STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BOYD,

Defendant-Appellant.

UNPUBLISHED
July 23, 1996

No. 177614
LC No. 93-009926

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 227b; MSA 28.424(2). The trial court sentenced defendant to twenty to forty years' imprisonment for second-degree murder, and two years' for felony-firearm. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial because the trial court did not instruct the jury on the lesser offenses of statutory involuntary manslaughter, MCL 750.329; MSA 28.561, and reckless discharge of a firearm, MCL 752.861; MSA 28.436(21), or on the issue of proximate cause. However, defendant failed to object below to the trial court's jury instructions. Therefore, these issues are unpreserved and will be reviewed only for the existence of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We find no manifest injustice. First, the elements of statutory manslaughter could not have been satisfied because in reaching a verdict of second-degree murder, the jury rejected defendant's accident defense and concluded beyond a reasonable doubt that defendant acted with malice in pointing a gun at the victim's head. Therefore, we find that the error, if any, in failing to instruct the jury with regard to statutory manslaughter is harmless because the instruction could have had no effect on the verdict. *People v Considine*, 196 Mich App 160, 162-163; 492 NW2d 465 (1992). Second, taken as a whole, the trial court's jury instructions fairly instructed the jury on the

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

element of proximate cause and sufficiently protected defendant's rights. See *People v Tims*, 449 Mich 83, 99; 534 NW2d 675 (1995); see generally *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994). Further, we are not persuaded that defense counsel's failure to request these jury instructions denied defendant the effective assistance of counsel because defendant was not prejudiced thereby. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

II

Defendant next contends that the trial court improperly permitted the prosecutor to ask defendant's expert witness whether he received compensation to testify and improperly permitted the prosecutor to comment on this testimony during closing argument. We disagree. A witness' credibility is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified, remanded on other grounds 450 Mich 1212 (1995). The trial court did not err in permitting the prosecutor to question defendant's expert witness on whether he was paid to testify because this question directly related to the witness' credibility. For the same reason, the prosecutor's comments relating to this testimony during closing arguments were proper. Therefore, this testimony did not deny defendant a fair trial.

III

Defendant further claims that the trial court improperly permitted the victim's mother to testify to the events leading up to the murder since her testimony was cumulative and was elicited to evoke sympathy from the jury. Defendant also argues that the trial court should have prohibited Tyrone Turner from testifying as to whether the victim cried after he was shot, but before he was run over by the car. We disagree.

A trial court's decision to admit evidence will not be reversed absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). In general, relevant evidence is admissible. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Relevant evidence is evidence that has any tendency to make the existence of any consequential fact more or less probable than it would be without the evidence. *Id.* However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*

The trial court did not abuse its discretion in permitting the mother's testimony since she was an eyewitness to the shooting and testified to the events that led up to the shooting. This evidence was clearly relevant because it concerned the identity of the shooter and the circumstances of the shooting. Defendant's argument that this testimony was unduly prejudicial since it was cumulative is unpersuasive because the circumstances leading up to the shooting were disputed.

Also, the trial court did not abuse its discretion in permitting Turner's testimony. The question posed to Turner was relevant because it tended to show that the victim was dead after he was shot, but

before he was hit by the car, a material issue in the case. Further, the testimony's probative value was not substantially outweighed by its prejudicial effect since there was little evidence, other than this testimony, concerning this issue.

IV

Next, defendant argues that the prosecutor improperly made a civic duty argument during his closing argument. However, defendant failed to object below to these statements. Because we find that manifest injustice will not result if we do not review this issue, defendant has waived it for review. *Van Dorsten, supra*. Furthermore, we find that defendant's argument that his trial counsel's failure to preserve this issue denied him effective assistance of counsel is unpersuasive because, considering the overwhelming evidence of defendant's guilt, defendant was not prejudiced by the prosecutor's relatively innocuous comments. See *People v Crawford,* 187 Mich App 344, 353-354; 467 NW2d 818 (1991).

V

Defendants fifth argument contends that the trial court improperly permitted the prosecutor to question a defense witness on his failure to report exculpatory evidence to the police prior to trial. We disagree.

This Court has repeatedly held that the prosecutor can impeach a witness for not reporting his or her story to the police so long as the prosecutor shows that it would have been natural for the witness to have done so. See, e.g. , *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991); *People v Lewis*, 162 Mich App 558, 568-569; 413 NW2d 48 (1987); *People v Clifton Fuqua*, 146 Mich App 250, 255-256; 379 NW2d 442 (1985). The prosecutor did so in this case. The witness admitted that he knew defendant did not murder the victim and that the shooting was an accident. Therefore, the trial court did not abuse its discretion in permitting this line of questioning.

VI

Defendant next argues that the trial court improperly permitted codefendant's attorney to cross-examine the medical examiner concerning the victim's cause of death in the presence of defendant's jury since codefendant's defense was that defendant caused the victim's death. According to defendant, the trial court should have either granted defendant's motion for separate trials or excused defendant's jury during codefendant's cross-examination. We disagree.

On a defendant's motion, a trial court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant. MCR 6.121(C). Reversible prejudice exists when one of the defendant's substantial rights, such as the opportunity to present an individual defense, is violated. *People v Hana*, 447 Mich 325, 360; 524 NW2d 682 (1994).

Defendant has failed to carry his burden of showing that one of his substantial rights were violated by not separating his trial from codefendant's. The fact that each defendant accused the other of being the cause of death is not sufficient to establish the requisite prejudice since the jury could have concluded that both defendants were the cause of death or that only one defendant was the cause. See *Hana, supra.* Therefore, the trial court did not abuse its discretion in ordering separate juries rather than separate trials.

VII

Defendant also argues that the trial court improperly permitted Angela Berry to testify at trial because the magistrate who presided over the preliminary examination barred Berry from testifying at either the preliminary examination or at trial on the ground that she violated the magistrate's sequestration order. We disagree.

The trial court correctly recognized that the magistrate did not enter an order forbidding Berry from testifying at trial. In fact, the magistrate did not even enter a sequestration order. The witnesses were sequestered at the preliminary examination but, although the attorneys requested sequestration, the magistrate did not order it. Therefore, defendant's argument is without merit.

VIII

Defendant next argues that the trial court erred in denying his motion for directed verdict on the first-degree murder charge because there was no evidence of premeditation and deliberation. Defendant also argues that there was insufficient evidence to support his conviction of second-degree murder since no rational trier of fact could have found that the element of malice was proven beyond a reasonable doubt. We disagree.

When reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Chandler*, 201 Mich App 611, 612; 506 NW2d 882 (1993). This can be satisfied through the introduction of circumstantial evidence alone. *Id.* at 613. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). These elements may be inferred from the circumstances surrounding the killing. *Id.*

Viewed in a light most favorable to the prosecution, the evidence was sufficient to support a finding that defendant killed the victim with premeditation and deliberation. The evidence established that defendant believed the victim was involved in burglarizing his brother's flat, and that he went to the victim's house to confront him. Further, eyewitness testimony established that defendant drove to the victim's house, put a gun to the victim's head, and demanded money from him.

Malice includes the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *People v Harris*,

190 Mich App 652, 659; 476 NW2d 767 (1991). While malice can be inferred from the facts and circumstances of the killing, *People v Porter*, 169 Mich App 190, 192-93; 425 NW2d 514 (1988), it must be established from facts or circumstances that do not mitigate the degree of the offense to manslaughter or constitute an excuse or justification. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993).

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to have concluded beyond a reasonable doubt that defendant killed the victim with malice. The evidence discussed above relating to premeditation and deliberation was clearly sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant acted with malice.

IX

Finally, defendant argues that he must be resentenced since the trial court misscored OV 3 and OV 13. We disagree.

A sentencing judge's scoring calculation will be upheld so long as there is evidence on the record that adequately supports the score. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). Further, a miscalculation in scoring is harmless error if it would not have changed the level at which the defendant was ultimately placed in calculating the guidelines' range. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

The sentencing judge assessed twenty-five points under OV 3. In justifying its decision, it asserted that this score was appropriate since the jury found beyond a reasonable doubt that defendant possessed the intent enumerated in OV 3. Defendant argues that OV 3 should have been scored at ten points since the death resulted from gross negligence or because the death occurred in a combative situation.

Defendant's argument relating to gross negligence fails because there is evidence on the record that defendant intended to kill the victim or intended to cause him great bodily harm. Under OV 3, if such intent is present, the sentencing judge must score twenty-five points. See *Michigan Sentencing Guidelines* (2d ed) at 77. Furthermore, defendant's argument relating to the death occurring in a combative situation also fails because there was no evidence that a combative situation existed. The only evidence that arguably supports defendant's argument is testimony that the victim hit the gun before defendant fired it. This, however, does not constitute a combative situation because if the victim hit the gun before defendant fired, he was acting in self-defense. In *People v Rodriguez*, 212 Mich App 351, 353; 538 NW2d 42 (1995), we held that lawful defense of oneself or others does not constitute a "combative situation" under OV 3.

The sentencing judge assessed five points under OV 13 based on testimony from the victim's mother that she was receiving psychological treatment from a social group at her church. Defendant argues that OV 3 should have been scored at zero points since there is no documented evidence that

the mother suffered serious psychological injury due to her son's murder and because psychological treatment at a church does not constitute professional treatment contemplated by OV 13. We find that there was evidence that the mother suffered serious psychological injury and that her psychological treatment fell within OV 13. In any event, the subtraction of five points from defendant's sentencing score would not have changed the level at which defendant was ultimately placed in calculating the guidelines' range so any error was harmless. See *Johnson, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Meyer Warshawsky