

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHAMAR AVERY,

Defendant-Appellant.

UNPUBLISHED

October 8, 2002

No. 229324

Wayne Circuit Court

LC No. 00-002750

Before: Meter, P.J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. The trial court sentenced defendant to twenty to fifty years in prison. We affirm.

Defendant argues that the trial court erred in admitting the testimony of Victor Budd, which indicated that codefendant, Recho Burns, threatened to kill the victim, Geoffrey Stanca. On appeal, he contends that the evidence was irrelevant and unduly prejudicial. Defendant also argues that the evidence was inadmissible hearsay and that admitting the evidence deprived him of his right to confrontation. Before trial, the prosecutor moved to admit the testimony on the basis of MRE 404(b). The court denied the motion on the basis that Budd's testimony did not specifically relate to defendant. However, at trial, the prosecution introduced this evidence despite the court's earlier ruling, without an objection from defense counsel. Defendant's failure to raise a timely objection to Budd's testimony means that we review the alleged error under the plain error rule. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain and 3) the plain error affected substantial rights. *People v Pesquera*, 244 Mich App 305; 625 NW2d 407 (2001).

Here, while we agree that the evidence was improperly admitted, we conclude that the error did not affect defendant's substantial rights because Budd's testimony did not prejudice defendant. Accordingly, we decline to reverse on this ground.

Defendant also contends that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant first argues that defense counsel was ineffective for failing to renew an objection to the admission of Budd's testimony that Burns threatened to kill Stanca, or to request that the jury be removed during Budd's testimony. While counsel may have erred, we conclude that defendant has not shown a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Also, defendant says that defense counsel was ineffective for failing to adequately investigate and present an alibi defense. Specifically, defendant asserts that counsel should have made more efforts in securing alibi witnesses. Failure to call witnesses will only constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701; 538 NW2d 465 (1995). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

At the *Ginther*¹ hearing, counsel testified that his investigator went to Crimes Towing and Auto Service, the location where defendant said the witnesses could be located. While defendant complains that counsel failed to contact Damar Crimes, the investigator did in fact locate and interview another one of the potential witnesses and left his business card with a request that the other potential alibi witnesses contact him. Counsel also had his investigator follow up by telephone and again in person, in an attempt to contact these other witnesses. Given these circumstances, we conclude that counsel adequately investigated. Moreover, counsel made a valid strategical decision not to present such a defense because the information he obtained did not provide defendant with an alibi for the time of the crime. Accordingly, we conclude that defendant has not sustained his claim of ineffective assistance of counsel.

Defendant further argues that he was denied a fair trial due to prosecutorial misconduct. Allegations of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *Id.*; *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant argues that the prosecutor made comments during opening statement that improperly shifted the burden of proof. A prosecutor may not imply that a defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). In context, the prosecutor's comments were not improper, though they did, as the trial court mentioned, tread near being improper. Before the court stopped the prosecutor, the prosecutor explained the types of defenses that are typically used in such cases. The comments were not so egregious as to shift the burden of proof. Moreover, had the statement improperly shifted the burden of proof to defendant, the trial court properly instructed the jury that defendant was not required to prove his innocence or to do anything. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, it is unlikely that the prosecutor's conduct resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Finally, defendant alleges that he should be resentenced because the court used the wrong sentencing grid. He maintains that his offense variable level should have been a I, rather than a II, because no points should have been assessed for offense variable six (OV 6). We disagree.

The court determined that this was a level II offense, because fifty points could be assessed for OV 6. MCL 777.36 provides that OV 6 should be scored fifty points if the offender had a premeditated intent to kill or the killing was committed while committing or attempting to commit enumerated offenses including robbery. MCL 777.36(2)(a) provides that the sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.

The prosecutor originally charged defendant with felony murder and possession of a firearm during the commission of a felony. The jury convicted defendant of the lesser included offense of second-degree murder. Thus, the jury did not find that defendant committed a robbery at the time of the killing despite the evidence presented that he did. Moreover, there is no information that the judge had information that was not presented to the jury. Therefore, because the court was required to score offense variable six consistent with the jury verdict, the trial court erred in adding fifty points for OV 6.

Nevertheless, defendant is not entitled to resentencing. MCL 777.36 provides that twenty-five points can be scored for offense variable 6 if the defendant had “unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result.” Defendant’s second-degree murder conviction supports a scoring of twenty-five points for OV 6. Second-degree murder is a general intent crime, which requires proof that the killing was “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 will cause death or great bodily harm.” *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). Had the trial court applied the twenty-five points instead of fifty points, the same sentencing grid would have been used. MCL 777.61. Therefore, defendant is not entitled to resentencing. Moreover, given these circumstances, defendant was not denied effective assistance of counsel at sentencing because any objection to using the sentencing grid would have been futile. *People v Rodriguez*, 212 Mich App 351, 355-356; 538 NW2d 42 (1995).

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).