

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT LAVELL BETTS,

Defendant-Appellant.

UNPUBLISHED

April 23, 2009

No. 282399

Wayne Circuit Court

LC No. 07-012111-FC

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for first-degree premeditated murder, MCL 750.316, four counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a firearm or dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to mandatory life imprisonment for the first-degree premeditated murder conviction, 23 to 40 years' imprisonment for each of the four assault with intent to murder convictions, three to five years' imprisonment for the felon in possession of a firearm conviction, three to five years' imprisonment for the carrying a firearm or dangerous weapon with unlawful intent conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions and sentences arise from the shooting death of decedent, Daniel Lowery, Jr., which occurred in a van occupied by decedent, Scott Cavasos, Daniel Boyd Harrington, Michael Tibbets, and Randy Hubbard. Defendant first argues that there was insufficient evidence of premeditation to support his conviction for first-degree premeditated murder, and that the prosecution failed to present legally sufficient evidence with respect to the elements of defendant's four assault with intent to murder convictions. We disagree. This court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *Id.* It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution's favor. *Wilkens, supra* at 738.

To convict defendant on the first-degree premeditated murder charge, the prosecution had the burden to prove beyond a reasonable doubt that “the defendant intentionally killed the victim and the act of killing was premeditated and deliberate.” *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). This Court has explained that there is no specific time requirement with respect to premeditation or deliberation; however, to obtain a conviction for first-degree premeditated murder, the prosecution must present evidence to show that enough time had elapsed to allow the defendant to “take a ‘second look.’” *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). The elements of the crime of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *Id.* at 305. “An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). The necessary intent to kill may exist even if it is not directed at any particular victim and may be established by inference from any facts in evidence. *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999). “Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence of intent to kill is sufficient.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant argues that the prosecution failed to present sufficient evidence that defendant’s act of killing decedent was premeditated. We disagree. Here, viewing the evidence in a light most favorable to the prosecution, we conclude it was sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that defendant’s act of killing decedent was premeditated. Michael Belanger testified that after Cavasos, Hubbard and decedent departed from the residence of Nicole Morrison, Belanger spoke to one of them on the telephone. That person told Belanger that they planned to return in order to continue the altercation. According to Belanger, the person with whom he spoke on the telephone stated that Cavasos, Hubbard and decedent intended to return to the Morrison residence armed with firearms in order to “shoot the place up.” Belanger testified that defendant assured him that defendant would return to the Morrison residence in order to assist Belanger if Cavasos, Hubbard and decedent returned. Further, according to Michelle Loukas, defendant repeatedly urged Belanger to tell the person on the other end of the telephone line to return to the Morrison residence. Defendant did, in fact, return to the Morrison residence after decedent arrived with Cavasos, Hubbard, Tibbets, and Harrington, and when defendant returned, he was armed with a firearm. Because premeditation and deliberation may be inferred from the circumstances, and minimal circumstantial evidence is sufficient to prove an actor’s state of mind, we conclude that a rational trier of fact could infer from this evidence that defendant premeditated and deliberated his subsequent actions in killing decedent. Specifically, the trier of fact could infer premeditation and deliberation because defendant was well aware of the situation but assured Belanger he would participate. He also urged Belanger to tell decedent and decedent’s friends to return to the residence, assuring Belanger that defendant “had” Belanger’s “back,” returning to the residence armed with a firearm.

Loukas testified that when defendant returned to the Morrison residence, where an altercation was in progress between some of the occupants of the residence and decedent and four of decedent’s friends, defendant carried a firearm that resembled a small, modified shotgun. Similarly, Morrison described the gun used in the shooting as a rifle and testified that she heard several gunshots.

Further, Cavasos, an occupant of decedent's van, testified that the shooting started as the van was backing up, that the shooting continued after decedent shifted the van into drive and began to re-approach the shooter, and that she heard decedent scream immediately before the van flipped over. Assistant Wayne County Medical Examiner Dr. Leigh Hlavaty testified that defendant was shot in the back and the left buttock. From this evidence, a rational trier of fact could conclude beyond a reasonable doubt that defendant's killing decedent was premeditated. A rational trier of fact could conclude from the testimony of Loukas, Morrison, and Cavasos, that defendant fired the shots that killed decedent, and that defendant had sufficient time to take a "second look." Defendant fired the first shots while decedent attempted to escape with his friends in his van by accelerating backwards; defendant continued to shoot at the vehicle when the van approached him, and further continued to shoot after the van passed him by.

Moreover, because decedent sustained gunshot wounds in his back and buttock immediately before the van flipped over, and even if defendant did not have sufficient time to take a "second look" when the shooting began, as the van backed away, defendant did have enough time to deliberate both his decision to continue shooting at the van as it approached, and the subsequent decision to continue shooting after the van had passed. A rational trier of fact could conclude that defendant's act of killing was premeditated and deliberate because the evidence demonstrates that defendant continued firing his gun at the van while it was moving, and did not stop shooting until the van stopped. Thus, the prosecution presented sufficient evidence that the killing was premeditated.

Defendant next asserts that the prosecution presented insufficient evidence with respect to each element of defendant's four assault with intent to murder convictions. We disagree. As explained above, when viewed in a light most favorable to the prosecution, the testimony of Loukas, Morrison, and Cavasos establishes that defendant fired the shots at decedent's van with a rifle. Further, the evidence shows that defendant fired rifle shots at the van while the van was traveling backwards to escape, continued to fire the shots while the van changed course and approached defendant, and further continued to shoot at the van after the van had passed by.

According to Cavasos, there were five people in the van when defendant began to shoot at it. The occupants of the van were decedent, Cavasos, Harrington, Tibbets, and Hubbard. This evidence demonstrates that by firing shots into the van, defendant assaulted each of the van's occupants. He either attempted to commit a battery or placed the van's occupants in reasonable apprehension of receiving an immediate battery. *Starks, supra* at 234.

Further, a rational trier of fact could reasonably infer that defendant intended to kill everyone in the van from defendant's use of a firearm to fire multiple rounds at the occupied van, which in two instances, was attempting to escape from the scene. Moreover, had defendant killed all of the occupants of the van instead of only decedent, all of the killings would have constituted murder. Had defendant been successful in shooting and killing the van's occupants, the deaths would have been caused by defendant's act of shooting at the van. As explained herein, a rational trier of fact could conclude that if he had been successful, defendant would have intended to kill all of the van's occupants. Finally, because evidence demonstrates that at least some of the shots were fired at the van from behind it, the killings, if defendant had been successful, would have been accomplished without justification or excuse. Thus, a rational trier of fact could conclude that defendant assaulted the four surviving occupants of decedent's van with the actual intent to kill, and had defendant been successful, the killing would have been

murder. *Plummer, supra* at 305. Accordingly, we conclude that the prosecution presented sufficient evidence with respect to each element of defendant's four assault with intent to murder convictions.

Defendant next argues that the prosecution's failure to produce an endorsed witness, Harrington, deprived him of his Sixth Amendment right to be confronted with the witnesses against him. We disagree. Defendant failed to raise his argument that the prosecution's failure to produce Harrington violated defendant's constitutional right to confront his accusers before the trial court; therefore, this issue is not preserved on appeal. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997).

This Court reviews unpreserved constitutional claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate 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." *Id.*, quoting *Carines, supra* at 763.

Under the Sixth Amendment of the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. Similarly, the Michigan Constitution protects a criminal's right to be confronted with his accusers. Const 1963, art 1, § 20. The Confrontation Clause demands "not only that evidence be reliable, but also that its reliability be assessed by testing it by cross-examination." *People v Jambor*, 273 Mich App 477, 487; 729 NW2d 569 (2007), citing *Crawford v Washington*, 541 US 36, 60-68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). But a defendant's "right to confrontation is not violated by the prosecution failing to call witnesses that defendant could have called to testify." *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999).

Here, as a preliminary matter, defendant cites no authority to support his proposition that his conviction for assault with intent to murder with respect to Harrington must be vacated because Harrington failed to appear for and testify at defendant's trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give [an issue] only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Because Harrington did not testify as a witness at defendant's trial, and no statements attributed to Harrington were admitted into evidence, defendant's right to confront and cross-examine Harrington was simply not implicated. Thus, defendant's claimed Confrontation Clause violation fails for the fundamental reason that Harrington was not a witness against defendant.

Defendant next argues that the verdict was against the great weight of the evidence. We disagree. Defendant failed to bring a motion for a new trial; accordingly, the issue is unpreserved on appeal. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, our review of this claim is for plain error affecting substantial rights. *Id.*

Where the verdict is against the great weight of the evidence, a new trial may be granted on some or all of the issues. MCR 2.611(A)(1)(e). Reversal is necessary only where the testimony is “inherently implausible” to the extent that it “contradicts indisputable physical facts or law.” *People v Lemmon*, 456 Mich 625, 642-647; 576 NW2d 129 (1998). “A verdict may be vacated only when it ‘does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record, such as passion, prejudice, sympathy or some extraneous influence.’” *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993), quoting *Nagi v Detroit United Rwy*, 231 Mich 452, 457; 204 NW 126 (1925). “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Lemmon*, *supra* at 647.

Here, defendant’s argument fails because he misunderstands what he must, but ultimately cannot, demonstrate in order to establish that the verdict was against the great weight of the evidence. Defendant contends that the verdict was against the great weight of the evidence because, from defendant’s perspective, the weight of the evidence tipped the balance in his favor. Still, defendant has failed to show that the testimony of the witnesses was contrary to indisputable physical facts or law, or that the verdict was the result of passion, prejudice, sympathy or other extraneous influence. Although defendant contends that Loukas’s and Morrison’s testimony was inherently incredible because of their testimony at trial regarding their ingestion of drugs and alcohol on the night of the incident, their testimony regarding the circumstances surrounding decedent’s death did not defy physical fact or law to the extent that no rational juror could believe them. Instead, it was for the jury to judge the credibility of Loukas and Morrison, and decide what weight to give their testimony. Furthermore, because the jury may believe all, part or none of the evidence presented, the jury could have simply discredited Loukas’s and Morrison’s testimony regarding their prodigious consumption of intoxicants, and believed those portions of their testimony where they described specific details of the incident. Thus, we conclude that defendant’s argument that the verdict was against the great weight of the evidence lacks merit.

Defendant next argues that the prosecution committed misconduct when it failed to produce an endorsed witness, Harrington, to testify at defendant’s trial, and that the trial court improperly failed to conduct a “due diligence” hearing with respect to whether the prosecution was able to demonstrate good cause for its failure to produce Harrington. We disagree. Our review of the record indicates that at the end of the prosecution’s case-in-chief, defendant stipulated to excuse the prosecution from calling the remaining witnesses on the prosecution’s witness list, which included Harrington. Our Supreme Court has defined “waiver” as “the ‘intentional relinquishment or abandonment of a known right.’” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). “‘One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.’” *Id.*, quoting *United States v Griffin*, 84 F3d 912, 924 (CA7, 1996). Because defendant voluntarily relinquished his rights to challenge the prosecution’s exercise of due diligence in attempting to locate and produce Harrington, we conclude that defendant has waived these issues, and we decline to discuss them further.

Defendant next argues that he received the ineffective assistance of counsel because his attorney failed to demand a due diligence hearing regarding the prosecution’s failure to produce

Harrington and failed to request a jury instruction permitting the jury to draw an inference that the missing witness's testimony would have been unfavorable to the prosecution. We disagree.

Defendant did not move for a new trial on the basis of ineffective assistance of counsel and failed to request a *Ginther*¹ hearing before the trial court. Accordingly, his claim of ineffective assistance of counsel is unpreserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Id.* We review a trial court's findings of fact, if any, for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). But we review de novo the ultimate constitutional issue whether defendant was deprived of the effective assistance of counsel. *Id.*

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Additionally, in order to show prejudice a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for counsel's errors. *Id.* at 302-303. Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, counsel's failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense, i.e., a defense that might have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Here, defendant contends that he received the ineffective assistance of counsel because his counsel failed to demand that the trial court hold a "due diligence" hearing regarding the prosecution's failure to produce Harrington, failed to seek dismissal of the case on that ground, and failed to request a jury instruction, CJI2d 5.12, informing the jury that it was permitted to infer that Harrington's testimony would have been unfavorable to the prosecution. We disagree.

Defendant asks this Court to leap too wide a gulf when he urges us to conclude that he received ineffective assistance of counsel because his counsel failed to demand that the court conduct a due diligence hearing. Defendant reasons that if the trial court had held the due diligence hearing, it would have concluded that the prosecution did not exercise due diligence in attempting to locate Harrington. But, it is at least equiponderant that the trial court would have concluded that the prosecution in fact exercised due diligence because defendant is merely speculating. He does not offer any support for his speculative assertion that the prosecutor did not.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant then, based upon the speculative assumption that the trial court would have ruled in his favor, conjectures that the trial court would have concluded that Harrington's absence prejudiced defendant. However, it is unlikely that the trial court would so conclude in view of the evidence showing that Harrington was a victim in this case, and would, if he testified, likely have provided evidence unfavorable to defendant. Defendant argues next, based upon the assumption that the trial court would have concluded that Harrington's absence was prejudicial to defendant, that he would have been entitled to the jury instruction that Harrington's testimony would be adverse to the prosecution.

A missing witness instruction may be proper where the prosecution fails to produce an endorsed witness without a proper excuse. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). But, in *Perez*, the Supreme Court also recognized that a trial court need not give CJI2d 5.12, the "missing witness instruction," in situations where the prosecution failed to exercise due diligence to produce an endorsed witness, but the missing witness's testimony would not have been beneficial to the defendant. *Id.* at 417-418, 420. Harrington, who was in the van with decedent when he was shot to death, would not reasonably be expected to testify favorably to defendant. It is more likely his testimony would have that bolstered the prosecution's case against defendant. As such, the missing witness instruction was inappropriate under these circumstances, and even if the trial court had concluded that the prosecution failed to exercise due diligence in failing to produce Harrington. *Id.*

Further, we presume that defense counsel's failure to challenge the prosecution's assertion that it used due diligence to produce Harrington was a decision based upon sound trial strategy. *Toma, supra* at 302. As we stated above, defendant cannot point to anything in the record to suggest that Harrington's testimony would have been beneficial to defendant. Contrariwise, because Harrington was a victim, it is likely that defense counsel made the strategic decision that any possible benefit from Harrington's testimony would be outweighed by the more probable damage to defendant's case that might ensue from pressing the issue. Thus, defendant cannot overcome the strong presumption that defense counsel made the strategic decision not to challenge the prosecution's contention that it used due diligence to produce Harrington, or demand that the trial court conduct a due diligence hearing. *Id.*

Defendant next argues that the trial court abused its discretion when it replaced a sitting juror with an alternate. Specifically, defendant contends that the trial court was motivated by racial bias, allowed the jury to continue deliberating instead of beginning its deliberations anew when joined by the alternate juror, and failed to re-read testimony to the alternate juror that was re-read to the jury before the alternate juror was re-seated. We disagree. This Court reviews a trial court's decision to replace a deliberating juror with an alternate juror for an abuse of discretion. *People v Tate*, 244 Mich App 553, 562; 624 NW2d 524 (2001). A trial court abuses its discretion only where its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCL 768.18 provides, in pertinent part:

Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

MCR 6.411 states:

The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.

We conclude that defendant's contention that the trial court was motivated by racial bias lacks merit. The trial court, in formulating its decision to replace the sitting juror, acknowledged that the sitting juror was one of two African-Americans on the jury; however, the trial court also recognized the potential problem related by decedent's father, who alleged under oath that he had observed the sitting juror speaking with defendant's family members. The trial court further acknowledged that although the sitting juror denied any contact with defendant's family members, the problem was easily resolved by simply replacing the sitting juror with the alternate juror. The trial court concluded that the best solution was to replace the sitting juror with the alternate juror, and the trial court took that action. The trial court, after due consideration of the invited input from the prosecution and defense, decided to eliminate the potential problem regarding the sitting juror's alleged contact with defendant's family members. MCL 768.18. Further, regarding defendant's allegation that the trial court's action in replacing the sitting juror resulted in the elimination of one of two African-American jurors was racially motivated, the record demonstrates that the trial court was aware of this problem, but nevertheless decided that the potential problem regarding the sitting juror's alleged contact with defendant's family members outweighed the result that an African-American juror was excused. We are unable to ascertain any other indication from the record that the trial court may have been motivated by racial bias when it excused the sitting juror, and defendant offers none. Accordingly, we conclude that the trial court did not abuse its discretion when it replaced the sitting juror with the alternate juror.

Further, defendant's argument that the jury did not begin its deliberations anew when joined by the alternate juror lacks merit. The trial court specifically instructed the jury, as it was required to do under MCR 6.411, that when joined by an alternate juror, a jury must begin its deliberations anew. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Aside from defendant's speculation that the jury merely continued to deliberate rather than begin its deliberations anew because the jury quickly reached a verdict, there is no evidence that the jury disregarded its instructions to begin its deliberations anew. Similarly, the trial court did not abuse its discretion in failing to re-read testimony to the alternate juror that the trial court re-read to the jury before the alternate juror replaced the sitting juror. The record does not reveal that defendant requested that the trial court re-read the testimony to the alternate juror and that the trial court refused, or that the trial court declined the alternate juror's request that the trial court re-read the testimony. In other words, the trial court did not abuse discretion it was never asked to exercise.

Accordingly, defendant's challenges to the actions of the trial court relating to the replacement of the sitting juror with the alternate juror lack merit.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher