

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DINO BERNARD HEARD,

Defendant-Appellant.

UNPUBLISHED

July 11, 1997

No. 171401

Recorder's Court

LC No. 93-004897

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals as of right from his nonjury convictions of first-degree premeditated murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, larceny over \$100, MCL 750.356; MSA 28.588, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent terms of life imprisonment for first-degree murder, ten to twenty years' imprisonment for assault with intent to murder, and two to five years' imprisonment for larceny over \$100. The sentences are consecutive to defendant's service of concurrent two-year terms for his felony firearm convictions. We affirm defendant's murder, assault and felony firearm convictions but vacate his larceny conviction.

Defendant shot and killed his housemate Lawrence Miles and wounded Miles' brother, Rodney Miles. According to Rodney Miles, he awoke from a nap to the sound of a gunshot, and walked to the room occupied by Lawrence Miles. As he stood in the doorway, Rodney saw defendant aim a long gun at Lawrence and shoot him. Defendant then turned the gun on Rodney and shot him in the face, causing him to fall backward and tumble down the basement stairs. Fifteen minutes later, defendant entered the basement and shot Rodney again. Defendant then fled in a car that Lawrence's girlfriend owned but Lawrence was using at the time of the shooting. Rodney managed to climb the basement stairs and crawl out of the house and into the street, where a neighbor found him. Six days later, Franklin County Sheriff Deputies arrested defendant in Columbus, Ohio and found a .38 caliber handgun, an AK-47 rifle, and extra ammunition in his possession. At the time of his arrest, defendant was driving the car stolen from Lawrence Miles. The deputies also recovered a radio, walkie-talkies and other items taken from the Miles' residence.

In statements made to sheriff's deputies in Ohio and police officers in Detroit, defendant admitted killing Lawrence Miles and wounding Rodney Miles. Defendant claimed that Lawrence repeatedly beat him and threatened to kill him because he made mistakes in carrying out his duties in furtherance of Lawrence's drug operations. He believed that Lawrence would eventually kill him, and he indicated that he killed Lawrence and shot Rodney in order to leave the drug business and avoid any risk of retaliation.

Defendant first contends that he was denied the effective assistance of counsel by trial counsel's decision to present a duress defense. We disagree. Because defendant failed to preserve this issue by moving for an evidentiary hearing or new trial below, review is foreclosed unless details of the deficiency are apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In order to demonstrate that a criminal defendant was denied the effective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and the defendant must have been prejudiced by the representation. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). With respect to the second requirement, the defendant must show that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

Upon review of the record, we find that trial counsel's presentation of a duress defense to murder charges fell below an objective standard of reasonableness. Trial counsel presented what he termed a duress defense, arguing that the victims used defendant as a servant/worker in their drug operation, repeatedly threatened him, and had such a psychological hold over him that, similar to the battered spouse syndrome, he believed that the only way to escape was to kill them. As demonstrated by his statements in closing argument, counsel clearly believed that duress is a defense to homicide, when it is not. *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987). At most, the defense was a defense to the assault charge. See 21 Am Jur 2d, Criminal Law, §148, p 283 (with the exception of homicide, duress excuses most offenses). Although counsel was faced with a choice among weak defenses with numerous evidentiary problems because defendant admitted planning the murder and entering Lawrence's bedroom with the sole purpose of killing him, counsel clearly erred in selecting an invalid defense.

Nevertheless, we find that defendant was not denied the effective assistance of counsel because he was not prejudiced by trial counsel's error. The trial judge sat as the finder of fact in this case, and while noting that duress is not a defense to homicide, found that even assuming that the defense was a valid one, the defense failed because he was not persuaded that defendant feared imminent harm. The judge then considered the defense of self-defense, and concluded that it did not apply because defendant did not fear death or serious injury. In reviewing evidence pertaining to defendant's intent, the judge recognized defense counsel's contention that defendant suffered from something akin to battered spouse syndrome, but it found that this case really involved a conflict over the sale of narcotics. Finding that there was no legally recognized excuse or justification for the killing, the judge convicted defendant of first-degree premeditated murder. Because the trial judge considered and rejected the defenses that could reasonably apply in this case and defendant does not suggest any defenses that

counsel should have raised, we find that defendant was not denied the effective assistance of counsel. *Johnson, supra* at 122.

Next, defendant contends that the trial court erred in denying his motion for a new trial on the ground that the trial judge should have sua sponte disqualified himself after reading letters from the victims' family members. We disagree. We review de novo the question whether the circumstances of a case require that the trial judge sua sponte disqualify himself. See *People v Gibson (On Remand)*, 90 Mich App 792, 794-797; 282 NW2d 483 (1979). A judge is disqualified when he cannot impartially hear a case, including when he is personally biased or prejudiced for or against a party. MCR 2.003(B)(1). Even when a judge should raise the potential grounds for his disqualification in a bench trial, reversal is not required unless the judge was sufficiently biased or prejudiced to require his disqualification. See *Gibson, supra* at 796.

As a general rule, the party seeking disqualification must prove actual bias or prejudice. *People v Houston*, 179 Mich App 753, 756; 446 NW2d 543 (1989). The circumstances underlying a request for disqualification must involve the judge's prejudging of the case or bias in favor of one party to the extent that his decision will be based on grounds other than the evidence before him. 46 Am Jur 2d, Judges, § 147, p 244.

However, that showing is not required in situations where experience teaches us that the possibility of actual bias is too high to be constitutionally tolerable, such as where the judge has a financial stake in the outcome, has been the target of personal abuse or criticism by a party, is enmeshed in other legal matters involving a party, or may have prejudged the case because of previous participation in the proceedings. [*Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995), (citing *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975).]

In those situations, the test is whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *People v Lowenstein*, 118 Mich App 475, 482; 325 NW2d 462 (1982), quoting *Ungar v Sarafite*, 376 US 575, 588; 84 S Ct 841; 11 L Ed 921 (1964).

We find that the trial court's reading of a victim's family's letters prior to trial is not the type of situation where the possibility of bias is too high to be constitutionally tolerated. Under normal circumstances, this Court assumes that a judge is free enough from bias to make an impartial decision. *Lowenstein, supra* at 481-482. Letters from a victim or family members normally convey highly emotional information about the impact of the crime on their family that can be considered in sentencing but is not relevant to the defendant's guilt or innocence. *People v Steele*, 173 Mich App 502, 504-505; 434 NW2d 175 (1988). The judge is credited with the ability to remain impartial when exposed to information, such as the emotional content of the letters, that might tend to prejudice the average person. 46 Am Jur 2d, Judges, §148, p 245. Moreover, the trial judge, when sitting as trier of fact, is presumed to know the difference between admissible evidence and the information contained in the letters. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

At the hearing held on defendant's motion for new trial, the trial judge indicated that while he normally reads all his mail, he also generally forgets it and did not remember reading the letters prior to trial. He stated that even if he had read the letters, he would not have considered them in making his decision and would not have let them influence his decision. Given the trial judge's ability to remain impartial when presented with potentially prejudicial information contained in the letters, we find there was insufficient evidence of actual prejudice or bias to require the trial judge to disqualify himself in this case. Accordingly, the trial court properly denied defendant's motion for a new trial on this basis.¹ See *Gibson, supra* at 796.

Defendant also asserts that the trial court erred in denying his request for an evidentiary hearing where defendant and trial counsel would have testified about the actions they would have taken had the trial judge disclosed that he received letters from the victims' family. We disagree. To the extent that a defendant's request for a new trial depends on facts not of record, the trial court should ordinarily hold an evidentiary hearing so the defendant can make a testimonial record in support of his motion. See e.g. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973) (ineffective assistance of counsel). The trial court did not err in declining to hold an evidentiary hearing in this case, however, because the testimony was not relevant to the issue of whether the trial judge should have disqualified himself. Furthermore, contrary to defendant's assertion, the trial court did not violate this Court's remand order because this Court did not order that the trial court hold an evidentiary hearing but rather simply remanded this matter so that defendant could file a motion for new trial.

Finally, defendant contends that the trial court erred in convicting him of larceny over \$100, MCL 750.356; MSA 28.588, when he was not charged with that offense. We agree.

A trial court has no authority to convict a defendant of an offense not specifically charged unless the defendant has had adequate notice. *People v Adams*, 389 Mich 222, 205 NW2d 415; 59 ALR3d 1288 (1973); *DeJonge v Oregon*, 299 US 353; 57 S Ct 255; 81 L Ed 278 (1937). The notice is adequate if the latter charge is a lesser included offense of the original charge. *People v Ora Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975). A trial court may not instruct a jury on a cognate lesser included offense unless the language of the charging document gives the defendant notice that he could face a lesser offense charge. *People v Chamblis*, 395 Mich 408, 418; 236 NW2d 473 (1975). [*People v Quinn*, 136 Mich App 145, 147; 356 NW2d 10 (1984).]

Here, the prosecutor charged defendant with both first-degree premeditated murder and first-degree felony murder but did not separately charge him with the predicate felony of felony murder. The trial court convicted defendant of first-degree premeditated murder but acquitted him of felony murder because, it reasoned, the homicide did not occur during the commission of felony and defendant committed the homicide for reasons other than robbery. However, the court convicted him of larceny over \$100, MCL 750.356; MSA 28.588, on the basis of evidence establishing that defendant took items for the residence after he shot the victims.

Upon review of the circumstances of this case, we find that the trial court did not have the authority to convict defendant of larceny because defendant did not have adequate notice of the offense. The predicate felony of a felony murder charge is not a lesser included offense, but rather is more accurately classified as an element of the offense. *People v Sanders (On Remand)*, 190 Mich App 389, 392; 476 NW2d 157 (1991). Although it cannot be argued that defendant was unaware of the possibility of a separate charge for the predicate offense of felony murder so as to permit amendment of the information prior to trial, see *Chamblis, supra* at 418 n 7, the prosecutor did not seek to amend the information in this case. In reliance thereon, defense counsel presented a justification defense to felony murder and did not contest the elements of the predicate felony. Thus, when the trial court elected to consider whether defendant was guilty of larceny, defendant was left to rely on the defense that had been designed to counter only charges of premeditated murder and felony murder. Accordingly, under the circumstances presented in the instant case, we find that defendant did not have adequate notice that he could face the larceny charge. See *People v Adams*, 202 Mich App 385, 391-392; 509 NW2d 530 (1993). We therefore vacate defendant's conviction of larceny over \$100. *People v James*, 142 Mich App 225, 230; 369 NW2d 216 (1985).

Defendant's conviction of larceny over \$100 is vacated. Defendant's remaining convictions are affirmed.

/s/ Jane E. Markey

/s/ Kathleen Jansen

/s/ Helene N. White

¹ The trial court's reading of the letters did not affect defendant's knowing, intelligent, and voluntary waiver of his right to a jury trial because both the letters were written after defendant waived his right at a June 18, 1993, hearing. *People v Killebrew*, 416 Mich 189, 202; 330 NW2d 834 (1982).