

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AVERIS RAMONE WILSON,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 249832

Wayne Circuit Court

LC No. 03-000888

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment without possibility of parole for the murder conviction and to a mandatory two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Instructional Errors

Defendant argues that he was deprived of a fair trial by several instructional errors. We review claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *Id.* Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Because defendant failed to object to the allegedly erroneous instructions, we review those claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Defendant first contends that the trial court omitted an element of the crime of murder by failing to instruct the jury that it had to find that defendant caused the death of the victim. Defendant's contention is misplaced. The trial court properly instructed the jury that one element of the crime of first-degree murder is "an intentional killing of a person." MCL 750.316(1)(a); see also *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

Defendant also contends that the trial court erroneously instructed the jury that a finding of guilt with regard to the crime of felony-firearm requires a finding that defendant "used" a

firearm in the commission of the murder. Because the statute criminalizes the mere *carrying or possession* of a felony during the commission or attempted commission of a felony, MCL 750.227b, and because the *use* of a firearm necessarily includes carrying or possessing it, this instruction adequately required the jury to find that defendant carried or possessed a firearm before it could convict defendant of felony-firearm.¹ Defendant has failed to demonstrate plain error affecting his substantial rights. *Carines, supra* at 763.

Defendant further contends that the trial court erroneously instructed the jury regarding aiding and abetting felony-firearm. However, a review of the record reveals that the court did not give an aiding and abetting instruction with regard to the crime of felony-firearm. Rather, the trial court instructed the jury that defendant could be found guilty of murder on an aiding and abetting theory. Consequently, the factual premise for defendant's argument is erroneous.²

Defendant next contends that the trial court failed to adequately instruct the jury on the law that was to be applied during deliberations. He argues that the trial court erroneously instructed the jury that the presumption of innocence is rebuttable. This argument is without merit, as the presumption of innocence is certainly rebuttable. See CJI2d 3.2.

He also argues that the trial court failed to give an instruction regarding witness bias or prejudice. The trial court instructed the jury to consider "whether or not any witness had an interest in the outcome of the case. Whether any witness is related to or a friend of any of the parties in the case. And you may also consider the witness' motive for testifying. What does the witness have to gain." While the instruction was not a verbatim recitation of the portion of CJI2d 3.6 referring to witness credibility, viewed in its entirety the instruction fairly presented the issue of witness credibility to the jury and sufficiently protected defendant's rights. Additionally, defendant, who is African American, argues that he was prejudiced by the trial court's failure to instruct the jury that it "must set aside any bias or prejudice you have based on the race . . . of the witness." Because defendant did not testify and did not present any witnesses, defendant has failed to demonstrate plain error affecting his substantial rights.

Defendant next asserts that the trial court improperly failed to instruct the jury "about the give and take inherent within the deliberative process," and specifically failed to give "the essential points from CJI 2d 3.11." Defendant relies upon *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995), in support of his contention that CJI 2d 3.11 should have been given. Defendant's reliance is misplaced. In *Pollick*, the Court held that where a trial court instructed the jury to pick a foreperson and agree upon a unanimous verdict without any further instruction similar to CJI 2d 3.11, reversal was not warranted where there was no evidence that a juror was unduly coerced by the instruction. *Id.* Defendant does not allege, and the record does not reveal, that the jury was coerced in any way. Because there is no evidence of coercion and because a

¹ Indeed, the instruction as given by the trial court was more restrictive than the statute and inured to defendant's benefit.

² Nonetheless, defendant's reliance on *People v Johnson*, 411 Mich 50, 2-55; 303 NW2d 442 (1981), is misplaced as *Johnson* was overruled by *People v Moore*, 470 Mich 56; 679 NW2d 41 (2004).

trial court is not required to give a model jury instruction, see *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), defendant has failed to demonstrate plain error affecting his substantial rights.

Defendant next asserts that the trial court erred when it rejected defense counsel's request to instruct the jury that prior inconsistent testimony of a witness may be used as substantive evidence.³ Preserved non-constitutional error will not warrant reversal unless "it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW 2d 607 (1999). Because all of the out-of-court statements used at trial were employed to impeach the credibility of the sole witness connecting defendant to the crime, and the jury was properly instructed regarding the impeachment value of the out-of-court testimony, the court's failure to instruct the jury that this testimony could also be used as substantive evidence did not affect the jury's credibility assessment of that witness. Therefore, any error in the trial court's refusal to instruct the jury that prior inconsistent testimony of a witness may be used as substantive evidence was not outcome determinative.

Defendant also recites a number of instructions that he claims the trial court should have given. However, defendant fails to explain why the instructions were appropriate or how he was prejudiced by the court's failure to instruct on them. He also fails to cite any relevant authority in support of his position. 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 only cursory treatment of an issue with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Therefore, these alleged instances of error are considered abandoned on appeal.

Finally, defendant argues that the cumulative effect of the instructional errors is sufficient to warrant a new trial. The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). In order to reverse on the basis of cumulative error, the effect of the errors must be seriously prejudicial in order to warrant a finding that the defendant was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Having found only a single error that we find to be harmless, we reject defendant's claim that the cumulative effect of multiple errors requires a new trial. *LeBlanc*, *supra* at 591-592.

II. Motion to Adjourn

Defendant argues that he was deprived of his right to put on a defense by the trial court's refusal to adjourn the trial while defendant attempted to obtain the cooperation of a witness. A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002).

³ MRE 801(d)(1)(A) permits the admission of out-of-court statements made under oath, and such statements may be used as substantive evidence.

There is no mechanical test for determining when a defendant's due process rights are violated by a denial of a motion for continuance. The determination depends upon the facts of the case and the reasons presented to the trial court. *People v Holleman*, 138 Mich App 108, 112; 358 NW2d 897 (1984). A motion for a continuance must be based on good cause. MCR 2.503(B)(1). In addition, a motion to adjourn a proceeding because of the unavailability of a witness must be made as soon as possible after ascertaining the facts and only if the trial court finds that the evidence is material and that diligent efforts have been made to produce the witness. MCR 2.503(C)(1)-(2); *Jackson, supra* at 276-277. When analyzing whether the trial court abused its discretion, this Court should consider whether "defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Additionally, even if the trial court did abuse its discretion, defendant must also show prejudice. *Id.*

Defendant's request for a continuance came at the start of the third day of trial and shortly before the prosecution presented its last witness. Defendant had already received a two-week adjournment of the trial to enable him to obtain this witness' testimony. By defendant's own admission, his trial attorney was aware by the first day of trial that his investigator had failed to locate the witness and had good reason to believe that this witness would no longer cooperate. Further, defendant admitted that he could not say for certain what the witness would testify about. Given these facts, it cannot be said that the trial court abused its discretion when it refused to further delay the trial. Even if the trial court did abuse its discretion, defendant has admitted that he has still been unable to obtain the cooperation of this witness in the months following his conviction. Therefore, defendant has not demonstrated any prejudice resulting from the trial court's refusal to grant defendant's second request for an adjournment.

III. Judicial Misconduct

Defendant asserts that the trial court engaged in numerous instances of misconduct that deprived defendant of a fair and impartial trial. We disagree.

"A trial court has wide, but not unlimited discretion and power in the matter of trial conduct." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). However, if the trial court's conduct "pierces the veil of judicial impartiality, a defendant's conviction must be reversed." *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). The test to determine whether a new trial is mandated is whether "the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *Id.*, quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975). A thorough review of the record fails to convince us that the trial judge actions conveyed bias or impartiality or unduly influenced the jury.

IV. Ineffective Assistance of Counsel

Defendant maintains that he was denied the effective assistance of counsel as a result of defense counsel's failure to make meritorious motions and objections. Specifically, defendant alleges that his counsel was ineffective for failing to object to erroneous jury instructions and for failing to object to judicial misconduct. Having found no error requiring reversal with regard to either of these issues, the failure to object to these instances does not constitute the ineffective

assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant also claims that his counsel was ineffective for failing to object to the prosecutor's failure to obtain the witness defendant was unable to obtain through his own efforts. We fail to see how defendant's trial counsel could have so objected, given that there was no specific conduct to which trial counsel could have objected.

Defendant also claims that his trial counsel was ineffective for failing to obtain a prophylactic ruling from the trial court limiting prosecution witness Logan to responsive answers on cross-examination. Defendant cannot and did not present any evidence that his trial counsel's failure to obtain such a prophylactic ruling somehow falls below an objective standard of reasonableness under the prevailing professional norms. See *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Furthermore, during the only instance throughout the entire trial where the prosecutor's witness offered unsolicited testimony potentially detrimental to defendant, defendant's trial counsel deftly used it to undermine the witness' credibility. Given this, defendant cannot even overcome the strong presumption that his trial counsel was simply engaging in effective trial strategy. *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant also argues that his trial counsel should have used the cross-examination of the prosecution's main witness to compel him to reveal the whereabouts of another witness or request an in camera hearing wherein the trial court could have obtained this information. Yet again defendant fails to indicate how this fell below an objective reasonable standard of conduct, fails to cite any authority in support of his contention, and fails to state how this prejudiced him. Therefore, defendant has abandoned this issue on appeal. *Watson, supra* at 587.

V. Cumulative Error

Defendant argues that he was denied a fair trial by the cumulative effect of several errors. Having found only a single error, which we concluded was harmless, we reject defendant's claim that the cumulative effect of multiple errors requires a new trial. *LeBlanc, supra* at 591-592.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly