STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES TREMAINE FREEMAN,

Defendant-Appellant.

UNPUBLISHED
December 17, 2020

No. 350077
Washtenaw Circuit Court
LC No. 17-000916-FC

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and carrying a concealed weapon, MCL 750.227(2). The trial court sentenced defendant to 28 to 50 years' imprisonment for the second-degree murder conviction, 2 years' imprisonment for the felony-firearm conviction, and 2 to 5 years' imprisonment for the carrying a concealed weapon conviction. We affirm.

I. FACTUAL BACKGROUND

Defendant testified that he confronted the victim, Deandre Willingham, about spreading rumors and asked him if he wanted to fight. At some point, the mother of defendant's child, Camae Abrahams, intervened and got in front of defendant, argued with the victim and punched him in the face. Defendant testified that the victim raised his hand and lunged as if he intended to hit Abrahams, but then he lowered his hand to his waist and hip area where defendant noticed a bulge in the victim's pants and thought that the victim intended to pull out a gun. Defendant responded by pulling out his own handgun and admitted that he shot the victim. Defendant and Abrahams then fled the scene. As they drove, defendant threw his cell phone out the window. They went to a Walmart and then Abrahams dropped defendant off at a relative's home where defendant disposed of his gun in a dumpster.

Other witnesses testified differently regarding the incident. Amber Rogers testified that she looked out of the door of her sister's home and saw a woman and a man approach the victim who had exited the home across the street. The woman confronted the victim verbally and then

struck him in some fashion. Rogers testified that she did not see the victim with a gun, and she did not see the victim try to hit the woman. Rogers, however, saw the man shoot the victim two or three times which caused him to stumble back and fall.

Gerald Crockett testified that he and the victim were going to a nearby store to buy cigarettes when Abrahams approached the victim and started arguing with him. Crockett saw Abrahams slap the victim who then raised his hand as if he would hit her back but then turned and walked away. Then defendant shot the victim three times. Defendant threatened the people who were outside that witnessed the incident and then he and Abrahams fled in a car. Crockett testified that the victim had no weapon.

Another witness, Cheryl Gawthrop, testified that she saw a woman arguing with the victim and then hit the victim in the face. The victim started to walk away from the woman when defendant called after the victim who turned around and defendant shot him three times. Gawthrop went outside to assist the victim and did not see any weapons on him.

After the shooting, an ambulance took the victim to the hospital where a doctor pronounced him dead. Detective Mark Neumann of the Washtenaw County Sherriff's Office identified Abrahams and defendant as suspects. Dr. Jeffrey Jentzen testified that he performed an autopsy on the victim and determined that the victim had three gunshot wounds: one in the back that did serious internal damage to the victim, one that passed through his left buttock, and one in the abdomen. Dr. Jentzen concluded that the gunshot wound in the back fatally injured the victim but he lacked certainty regarding the sequence of the shots. He opined that the victim either "received wounds number two and three while turning away from the shooter and the fatal wound in the back in which instance he would have dropped suddenly," or the victim received the fatal wound first and then received the other two wounds while he twisted and fell.

The day after Dr. Jentzen performed the autopsy, defendant turned himself in to the police. After receiving a *Miranda*[1] warning and defendant waiving his *Miranda* rights, Detective Neumann interviewed defendant who confessed to shooting the victim. After defendant testified on his own behalf at trial, Detective Neumann testified in rebuttal and pointed out numerous discrepancies between defendant's trial testimony and his description of the incident and his disposal of his phone and gun.

II. ANALYSIS

Defendant first argues that the prosecution presented insufficient evidence to prove that he acted with malice when he killed the victim. We disagree.

We review de novo challenges to the sufficiency of the evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). "We view the evidence in the light most favorable to the prosecution to determine whether a rational tier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Id.*

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004) (quotation marks and citation omitted). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. (quotation marks and citation omitted). "Malice for second-degree murder can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999) (quotation marks and citation omitted). "Similarly, malice can be inferred from the use of a deadly weapon." *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004) (citation omitted). "[M]inimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) (citation omitted).

Viewed in the light most favorable to the prosecution, the evidence presented at trial sufficed to establish that defendant committed second-degree murder and acted with the requisite malice. See *Meissner*, 294 Mich App at 452. The evidence established that after Abrahams slapped the unarmed victim, he started to walk away from her when defendant drew his gun and lethally shot the victim in the back. The prosecution also presented evidence that established that after defendant shot the victim, defendant fled the area, threw away his gun, and lied to Detective Neumann about his and Abrahams's involvement in the shooting. From this evidence the trial court could properly conclude beyond a reasonable doubt that defendant acted with malice and committed second-degree murder. See *Bulls*, 262 Mich App at 627.

Defendant also argues that his conviction of second-degree murder was against the great weight of the evidence because "there was no proof" that he acted with malice. We disagree.

Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Our Supreme Court has held that defendants must meet three requirements to establish plain error: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. (citation omitted). Defendant bears the burden of establishing prejudice. *Id*. Additionally, even if the "defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse" because "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763-764 (quotation marks and citation omitted; second alteration in original).

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). Generally, we only vacate a guilty verdict "when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id*. (citation omitted). We "will not interfere with

the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Kanaan*, 278 Mich App at 619 (citation omitted).

At trial, evidence established that defendant had a handgun that he used to shoot and kill the victim. Defendant admitted during his trial testimony that he shot the victim with a nine-millimeter handgun. Bystanders Crockett and Gawthrop testified that they saw defendant shoot the unarmed victim when he walked away from Abrahams. Because "malice can be inferred from the use of a deadly weapon," *Bulls*, 262 Mich App at 627, the trial court's finding of malice was not against the great weight of the evidence. Defendant has failed to establish the existence of any plain error. See *Carines*, 460 Mich at 763.

Defendant argues next that the prosecution presented insufficient evidence to disprove his theory of self-defense. We disagree.

"A killing may be considered justified if the defendant acts in self-defense." *People v Bailey*, 330 Mich App 41, 376; 944 NW2d 370 (2019) (citation omitted). Under Michigan's common law, "the affirmative defense of self-defense justified the killing of another person if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *People v Guajardo*, 300 Mich App 26, 35; 832 NW2d 409 (2013) (quotation marks and citations omitted). Further, the right to use deadly force extends to the defense of others. See *People v Wright*, 25 Mich App 499, 503; 181 NW2d 649 (1970). The Legislature promulgated the Self-Defense Act, MCL 780.971 *et seq*., to "codif[y] the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *Guajardo*, 300 Mich App at 35 (quotation marks and citation omitted). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993) (citation omitted).

In this case, the prosecution presented evidence that the victim did not have or use a deadly weapon against defendant or Abrahams. See *Bailey*, 330 Mich App at 377. The victim did not brandish a weapon nor make any gestures indicating that he had a gun. See *id*. The record reflects that after Abrahams slapped the victim, the victim turned to walk away from Abrahams and defendant. The record reflects that the victim may have considered striking Abrahams back after she hit him, but witnesses testified that the victim stated that he would not fight a woman and turned away from the altercation. As the victim retreated, defendant drew his handgun and shot him three times. See *id*. Rogers testified that she did not see the victim with a gun, and she did not see him hit anyone or even try to hit anyone before being shot. Crockett testified that the victim acted like he was going to hit Abrahams but then he "just turned around and walked away" before defendant shot him. Gawthrop similarly testified that the victim walked away when defendant called out to him causing the victim to turned around, whereupon defendant shot him. Gawthrop also testified that the victim did not have a gun. Dr. Jentzen posited two scenarios regarding the sequence of the gunshots based upon the victim's gunshot wounds. Both scenarios supported the witnesses' testimony that during the victim's retreat defendant shot him. No evidence suggested that the victim intended to use deadly force or a weapon against defendant or Abrahams. The evidence does not support any justification for defendant's conduct.

Further, although defendant testified that the victim's movement of his hand to his waist and hip area indicated to defendant that the victim reached for a gun to shoot him or Abrahams, the trial court did not find defendant's testimony credible. This Court "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Kanaan*, 278 Mich App at 619 (citation omitted). Therefore, the prosecution presented sufficient evidence to rebut defendant's theory of self-defense which lacked any evidentiary support. Shooting an unarmed person in the back while retreating lacks justification.

Defendant argues next that the trial court's finding that defendant killed the victim without justification was against the great weight of the evidence. We disagree.

In this case, the determination of defendant's self-defense claim turned on the credibility of the evidence presented at trial. In making its determination, the trial court evaluated the testimonies of defendant, Rogers, Gawthrop, Crockett, and Dr. Jentzen. Although defendant testified that the victim acted like he might have been reaching for a gun to shoot him or Abrahams, Rogers's, Gawthrop's, and Crockett's testimonies indicated that the victim was unarmed and made no such gesture, but that he turned and began walking away from Abrahams and defendant. This evidence clearly rebutted defendant's theory of self-defense. See *Bailey*, 330 Mich App at 377. Additionally, Dr. Jentzen testified that the victim's gunshot wounds indicated that the victim was either turning away from defendant or had his back to defendant when defendant fired the first shot. The trial court ultimately found that defendant lacked credibility compared to the other witnesses' testimony. We will not interfere with the trial court's assessment of "the credibility of witnesses." *Kanaan*, 278 Mich App at 619. Therefore, the trial court's finding that defendant did not act in self-defense was not against the great weight of the evidence.

Defendant argues next that the prosecution's failure to provide him with the trial exhibits pursuant to MCR 7.210(C) deprived him of meaningful appellate review. We disagree.

"We review constitutional questions de novo." *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009) (citation omitted). Michigan's Constitution guarantees defendants a right to an appeal. See Const 1963, art 1, § 20. MCR 7.210(C) provides that parties must file "any exhibits offered in evidence, whether admitted or not, . . . with the trial court or tribunal clerk" within 21 days after a party files a claim of appeal. When the prosecution fails to file all required exhibits, we must determine whether the prosecution's failure prejudiced the defendant's enjoyment of his constitutional right to an appeal. *People v Drake*, 64 Mich App 671, 679; 236 NW2d 537 (1976). "[N]ot every gap in a record on appeal requires reversal of a conviction." *People v Wilson*, 96 Mich App 792, 797; 293 NW2d 710 (1980). "If the surviving record is sufficient to allow evaluation of defendant's claims on appeal, defendant's right is satisfied; the sufficiency of the record depends upon the questions which must be asked of it." *People v Audison*, 126 Mich App 829, 835; 338 NW2d 235 (1983) (quotation marks and citation omitted).

In this case, although the prosecution violated MCR 7.210(C) by not filing the trial exhibits in the trial court within 21 days after defendant filed his claim of appeal, the record indicates that the prosecution later filed the trial exhibits in the trial court before defendant's deadline to file his brief on appeal. The record also indicates that defendant had possession of the complete lower court record before his deadline to file his appeal brief. Additionally, we are currently in possession of the complete lower court record, including all trial exhibits. Defendant, however,

failed to assert any error that may be contained within any of the trial exhibits. Therefore, defendant's argument fails.

Defendant also asserts that defense counsel denied him effective assistance of counsel on several grounds. None of them have merit.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review for clear error a trial court's findings of fact and review de novo questions of constitutional law. *Id*. However, because defendant failed to move "for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (citations omitted).

Defendant has the burden of establishing that he was denied effective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012) (citations omitted). Defendant "must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id*., citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy, as is a decision concerning what evidence to highlight during closing argument." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (citations omitted). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008) (citation omitted). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (citation omitted).

Defendant argues first that defense counsel should have moved to disqualify the trial judge who presided over his bench trial because she presided over his motion to suppress hearing and denied his motion. We disagree.

Before trial, defense counsel moved to suppress defendant's confession to Detective Neumann on several grounds. The prosecution opposed defendant's motion. The trial court held a hearing and denied defendant's motion. The trial judge later presided over defendant's bench trial, and when defense counsel wanted to play the DVD containing defendant's interview with Detective Neumann at trial, the trial judge stated that it was unnecessary because she had already watched it and taken notes on it for the motion hearing.

In this case, defense counsel's failure to move to disqualify the trial judge did not fall below an objective standard of reasonableness. *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). Criminal defendants are "entitled to a neutral and detached magistrate." *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011) (quotation marks and citation omitted). Defendants "claiming judicial bias must overcome a heavy presumption of judicial impartiality." *Id*. at 598 (quotation marks and citation omitted). "Judicial rulings, as well as a judge's opinions formed during the trial process, are not themselves valid grounds for alleging bias unless there is

a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id.* (quotation marks and citation omitted).

Defendant contends that the trial court must have had "a personal bias or prejudice against [him] or a preconceived notion about his guilt" because she presided over the motion to suppress hearing and denied his motion. "However, [m]erely proving that a judge conducted a prior proceeding against the same defendant does not amount to proof of bias for purposes of disqualification." *People v Johnson*, 315 Mich App 163, 196; 889 NW2d 513 (2016) (quotation marks and citation omitted; alteration in original). Additionally, the trial court's denial of defendant's motion to suppress "is an insufficient ground for proving bias unless the defendant can show that there was deep-seated favoritism or antagonism such that the exercise of fair judgment [was] impossible." *Id.* (quotation marks and citation omitted; alteration in original).

In support of his argument, defendant points to the fact that the trial court did not need to rewatch his confession video at trial because of her familiarity with it from his motion hearing. However, nothing in the record suggests that the trial court's decision not to watch the video again at trial "was made out of deep-seated favoritism or antagonism." *Id.* Rather, the trial court appears to have decided not to review the recording again to save time. The trial court had already watched and taken notes on the video, and therefore, had knowledge of its contents sufficient to consider the evidence it presented. Trial courts may control trial proceedings and "limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." MCL 768.29. The trial court has wide discretion and power in fulfilling its duty. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). In this case, defendant has failed to "overcome the heavy presumption of judicial impartiality, which means that any motion to disqualify the trial judge would have been meritless." *Johnson*, 315 Mich App at 197-198. Defense counsel's failure to raise a meritless argument does not establish ineffective assistance of counsel. See *Ericksen*, 288 Mich App at 201.

Defendant argues next that he was denied effective assistance of counsel because defense counsel failed to admit into evidence the video containing his interview with Detective Neumann. We disagree.

Although at trial both parties agreed to the admission of the video and the parties and the trial court assumed that the video had been admitted, the record indicates that it was never formally admitted into evidence. After the trial court asked if there were any objections to the admission of the video, defense counsel said no and then also asked to admit a different exhibit, which the trial court ultimately did without mentioning whether the DVD containing the interview was also admitted. Defense counsel's failure to ensure that the trial court formally admitted the DVD containing defendant's interview with Detective Neumann could be construed as objectively deficient. See *Randolph*, 502 Mich at 9. The record also indicates that defense counsel's failure to ensure that the trial court formally admitted the video did not occur as a matter of trial strategy but rather a procedural oversight. See *Trakhtenberg*, 493 Mich at 52; *Horn*, 279 Mich App at 39.

Defendant, however, cannot establish that defense counsel's objectively deficient performance prejudiced him. See *Randolph*, 502 Mich at 9. The record reflects that both parties and the trial court assumed that the trial court admitted the recording into evidence and conducted

the hearing as if it had been. Further, although the trial court did not formally admit the evidence on the record, the trial court's exhibit list referred to the evidence as admitted and the record indicates that the trial court considered the evidence along with the evidence and testimony presented by the parties at trial.

Although defendant claims that defense counsel's failure to ensure the admission of his recorded confession at trial impedes his constitutional right to appeal, defendant fails to provide any substantive argument to support his assertion. Specifically, defendant fails to explain how defense counsel's failure to ensure that the formal admission of the DVD impeded his right to an appeal. Defendant fails to establish that he has been hindered or prevented on appeal from claiming any error or from making any argument. Further, defendant has failed to prove that he suffered any prejudice resulting from his counsel's deficient performance in this regard. Defendant has failed to establish that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. Therefore, his ineffective assistance of counsel claim fails.

Defendant argues next that he was denied effective assistance of counsel because defense counsel failed to maintain the trial exhibits. We disagree.

Before trial, defense counsel filed a demand for discovery from the prosecution. Additionally, at trial, defense counsel stated that he had a copy of defendant's interview with Detective Neumann. However, after defendant's trial, appellate counsel requested copies of the trial exhibits from defense counsel, and defense counsel only provided appellate counsel the exhibit list and the one exhibit defense counsel admitted at trial.

Under the circumstances presented, defense counsel's performance was objectively deficient. Under MCR 6.005(H)(5), trial counsel must, "when an appellate lawyer has been appointed or retained, promptly mak[e] the defendant's file, including all discovery material obtained, available for copying upon request of that lawyer." Additionally, MRPC 1.16(d) provides that "[u]pon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . ." The record indicates that defense counsel had copies of the prosecution's trial exhibits or at the very least a copy of defendant's interview with Detective Neumann. However, when appellate counsel requested the trial exhibits, defense counsel only provided appellate counsel the exhibit list and the one exhibit defense counsel admitted at trial. Defense counsel failed to fulfill MCR 6.005(H)(5) and MRPC 1.16(d) and such conduct cannot be deemed the "result of reasonable professional judgment." *Strickland*, 466 US at 690. Nevertheless, defendant has failed to establish that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. Accordingly, this ineffective assistance of counsel claim also fails. See *Randolph*, 502 Mich at 9.

Finally, defendant argues that defense counsel provided ineffective assistance by advising him to waive his right to a jury trial. We disagree.

Defendant has failed to present any evidence to support his claim that defense counsel's advice to waive his right to a jury trial constituted objectively unreasonable performance. Further, he has failed to overcome the presumption that the advice "was born from a sound trial strategy."

Trakhtenberg, 493 Mich at 52. Additionally, even assuming that defense counsel performed deficiently as claimed, defendant has failed and cannot establish that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. *Id*. The record reflects that the prosecution presented substantial evidence from which the trier of fact, whether a judge or a jury, could find beyond a reasonable doubt that defendant committed second-degree murder. Therefore, defendant has failed to prove that defense counsel denied him effective assistance of counsel.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford