STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SYLVESTER STEVEN KEYS,

Defendant-Appellant.

UNPUBLISHED
February 12, 2009

No. 277649
Wayne Circuit Court
LC No. 06-014069-01

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for his first-degree murder conviction, one to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. Defendant appeals his first-degree murder conviction as of right. We affirm.

Defendant first argues that the trial judge and presiding judge of the criminal division reversibly erred when they denied defense counsel's request for an adjournment, thereby denying him an opportunity to adequately prepare for trial, and in turn, denying him his constitutional right to the effective assistance of counsel. We disagree. We review a trial court's decision on whether to grant an adjournment for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). "[A]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006) (quotation and citation omitted).

To invoke the trial court's discretion to grant an adjournment, a defendant must show both good cause and due diligence. MCR 2.503(B)(1); *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). Even if good cause and due diligence are shown, a trial court's erroneous denial of a request for an adjournment is not grounds for reversal unless the defendant demonstrates prejudice as a result of the erroneous denial. *Id*. at 18-19. When reviewing a court's denial of a defendant's motion for an adjournment, a reviewing court considers:

> (1) [W]hether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his

> right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

In determining whether the denial prejudiced an accused, a court must balance the benefits of granting the adjournment against the public's interest in the prompt and efficient administration of justice. *Akins, supra* at 557.

After filing an appearance on the record, but prior to being substituted as counsel and moving for an adjournment, defense counsel told the trial judge that if prior trial counsel (Robert Elsey) filed a motion for an adjournment that was denied, defense counsel was still "ready to go and we can pick a jury." After Elsey informed the trial judge that defense counsel had been (1) visiting with defendant in jail, (2) had appeared with defendant at a proceeding the prior week, (3) had been advising defendant, and (4) had been talking to witnesses, who as a result would no longer talk to Elsey, Elsey moved to withdraw as counsel. After the trial judge acknowledged that defense counsel had been in court the previous week at defendant's proceedings, the court granted the substitution of counsel because defense counsel indicated that he was "ready to proceed with the case." Defense counsel then immediately requested that he be allowed to "go before the presiding judge" to request an adjournment "to protect the defendant." Defense counsel's request was granted, and while appearing before the presiding judge, defense counsel indicated that he had been in contact with defendant for the past six days and that, although trial was scheduled to begin "today," he was "ready to go." The presiding judge denied defense counsel's motion, indicating that pursuant to an administrative order he did not have the authority to grant an adjournment, as his power was limited to reviewing prosecutor requests to review orders granting adjournments.[1]

The trial court did not abuse its discretion. The record shows that defense counsel (1) had been working with defendant for at least six days, (2) had already appeared at court proceedings with defendant, and (3) had indicated to the trial judge and the presiding judge that he was prepared to proceed with trial. Furthermore, defense counsel sufficiently addressed multiple preliminary matters immediately after the motion for an adjournment was denied, and subsequently rigorously cross-examined the prosecution's witnesses regarding inconsistencies between their trial testimony and prior written statements and preliminary examination testimony. Consequently, defendant neither showed good cause for the adjournment nor that he was prejudiced by the denial. *People v Frazier*, 478 Mich 231, 243 n 10; 733 NW2d 713 (2007). Therefore, neither the trial judge nor the presiding judge abused his respective discretion when denying defendant's motion to adjourn, and the denial of the adjournment did not deny defendant

[1] Third Judicial Circuit Court Rule 6.100(C) provides that only the presiding judge of the criminal division can adjourn a trial:

> No trial of a criminal case shall be adjourned except by the presiding judge for good cause shown upon motion of the party seeking the adjournment or by the presiding judge for good cause.

his constitutional right to the effective assistance of counsel. *Akins, supra* at 556-557; *Coy, supra* at 17-19.[2]

Defendant also argues that the trial court committed error requiring reversal when it failed to give a requested instruction on involuntary manslaughter. We disagree. We review for an abuse of discretion a trial court's determination whether a jury instruction was applicable to the facts of the case. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 1108 (2006). However, whether an offense is a lesser-included offense is a question of law, which we review de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003). Finally, a jury's conviction of a defendant for first-degree murder when also instructed on the lesser included offense of second-degree murder reflects an unwillingness to convict on another lesser included offense, and thus the failure to instruct on further lesser included offenses, like manslaughter, is harmless. *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997).

Here, the jury convicted defendant of first-degree murder, despite also being instructed on second-degree murder. Thus, even if we assume instructional error occurred, it would have been harmless error and would not merit reversal. *Id*.[3]

We also reject defendant's argument that his trial counsel's performance was so deficient that it denied defendant his constitutional right to the effective assistance of counsel. When reviewing a claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, we conduct a de novo review of the existing record. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

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 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). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

---

[2] Even though the presiding judge denied defendant's motion to adjourn on the erroneous ground that he did not have authority to grant an adjournment, see Third Circuit Rule 6.100(C), *supra*, because the denial of the adjournment was not improper, we nonetheless affirm the presiding judge's decision. See *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998) (holding that this Court does "not reverse where the trial court reaches the right result for a wrong reason.").

[3] Because defense counsel expressed satisfaction with the jury instructions that were given, we also conclude that defendant has waived his arguments regarding the trial court's aiding and abetting instruction, and the trial court's first- and second-degree murder instructions. See *People v Hall* (*On Remand*), 256 Mich App 674, 679; 671 NW2d 545 (2003).

Defense counsel was not ineffective for failing to object to the trial court's aiding and abetting instruction. To prove aiding and abetting of a crime, a prosecutor must show: (1) that the crime charged was committed by the defendant or some other person; (2) that the defendant performed acts or gave encouragement which assisted in the commission of the crime; and (3) that the defendant intended the commission of the crime or had knowledge of the other's intent at the time he gave the aid or encouragement. *People v Moore*, 470 Mich 56, 67; 679 NW2d 41 (2004).

In relevant part, the trial court's aiding and abetting instruction stated that in order to convict defendant as an aider and abettor, the jury had to find that someone committed the charged crime, that defendant assisted in the commission of the crime, and that at the time defendant gave assistance "he intended to help someone else commit the crime." Because one cannot intend to help someone else commit murder (the crime), unless one intends to commit murder (the crime) or at the very least know that the person you are helping intends to commit murder (the crime), the trial court's instructions imply that defendant could only be found guilty under an aiding and abetting theory if he intended to commit murder or knew that the person he assisted intended to commit murder. Therefore, the trial court properly instructed the jury on what it must find in order for it to convict defendant under an aiding and abetting theory. *Moore, supra* at 67; *Hawthorne, supra* at 51, 57. Any objection to the trial court's aiding and abetting instruction would have been futile, so counsel did not render ineffective assistance by failing to make such an objection. *Ackerman, supra* at 455.

We also reject defendant's argument that defense counsel was ineffective for failing to object to the trial court's first- and second-degree murder instructions, which failed to instruct the jury that the prosecution must establish that "the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime." The commentary to CJI2d 16.1 (first-degree premeditated murder) and CJI2d 16.5 (second-degree murder) provide that although the instruction can be read after the respective murder instructions, it is "more commonly given at a later time."

After the trial court instructed the jury on the elements of first- and second-degree murder, and before it instructed the jury on voluntary manslaughter, it instructed the jury that the prosecution must establish "that the defendant caused the death without lawful excuse or justification." The trial court's instructions, taken as whole, properly instructed the jury on the elements of first- and second-degree murder. See CJI2d 16.1 and CJI2d 16.5. Accordingly, the trial court's first- and second-degree murder instructions were not erroneous. *Hawthorne, supra* at 51. Any objection to the instructions would have been futile, and thus counsel did not render ineffective assistance by failing to make such an objection. *Ackerman, supra* at 455.[4]

[4] We likewise reject defendant's argument that defense counsel was ineffective for failing to object to the trial court's failure to give an involuntary manslaughter instruction. Even if such an instruction was warranted, since defense counsel requested the instruction, his performance could not have fallen below an objective standard of reasonableness. Accordingly, defense counsel's performance was not ineffective. *Toma, supra* at 302-303.

We additionally reject defendant's argument that defense counsel was ineffective for failing to cross-examine Antoine Shaw with his preliminary examination testimony that he did not see defendant with a gun on the night of the shooting. At trial, Shaw testified that he never saw defendant with a gun on the night of the shooting. In response to Shaw's trial testimony, the prosecution impeached Shaw by introducing his statement to the police that he saw defendant run out of his house and start shooting. Although Shaw admitted that he told the police that he saw defendant fire a gun on the night of the shooting, he testified that he only told the police that because he was confused and was trying to get the police out of his house.

Given that Shaw testified that he did not see defendant with a gun on the night of the shooting, Shaw's preliminary examination testimony to the same effect would have been merely cumulative. Furthermore, although introduction of the testimony may have bolstered Shaw's trial testimony, it still would not have changed the fact that Shaw told the police that he saw defendant fire a gun on the night of the shooting. Finally, Shaw provided a reason why his trial testimony was different from what he told the police. Defendant has therefore failed to establish that defense counsel's failure to cross-examine Shaw with his preliminary examination testimony fell below an objective standard of reasonableness, or that doing so would have affected the outcome of the proceedings. Accordingly, trial counsel was not ineffective. *Toma, supra* at 302-303.

Additionally, because (1) eyewitnesses saw defendant in the proximate area of the shooting immediately after gunshots were heard, and one witness even told the police that he saw defendant fire a gun, and (2) defendant has failed to establish who could have provided alibi testimony, defense counsel's failure to present an alibi defense did not fall below an objective standard of reasonableness. Nor was presenting a self-defense theory plausible since (1) no evidence was presented that would suggest that defendant acted in self-defense, and (2) defendant failed to establish what evidence could have been presented that would have suggested that defendant acted in self-defense. We therefore conclude that defense counsel likewise did not provide ineffective assistance when he failed to present either an alibi defense or self-defense theory. *Id.*

Defendant's final argument is that the trial court erred when it precluded defendant from presenting evidence regarding the victim's reputation for violence. Once again we disagree. Generally we review a trial court's evidentiary decisions for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, when a trial court's decision to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes the admission of evidence, we review a trial court's decision under a de novo standard of review. *Id.* Thus, when preliminary questions of law are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.*

The relevance of a victim's aggressive character depends on whether it is used as proof of an essential element of a charge, claim, or defense, or whether it falls within an exception to MRE 404(a)'s propensity rule. *People v Harris*, 458 Mich 310, 315-317; 583 NW2d 680 (1998). MRE 404(a)(2) creates an exception for the admission of circumstantial character evidence of the victim only "[w]hen self-defense is an issue in a charge of homicide[.]"

Although defense counsel stated that the prosecution failed to establish that the crime occurred "under circumstances that are not excused or justified" because nobody knew "what

happened," defendant never presented a theory of self-defense. A defendant can be found to have acted in self-defense "if, under all the circumstances, he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).

Here, the record establishes that during the verbal altercation between the victim and defendant, the victim stated that he was going to call people from the east side to presumably help the victim fight defendant. However, no evidence was presented that the victim actually called anyone from the east side. In fact, the evidence presented established that shortly before the victim was shot, he and his girlfriend returned home unaccompanied by anyone else. Furthermore, although the record establishes that the victim asked his brother for a gun, no evidence was presented that defendant was aware of the fact. And, even though Shaw testified that he saw the victim with "something" in his hand shortly before the incident, no gun was found on the victim's person after he was shot, no one ever saw the victim with a gun, and the victim told his brother that he was unable to procure a gun. Hence, no evidence was presented to establish that at the time the victim was murdered, defendant could have honestly and reasonably believed that he was in imminent danger of death or great bodily harm and that it was necessary for him to exercise deadly force. Therefore, the MRE 404(a)(2) exception does not apply. *Id*. Thus, the trial court did not abuse its discretion when it precluded testimony pertaining to the victim's character. MRE 404(a)(2); *Harris, supra* at 317.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray