrate in *Martin*, but the magistrate here in fact permitted such cross examination to occur. Defense counsel did not limit himself to two questions like counsel in *Martin*. Instead, cross examination occurred mainly uninterrupted, and fills many transcript pages.

grabbed a handgun and shot defendant, and defendant turned the shotgun on Cheatham and killed him. Under these circumstances, we find that sufficient evidence of premeditation existed. *People v Anderson*, 209 Mich App 527, 537-538; 531 NW2d 780 (1995).

Defendant further argues that causation was never shown because the medical examiner did not identify a cause of death in his testimony. Defendant argues that the gunshot wound to Cheatham's thigh was not the cause of death, and suggests instead that death may have resulted from the drugs in Cheatham's system.

Although the medical examiner testified that the Cheatham had cocaine in his system, the examiner could not determine when the cocaine had been ingested. The examiner described in detail Cheatham's entrance and exit wounds, which he characterized as showing "extensive tissue destruction." An eyewitness testified that after Cheatham was shot, he laid across a bed in a puddle of blood, wheezing and fading in and out of consciousness. From this evidence, the jury could reasonably infer that Cheatham's death was caused by the gunshot wound, and not by cocaine ingestion. Moreover, it is not always necessary for a medical examiner to identify a cause of death. See *People v Modelski*, 164 Mich App 337; 416 NW2d 708 (1987) (upholding a manslaughter conviction where no body was ever found).

IV

Defendant also asserts that insufficient evidence existed to sustain his conviction for second-degree murder. The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably would cause death or great bodily harm, i.e., malice. *People v Bailey*, 451 Mich 657; 549 NW2d 325, amended on other grounds 453 Mich 1204 (1996). Defendant specifically challenges the elements of malice and causation.

Because the proofs supported submission of the original first-degree murder charge to the jury for reasons stated in part III of this opinion, we find that the proofs also supported defendant's conviction on the lesser-included offense of second-degree murder.

V

Defendant claims that several mistakes deprived him of the effective assistance of counsel guaranteed by the federal and state constitutions.³ Defendant argues that counsel (1) failed to adequately investigate and advance a theory of self defense, (2) failed to timely object to a purported under representation of African-Americans on the jury, and (3) gave defendant inadequate, coercive and misleading advice, which led him to waive his right to testify. Defendant seeks a *Ginther*⁴ hearing where he can develop these arguments.

³ See US Const, Am VI; Const 1963, art 1, § 20.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The right to counsel is not offended unless counsel's performance fell below an objective standard of reasonableness and the defendant was so prejudiced that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice exists when there is a reasonable probability that the result of the proceeding would have been different absent counsel's errors. *Pickens, supra* at 312.

Defendant has not shown that his attorney's performance fell below an objective standard of reasonableness. Furthermore, he also has not shown prejudice. Our review of the record indicates that a different outcome would have been unlikely even if counsel had presented a self defense theory. Defendant's actions in initiating the fatal shootout make it unlikely that the jury would have perceived him as a victim of Cheatham's aggression.

Defendant's claim regarding under representation of African-Americans on the jury has no factual support whatsoever. Because defendant essentially provides only a bald suggestion that African-Americans must have been systematically excluded from the jury array, we conclude that his claim must fail. *People v Flowers*, 222 Mich App 732, 736-737; 565 NW2d 12 (1997). Accordingly, we cannot conclude that defense counsel unreasonably failed to object to the alleged under representation of African-Americans.

For the reasons stated in part VI of this opinion, *infra*, we also reject defendant's claim that his counsel's advice regarding his right to testify constituted ineffective assistance of counsel.

VI

In addition to arguing that he received inadequate advice from counsel that resulted in a waiver of his right to testify, defendant also contends that he is entitled to an evidentiary hearing regarding his waiver under *Gonzalez v Elo*, 972 F Supp 417 (ED Mich, 1997)⁵ so that he might develop a record to substantiate that his waiver rested on inadequate advice. Defendant specifically alleges that he did not know that he had an absolute right to testify or that the ultimate choice whether to testify belonged to him.

We initially note that the evidentiary hearing conducted in *Gonzalez* was the type of hearing specifically endorsed by the habeas corpus statute, 28 USC § 2254(d). *Gonzalez, supra* at 419-421. The habeas corpus statute applies specifically to federal courts, not state courts. 28 USC § 2254(a). Because the present action is not a federal habeas corpus action, defendant's reliance on *Gonzalez* is misplaced.

Furthermore, the record does not support defendant's allegation that he was improperly advised. After the prosecutor rested, the following was placed on the record:

⁵ In the federal district court opinion appearing at 972 F Supp 417, the court ordered an evidentiary hearing into the petitioner's allegation that he had been given improper advice regarding his right to testify. After the hearing was conducted, the district court determined that the petitioner had not been denied the effective assistance of counsel. That decision was upheld in *Gonzalez v Elo*, 233 F3d 348 (CA 6, 2000).

Defense Counsel: The other issue I would like to address is I have had an opportunity to discuss on numerous occasions with my client Mr. Wright, the aspect of him testifying in his case. Mr. Wright understands two things, No. 1, he has the right to testify if he so chooses. He also understands that the law does not require him to testify. Mr. Wright has indicated to me that he does not wish to testify in this matter. So I wanted to place that on the record. Mr. Wright, can you hear me okay?

Defendant: Yes.

Defense Counsel: You understand that you have the right to testify on your own behalf in this case, correct?

Defendant: Correct.

Defense Counsel: You also understand you do not have to testify and that cannot be held against you, correct?

Defendant: Correct.

Defense Counsel: Is it your desire to testify or not testify on your own behalf?

Defendant: Not to testify.

This colloquy demonstrates that defendant was informed that he had a right to testify, and that his desire was specifically elicited. If defendant was advised against testifying, we can find no fault in that trial strategy, a position endorsed by the Sixth Circuit when it ultimately found in the *Gonzalez* case that the prisoner there had not been denied the effective assistance of counsel. *Gonzalez v Elo*, 233 F3d 348, 356-357 (CA 6, 2000).

We additionally note that the Sixth Circuit in *Gonzalez* observed that a defendant who disagrees with counsel's advice must at least advise the trial court of his wish to testify or that a disagreement with defense counsel has arisen concerning whether the defendant should testify. *Id.* at 357. Defendant did not so alert the trial court, and we find nothing in the record that would have alerted the trial court, or which raises alarm in this Court, to support further inquiry into the circumstances that led defendant to waive his right to testify on his own behalf.

VII

Defendant next urges that even if none of the alleged errors standing alone entitles him to a new trial, the cumulative effect of those errors warrants a new trial. Because we find no errors, however, we also find no cumulative effect. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

VIII

Defendant lastly challenges the sentences for both his convictions. The trial court sentenced defendant to thirty to fifty years' imprisonment for the second-degree murder

conviction, which sentence exceeded the guidelines' recommended minimum range of fifteen to twenty-five years, and to twenty to forty years' imprisonment for assault with intent to murder conviction, which exceeded the guidelines' recommended minimum range of 135 to 225 months.

Defendant and the prosecutor both suggest on appeal that the trial court failed to articulate sufficient substantial and compelling reasons for exceeding the guidelines' ranges, contrary to MCL 769.34(3). After reviewing the vague reasons for departure proffered by the trial court, which appear to have been already taken into account within the calculation of the guidelines' ranges,⁶ MCL 769.34(3)(b), we agree that it is appropriate to remand this case for further articulation of the court's objective and verifiable reasons for departure from the guidelines' ranges. *People v Babcock*, 244 Mich App 64, 74-75; 624 NW2d 479 (2000).

We affirm defendant's convictions and remand for further articulation of the trial court's reasons for exceeding the sentencing guidelines. We retain jurisdiction. *People v Pena*, 457 Mich 885; 586 NW2d 925 (1998).

/s/ Donald E. Holbrook, Jr.

/s/ Hilda R. Gage

/s/ Patrick M. Meter

⁶ The trial court explained its basis for departure as follows:

The sentence guidelines in your case are considerably very low, 15 to 25 years on the minimum on second degree murder, and considering your action and considering the totality of the case, and how it had affected the family [of the victim], and what you did, the court is going to exceed the guidelines by a small amount, and sentence you to 30 to 50 on Count I, second degree murder.

The court is going to sentence you to 20 to 40 on Count 2, assault with intent to commit murder; just two years over the guidelines. And those two sentences are concurrent to each other.