STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DAVIS,

Defendant-Appellant.

UNPUBLISHED
February 18, 2010

No. 287476
Wayne Circuit Court
LC No. 06-004397-FC

Before: Sawyer, P.J., and Saad and Shapiro, 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), and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced as a fourth offense habitual offender, MCL 769.12, to concurrent prison terms of 315 to 600 months for the second-degree murder conviction and 22 to 60 months for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of fatally shooting William Cheeks Calhoun. Evidence at trial indicated that following a dispute between members of defendant's family and members of the victim's family, defendant went to the home of Goldie Stanfield and, while armed with a gun, demanded to see Octavious Johnson. The victim refused to let defendant inside the house to see whether Johnson was there. Defendant's cousin, Ramone Flood, then exchanged punches with the victim, and then defendant shot the victim. Defendant denied being armed with a gun and claimed that Flood shot the victim in self-defense. Although defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a), the jury convicted him of the lesser offense of second-degree murder.

I. Jury Instructions

Defendant first argues that the trial court erred in instructing the jury on second-degree murder as a lesser offense of first-degree murder. Because defendant did not object when the trial court announced that it intended to instruct the jury on second-degree murder and, with the exception of an instructional matter not relevant to this appeal, thereafter expressed satisfaction with the instructions as given, the issue is waived. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). An issue that is waived is not susceptible to review on appeal. *Id.* Even if

this issue had not been waived, and instead was subject to review for plain error affecting defendant's substantial rights as an unpreserved issue, see *People v Carines*, 460 Mich 750, 766-767, 772-773; 597 NW2d 130 (1999), and *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001), reversal would not be warranted.

We agree that the trial court erred to the extent that it stated that a lesser offense instruction on second-degree murder was mandatory. In *People v Cornell*, 466 Mich 335, 358 n 13; 646 NW2d 127 (2002), our Supreme Court overruled *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975), and held that a lesser offense instruction on second-degree murder is not automatically required where a defendant has been charged with first-degree murder. However, such an instruction is proper "if the intent element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder." *Cornell*, 466 Mich at 358 n 13. Stated another way, an instruction on a necessarily included lesser offense "is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357; *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

Whereas the intent required for first-degree murder is the intent to kill with premeditation and deliberation, a conviction of second-degree murder requires only that the defendant act with malice. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *Id*. at 464.

In this case, the evidence showed that defendant carried a weapon to Goldie Stanfield's house, but that defendant did not go to the house looking for the victim. Instead, he demanded to see Octavious Johnson. Further, the eyewitnesses testified that defendant did not shoot the victim until after the victim began fighting with defendant's cousin, Ramone Flood. A jury could rationally conclude from the evidence that although defendant shot the victim with the intent to kill or the intent to cause great bodily harm, he did not go to Stanfield's home with a premeditated plan to kill the victim. The jury could also rationally conclude that defendant did not formulate an intent to shoot the victim until after the victim began fighting with Flood, before defendant had an opportunity to premeditate. Thus, the intent element differentiating first-degree premeditated murder from second-degree murder was in substantial dispute, and a second-degree murder conviction was supported by a rational view of the evidence. Therefore, although the trial court erroneously believed that an instruction on second-degree murder was mandatory, the court did not err in instructing the jury on that offense because the instruction was supported by a rational view of the evidence. Accordingly, appellate relief is not warranted because defendant's substantial rights were not affected.

II. Ineffective Assistance of Counsel

Defendant next argues that a new trial is required because defense counsel was ineffective for consenting to allow Judge Leonard Townsend to finish conducting the trial in place of the original judge, Judge Cynthia Gray Hathaway.

Because defendant did not raise an ineffective assistance of counsel issue in the trial court, this Court's review of this issue is limited to mistakes apparent on the record. *People v*

Wilson, 242 Mich App 350, 352; 619 NW2d 413 (2000); *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312-314. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, 446 Mich at 312-314.

The record discloses that Judge Hathaway was unable to finish the trial because of a family emergency and, with the consent of defense counsel, Judge Townsend presided over closing arguments and jury instructions. As noted by defendant, MCR 6.440(A) provides:

> If, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to continue with the trial, another judge regularly sitting in or assigned to the court, on *certification of having become familiar with the record of the trial*, may proceed with and complete the trial. [Emphasis added.]

In the present case, the record fails to show the certification required by MCR 6.440(A).

In *People v McCline*, 442 Mich 127, 132-133; 499 NW2d 341 (1993), our Supreme Court agreed with the general rule that "a judge may not be substituted to preside over the remainder of a trial after evidence has been adduced before the original judge (quotation marks and citation omitted)." This rule is designed to ensure "that the judge who hears the testimony as to the facts also applies the law thereto." *Id*. at 132. In *McCline*, however, the Court concluded that reversal was not required where the substitution occurred after jury voir dire, before any evidence was taken, and the defendant failed to show any prejudice. *Id*. at 134. See also *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995) (holding that a harmless error analysis applies to an improper substitution of a judge at trial).

In this case, defense counsel expressly consented to the substitution. Although defendant complains that Judge Townsend failed to certify that he had become familiar with the record, Judge Hathaway indicated on the record that she had spoken to Judge Townsend about the case. Further, the decision whether to object on this basis was a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defense counsel may have consented to the substitution for a variety of strategy reasons. For example, he may have consented because defendant had been in custody since March 2006, or because he felt that the trial had gone well and he did not want the jury to forget any details in the event of a delay. He may also have believed that Judge Townsend might make favorable rulings on issues that might arise during closing arguments and jury instructions. We cannot divine defense counsel's thinking. From the available record, however, there is no basis for concluding that counsel's decision was a serious error rather than sound trial strategy.

Further, to prevail on an ineffective assistance of counsel claim, defendant must show that counsel's alleged error resulted in prejudice. *People v Kimble*, 470 Mich 305, 314; 684

NW2d 669 (2004). While defendant refers to several rulings made by Judge Townsend, he only argues that two were erroneous: (1) his refusal to give a mere presence instruction, and (2) his decision to give a second-degree murder instruction.

As discussed previously, it was proper for Judge Townsend to instruct the jury on second-degree murder as a lesser offense of first-degree murder because the instruction was supported by a rational view of the evidence. Further, although defendant requested a mere presence instruction, CJI2d 8.5, that instruction is only applicable to an aiding and abetting theory of guilt. Here, defendant was not charged as an aider and abettor and the prosecutor did not argue an aiding and abetting theory of guilt. Rather, the prosecutor's theory at trial was that defendant was the shooter, consistent with the testimony of all eyewitnesses. Moreover, at defendant's request, because defendant was only charged as a direct principal, Judge Townsend instructed the jury that in order to convict defendant, "you must find that he is the person who fired the shots, that, that committed the offense." Thus, defendant could not have been convicted if the jury was not convinced beyond a reasonable doubt that he was the person who shot the victim.

Accordingly, defendant has failed to show that he was prejudiced by defense counsel's decision to consent to Judge Townsend's substitution during closing arguments and jury instructions.

III. Prosecutorial Misconduct

Defendant lastly argues that the prosecutor committed misconduct by accusing defense counsel of manufacturing evidence, and by referring to defendant's decision not to testify. Only the first issue was preserved with an appropriate objection at trial.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Where a defendant fails to object to alleged misconduct, however, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *Noble*, 238 Mich App at 660. Unpreserved claims of misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

A. Denigrating the Defense

Defendant argues that the prosecutor improperly accused defense counsel of creating evidence. We disagree.

"A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). "However, the prosecutor's comments must be considered in light of the defenses counsel's comments." *Id*. at 592-593. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id*. at 593 (internal quotations and citation omitted).

Further, a prosecutor is free to comment on the evidence, to draw all reasonable inferences from the evidence, and to argue how the evidence relates to the prosecution's theory of the case. *Cox*, 268 Mich App at 451. The use of passionate language, by itself, is not improper, *People v Abraham*, 256 Mich App 265, 276-277; 662 NW2d 836 (2003), and a prosecutor need not phrase her arguments in the blandest possible terms. *Cox*, 468 Mich App at 451.

As argued by defendant, in her rebuttal argument, the prosecutor repeatedly accused defense counsel of creating evidence. Viewed in context, however, the comments were a fair response to defense counsel's closing argument, during which counsel argued that the bullet found embedded in the porch wall was the fatal shot, that the victim was shot while he was bent over Flood, that the victim was reaching for a gun, and that Flood acted in self-defense. The prosecutor responded to these arguments by emphasizing that they were not supported by the actual evidence at trial, and that insinuations by defense counsel in his opening statement and during questioning at trial were not evidence. The prosecutor's arguments were not directed at defense counsel personally, but rather at the evidence at trial. Considered in this responsive context, we find no misconduct.

B. Defendant's Right to Remain Silent

Defendant also argues that the prosecutor improperly commented on his decision not to testify. We disagree.

Because a defendant has a right not to be compelled to incriminate himself, a prosecutor may not comment on a defendant's failure to testify. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). A prosecutor cannot undermine the presumption of innocence by suggesting that the defendant has an obligation to prove anything, because such an argument tends to shift the burden of proof. See *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), overruled in part by *Fields*, 450 Mich at 115 n 24. However, "the protective shield of the Fifth Amendment should not be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *Fields*, 450 Mich at 109 (internal quotations and citation omitted).

Thus, a prosecutor may argue that particular evidence is undisputed, even if the defendant is the only witness who could have controverted the evidence. *Id*. at 115. Similarly, a prosecutor may make a "fair response" to a defendant's argument that, for example, the defendant was deprived of the opportunity to explain his side of the story. *Id*. at 110-111. Further, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory that, if proven, might exonerate him, the prosecutor's comment on "the inferences created," including the defendant's failure to call witnesses or produce corroborating evidence, "does not shift the burden of proof." *Id*. at 115-116.

In the present case, defendant's theory was that Flood shot the victim in self-defense while the victim was bent over Flood, reaching for a gun, after having knocked Flood down. However, there was no evidence tending to prove that the bullet found in the wall was the fatal shot, that the victim had a gun, or that Flood was the shooter. In her rebuttal argument, the prosecutor twice stated that defense counsel had put everyone on trial except for his client. Considered in context, however, the prosecutor was not impermissibly commenting on

defendant's failure to testify. Rather, she was commenting on defendant's strategy of impugning the character of every person involved in the matter, even those who did not testify. The prosecutor was also commenting on the absence of evidence supporting defendant's theory of the case. In context, the prosecutor's comments were not improper.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro