STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ESON BUTLER,

Defendant-Appellant.

UNPUBLISHED
December 17, 2002

No. 233309
Wayne Circuit Court
LC No. 00-007228

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f, for shooting at his former girlfriend's vehicle as she and her fiancé were driving down her residential street. Following a bench trial, defendant was convicted of felonious assault, MCL 750.82, felony-firearm, MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. He was sentenced to serve concurrent prison terms of ten months to four years for the felonious assault conviction and one to five years for the possession of a firearm by a felon conviction, consecutive to a term of five years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Validity of Defendant's Waiver of His Right to a Jury Trial

Defendant argues that his convictions must be reversed because his waiver of jury trial was not knowingly, voluntarily, or intelligently made where the trial court failed to advise defendant that he could participate in jury selection, that a jury verdict must be unanimous, and that, in a bench trial, the judge alone would decide his guilt. We disagree. A trial court's compliance with MCR 6.402 is a question of law that we review de novo. See *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999). We review for clear error a trial court's determination that a defendant validly waived his right to a jury trial. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

A defendant has the right to a jury trial and this right may be waived, in favor of a bench trial, with the consent of the prosecutor and the approval of the trial court. MCR 6.401. A valid

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

waiver of the constitutional right to a jury trial must be voluntary. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). The waiver procedure is governed by MCR 6.402(B):

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Having reviewed the record, we find that the trial court complied with the procedural mandates in MCR 6.402(B), and that defendant's waiver, which was made on the record in open court and in writing, was made knowingly, intelligently, and voluntarily. See *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001); *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993). Indeed, defendant conceded on the record that his waiver of jury trial was knowingly, voluntarily, or intelligently made, both personally by nodding in agreement to the trial court's explanation that he knew of his rights, and through trial counsel. Thus, the trial court did not clearly err in concluding that defendant knowingly, voluntarily, and understandingly waived his right to a trial by jury. *Leonard, supra*.

Defendant now asserts that the trial court failed to advise defendant of the meaning of the right to a jury trial, e.g., that he could participate in jury selection, that a jury verdict must be unanimous, and that, in a bench trial, the judge alone would decide his guilt. Because this issue is raised for the first time on appeal, appellate relief is precluded absent plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). We find no such error. See *People v James (After Remand)*, 192 Mich App 568, 595-596; 481 NW2d 715 (1992).

II. Defendant's Motion to Withdraw His Waiver of Jury Trial

Defendant argues that the trial court abused its discretion in denying defendant's motion to withdraw his waiver of jury trial because (1) he timely filed a pretrial motion to withdraw the jury trial waiver, (2) the prosecutor did not object to the motion, and (3) no findings were made that the motion was intended as a delay tactic or for judge-shopping purposes. Once a defendant knowingly, voluntarily, and intelligently waives the right to a jury trial, the waiver cannot be withdrawn except in the discretion of the court. *People v Wagner*, 114 Mich App 541, 558-559; 320 NW2d 251 (1982).

The public policy favoring the orderly process of the administration of justice demands that restrictions be placed on the withdrawal of a valid waiver of jury trial. *People v Haddad*, 306 Mich 556; 11 NW2d 240 (1943); *People v Serr*, 73 Mich App 19, 29; 250 NW2d 535 (1976). Here, defendant's motion was untimely, creating concern on the part of the trial court regarding docket control and efficiency of court process. We find no abuse of discretion by the trial court in denying the withdrawal motion.

III. Defendant's Lack of Presence at a Critical Proceeding Stage

In a Standard 11 brief, defendant contends that he was denied due process of law when he was not present at the hearing on his motion to withdraw his jury trial waiver, which was held

before the circuit court's chief judge. Defendant contends that the hearing was a critical stage of the criminal proceeding and that his testimony was vital to the court's decision. Because the record fails to show that defendant requested to attend the hearing or that he objected to his exclusion from the hearing, we review this unpreserved issue for plain error. *Carines*, *supra.*

A criminal defendant has a right to be present during any critical stage of a trial where his substantial rights may be adversely affected. *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998). The subject matter of the hearing at issue was the same subject matter that was raised before the trial court. In particular, the question was the timeliness of defendant's motion to withdraw his waiver and whether an adjournment was possible under circuit court policy. There was no need to question defendant regarding the reasons for his motion; no substantive evidence was introduced. *Id*. Accordingly, no plain error occurred.

IV. Authentication of Documentary Evidence Pursuant to MRE 901

Defendant argues that the trial court abused its discretion in admitting into evidence a letter allegedly written by defendant that could be interpreted as an admission of guilt. Specifically, defendant asserts that no testimony was presented by a "witness with knowledge" that the letter was what it claimed to be, and because a handwriting expert was not introduced for a professional comparison between a sample of defendant's handwriting and the handwriting in the letter. This argument is without merit.

Whether a proper foundation has been established to admit evidence is to be determined by the trial court in accordance with MRE 901. *People v Berkey*, 437 Mich 40, 49-50, 52; 467 NW2d 6 (1991). The decision whether to admit evidence is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Rule 901(a) provides generally that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." See *Berkey, supra* at 52. The methods of authentication or identification in MRE 901(b) are presented "[b]y way of illustration only, and not by way of limitation," including testimony from a witness with knowledge "that a matter is what it is claimed to be," MRE 901(b)(1); *People v Howard*, 226 Mich App 528, 553; 575 NW2d 16 (1997), "nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation," MRE 901(b)(2), and by an expert witness for comparison with specimens that have been authenticated, MRE 901(b)(3).

