

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS LENNELL THOMAS,

Defendant-Appellant.

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UNPUBLISHED

July 14, 2005

No. 255126

Wayne Circuit Court

LC No. 03-013247

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for second-degree murder, MCL 750.317, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty to seventy years in prison for his second-degree murder conviction, 2 to 7½ years in prison for his felon in possession conviction, and five years in prison for his felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree.

A claim of insufficient evidence is reviewed de novo to determine if, when reviewed in the light most favorable to the prosecutor, the evidence presented could lead a rational trier of fact to find beyond a reasonable doubt that the elements of the crime were proven. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The reviewing court must draw any reasonable inference and resolve any credibility conflict in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "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 Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998), citing *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).

“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.” *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004), quoting *Goecke, supra* at 464. Because state of mind is hard to prove, minimal circumstantial evidence is required. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). Here, a witness observed defendant raise a gun, point it in the victim’s

direction, and fire it. Thus, when viewed in the appropriate light, the evidence was sufficient for the trial court to conclude that defendant had the requisite intent. *Fletcher, supra* at 559.

Nevertheless, defendant argues that the prosecution failed to proffer any evidence that his shooting of the victim was “without justification or excuse,” where the evidence at trial allegedly showed that the shooting was an accident. An accident is an excuse that will negate the intent element of murder. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). Defendant offered no evidence supporting his claim of “accident” at trial, but on appeal relies solely on the witness’ erroneous belief that the gun was not loaded.<sup>1</sup> Although the eyewitness to the shooting testified that he heard defendant empty the chamber and a bullet fall to the floor, and he did not see whether defendant reloaded the gun, the witness’ state of mind was irrelevant to whether defendant knew the gun was loaded. Therefore, we reject defendant’s argument.

Defendant next argues that defense counsel’s alleged failure to adequately investigate or call potential alibi witnesses, and failure to provide notice of an alibi defense deprived him of his right to effective assistance of counsel. We disagree.

Challenges to the effectiveness of trial counsel present mixed questions of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court’s factual findings are reviewed for clear error while constitutional questions are reviewed de novo. *Id.* To establish ineffective assistance of counsel, a defendant must show: (1) that counsel performed below an objective standard of reasonableness, and (2) it was reasonably probable that the result of the proceedings would have been different had it not been for counsel’s errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel’s performance was below an objective standard of reasonableness, a defendant must overcome the presumption that counsel’s actions were sound trial strategy. *Id.* at 302.

Counsel’s failure to call witnesses is presumed to be trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and relief is warranted only when the failure deprived the defendant of a substantial defense, *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). While defendant alleges in general terms that counsel’s failure to provide notice of an alibi defense and failure to investigate and call alibi witnesses deprived him of a substantial defense, he has failed to establish the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defendant testified at trial that he lived in Decatur, Illinois from September, 2002, to November 10, 2003, and, thus, was not in Michigan when the murder occurred.<sup>2</sup> Although he claimed to have lived in another state for fourteen months, he has not provided the name or affidavit of a single witness who could verify his assertion.

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<sup>1</sup> Defense counsel argued during closing argument that the weapon accidentally discharged when defendant was attempting to intimidate the victim; however, defendant, the only defense witness, testified that he was in Decatur, Illinois at the time the shooting occurred.

<sup>2</sup> We note that defendant’s testimony in this regard was brought out on cross examination rather than direct examination. Defense counsel’s questions on direct appeared carefully tailored to avoid defendant’s assertion that he was in Illinois at the time of the murder. Strategically, this could be because of the purported statement by defendant’s mother to police, which was used by  
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Regardless, defendant fails to demonstrate a reasonable probability that, but for counsel's purported errors, the result of the proceedings would have been different. One witness testified that he was standing a few feet away when he saw defendant point and shoot the gun at the victim, and he shortly thereafter saw the victim moaning on the ground. Two other witnesses testified that the victim identified defendant as his shooter. One of the witnesses – the victim's brother – stated that defendant and the victim had been friends, and the three witnesses testified that they knew defendant, indicating that this was not a case of mistaken identity. Notwithstanding defendant's claim that he was in Illinois at the time of the shooting, defendant admitted at trial that he used to live at the house where the shooting occurred. Even if alibi testimony had been presented, there is no indication, given the overwhelming evidence to the contrary, that the result of the proceedings would have been different. *Toma, supra* at 302-303.

Defendant next argues that the prosecutor's attempt to impeach him with a signed statement by his mother implicated his state and federal rights to confront witnesses against him under the Confrontation Clause, US Const, Ams VI, XIV; Const 1963, art 1, § 20. We disagree.

Defendant's challenge based on the Confrontation Clause is raised for the first time on appeal and is therefore unpreserved. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). An unpreserved Confrontation Clause challenge is subject to review for plain error. *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must show that clear and obvious error occurred, which prejudiced the defendant by affecting the outcome of the trial court proceedings. *Carines, supra* at 763. Reversal is required only when the plain error caused an innocent defendant to be convicted or seriously affected the fairness, integrity, or public reputation of the proceedings regardless of the defendant's innocence. *Id.*

"The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), quoting *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994) (Brickley, J). Recently, in *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that testimonial hearsay is admissible against a criminal defendant only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Although the *Crawford* Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'" it stated, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

Because defendant's mother's statement was made to a police officer, and the mother did not testify at trial, the statement arguably qualified as a "testimonial" statement. On the other hand, the statement was used to impeach defendant's testimony; it was not introduced as substantive evidence that defendant committed the crime, and it was not admitted into evidence. Because the statement was not admitted, we find no *Crawford* violation. *Crawford, supra* at 68-69. Regardless, even if the trial court did err in this regard, the error was not outcome

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the prosecutor to impeach defendant's claim that he was out of state.

determinative because the statement was not the primary evidence supporting his convictions. One witness testified that he witnessed defendant shoot the victim, and there was additional witness testimony that the victim identified defendant as the shooter. In this respect, defendant's mother's statement about what defendant told her was merely cumulative. We conclude that the prosecutor's questions did not affect the outcome of the trial court proceedings. Defendant, therefore, has failed to establish a plain error warranting reversal. *Carines, supra* at 763.

Defendant next argues that the trial court erred in admitting the victim's statements to one of the witnesses, identifying defendant as his shooter, under the "excited utterance" exception to the hearsay rule, MRE 803(2). We disagree.

This Court reviews a trial court's decision to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). If an unprejudiced person would find no justification or excuse for the ruling when considering the facts before the trial court, then an abuse of discretion has occurred. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). MRE 803(2) provides that a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is not excluded by the hearsay rule. This Court has explained:

The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that [he] lacks the capacity to fabricate. [*People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003), citing *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998).]

Here, the trial court did not abuse its discretion in finding that the victim was so overwhelmed that he lacked the capacity to fabricate. *Id.* The witness testified that the victim appeared to have been shot shortly before he implicated defendant. The victim was having trouble breathing and was upset. The record showed that the victim's statement related to an event that unquestionably qualified as a startling event for purposes of MRE 803(2), and that the victim was under the stress of excitement caused by the event or condition.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Donald S. Owens