Here, complainant Felicia Allen testified that she was familiar with defendant's handwriting because she had dated him. She testified that the letter appeared to be in defendant's handwriting, and was signed "Red Lobster," which was the restaurant frequented by them when they were dating. Defendant also testified that he and Allen frequented the restaurant, although he denied ever referring to himself as "Red Lobster." Further, although the name on the letter's return address was unfamiliar to Allen, the return address was that of the jail where defendant was incarcerated. Under the circumstances, the trial court did not abuse its discretion in finding that the letter was sufficiently authenticated for admission pursuant to MRE 901(b)(2) and (4). The weight to be accorded the evidence was a question for the trier of fact. *Berkey, supra* at 52.

V. Admission of the Disputed Bad Acts Evidence

Defendant argues that he was denied a fair trial when the trial court failed to exclude sua sponte admission into evidence of testimony that defendant was previously convicted for shooting at a woman and that he had allegedly shot at another person's house. Defendant frames this issue as one of evidence admitted in violation of MRE 404(b). We disagree with this characterization. The defense presented character witnesses—defendant's father, mother, and uncle—who testified on direct examination, pursuant to MRE 404(a)(1), that defendant was a reformed man following his release from incarceration for a prior conviction and that, in their respective opinions, defendant would not shoot at someone. Once a defendant opens the door by placing his character in issue, the prosecution is permitted, pursuant to MRE 405(a), to cross-examine the character witness as to relevant specific instances of conduct. Accordingly, the prosecution's cross-examination of defendant's character witnesses regarding their knowledge of the circumstances of defendant's prior convictions and shooting incidents was admissible under MRE 404(a)(1) and MRE 405(a). *Lukity*, *supra*, 460 Mich at 497-499. Contrary to defendant's argument, MRE 404(b) was not implicated. *Id.* at 499. Further, defendant was tried by the court, and it is presumed that the court used the evidence only in assessing the witnesses' credibility, and not to support an inference that defendant had a propensity to shoot.

VI. Suggestive In-Court Identification of Defendant

Defendant argues that the in-court identification of him by Lavarrin Covington, who witnessed the shooting, was unduly suggestive because there was no pretrial identification and Covington had testified that he had no previous contact with defendant. Because defendant raises this claim for the first time on appeal, our review is limited to plain error that affected defendant's substantial rights. *Carines, supra*. We find no such error.

Defendant has misconstrued Covington's testimony. Contrary to defendant's implication that Covington testified that he had no previous contact with defendant, the actual question asked was, "Had you had any contact with Mr. Butler before that, had you ever spoken to him?" Covington responded, "No." On redirect examination, the prosecutor asked Covington to clarify his answer regarding previous contact with defendant, and Covington testified that the day after he, Covington, was released from prison, Allen's house was broken into and Covington saw defendant then. Covington explained: "I seen him. I didn't have no verbal contact. I visually seen him at the night of the shooting." Accordingly, Covington had previously seen defendant, vitiating any claim of an unduly suggestive in-court identification.

VII. Ineffective Assistance of Trial and Appellate Counsel

In his Standard 11 brief, defendant contends that trial counsel's representation was ineffective on several grounds. Because defendant did not move below for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, a defendant must prove that (1) counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy, and (2) the deficiency prejudiced him to the extent there is a reasonable probability that, but for counsel's error, the result of the proceedings would

have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will this Court assess counsel's competence with the benefit of hindsight. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994).

In particular, defendant asserts that trial counsel was ineffective when he (1) opened the door to the introduction of defendant's prior conviction and a prior bad act, (2) failed to call two alibi witnesses, (3) proceeded with the trial while defendant was wearing prison clothes, (4) caused the suggestive in-court identification of defendant by Covington, and (5) failed to move for the appointment of an expert handwriting witness to rebut the assertion that defendant authored the letter sent to Allen. With respect to (4), we have already determined that the in-court identification was not suggestive. With respect to (5), defendant has failed to show that an expert would have in fact rebutted the assertion that defendant did not write the letter. With respect to (1) and (3), we conclude that defendant has failed to satisfy his heavy burden of demonstrating that counsel's strategic decisions constituted serious error, or that, if there was error, it was outcome determinative of defendant's bench trial. See *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (unlike a jury, a judge possesses an understanding of the law which allows him to ignore errors and decide a case based solely on the properly admitted evidence). With respect to (2), defendant has failed to show that counsel committed a serious error where the proposed testimony would likely have conflicted with testimony given by defendant and his father.

Defendant also asserts that appellate counsel rendered ineffective assistance by submitting a nonconforming and error laden appellate brief and by the existence of a conflict of interest given that defendant had filed a grievance against counsel prior to the brief's submission. The standards for appointed appellate counsel require that counsel assert claims of error that are supported by the record and possess arguable legal merit. See *People v Neal*, 459 Mich 72, 78; 586 NW2d 716 (1998). While we agree with defendant that the amended appellate brief submitted by appellate counsel was non-conforming under the court rules in that it misstated certain facts, we have accorded defendant the full measure of appellate review. Further, we do not find that a conflict of interest was necessarily created when defendant allegedly filed a grievance against counsel before the nonconforming brief was submitted. When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), citing *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980). Although a "heightened standard" is applicable to conflict of interest claims, a per se rule of prejudice does not apply. *Smith*, *supra* at 556-557. Rather, defendant bears the burden of demonstrating "that counsel 'actively represented conflicting interests'" and that this conflict adversely affected counsel's representation. *Id*. at 557. Here, we find no indication that defendant's relationship with appellate counsel affected counsel's performance or that any prejudice resulted.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie