

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAUNCEY MAURICE JACKSON,

Defendant-Appellant.

UNPUBLISHED

April 28, 2005

No. 253391

Wayne Circuit Court

LC No. 03-008929-01

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.277b.¹ Defendant was sentenced to twenty to forty years in prison for the second-degree murder conviction and two years for the felony-firearm conviction. We affirm.

I

Defendant first argues that the evidence presented by the prosecution was insufficient to sustain his convictions. We disagree.

We review a challenge to the sufficiency of the evidence de novo to determine whether, resolving all factual conflicts in the light most favorable to the prosecution, a rational trier of fact could have found that all essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In the present case, the prosecution offered sufficient evidence to support defendant’s conviction for second-degree murder. The elements of second-degree murder are: (1) a death,

¹ Defendant was originally charged with first-degree murder, MCL 750.316(a), and felony-firearm, MCL 750.277b.

(2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. MCL 750.317; *People v Maynor*, 256 Mich App 238, 244; 662 NW2d 468 (2003), aff'd 470 Mich 289 (2004), quoting *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998).

First, making all reasonable inferences in favor of the prosecution, sufficient evidence supported the conclusion that the victim, Michael Wells, died by an act of defendant. Colston Carter, Wells' cousin, testified that shortly before the shooting, a man wearing braids with a large distinctive scar on his neck, pointed a stick at Wells' car and said "boom-boom." Carter later identified defendant as the man who pointed the stick. Sharron Wynn, Wells' friend, saw Wells' car drive by her house at approximately the same time. Wynn testified that, shortly after Wells arrived at her apartment, a man she later identified as defendant, along with two other individuals, approached Wells' car in front of her apartment. One man punched Wells in the face, while defendant said to Wells, "Oh, you talking some ho-ass shit." Wynn testified that she saw defendant, who was standing to the left of Wells near the driver's side door, reach into the back of his pants at his waistband, pull "something" out and point it at Wells. Thereafter, she instantly heard the sound of a "firecracker." Wynn saw defendant clearly when he thereafter walked up to her and stared at her. A medical expert testified that Wells died of a gunshot wound to the left upper back and that Wells had a bruise on his nose.

Sufficient evidence also supported the conclusion that defendant acted with malice. Second-degree murder is a general intent crime requiring malice, defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Maynor*, *supra* at 244, quoting *Goecke*, *supra* at 463. Malice can be inferred from the use of a dangerous weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). Although Wynn never saw defendant with a gun and the police never recovered a gun, Wynn testified that she saw defendant pull "something" from his pants, point it at Wells, and then immediately heard a loud sound like a firecracker. Wells died of a gunshot wound to his left back shoulder, near where Wynn saw defendant standing and pointing "something" at Wells. Testimony also indicated that approximately twenty minutes before Wells was shot, defendant pointed a stick at Wells and said, "boom-boom." Circumstantial evidence and reasonable inferences arising from the evidence may be used to prove the elements of a crime. *Id.* at 624; *Nowack*, *supra* at 400. The evidence, when viewed in a light most favorable to the prosecution, was sufficient to support defendant's conviction for second-degree murder.

Likewise, there was sufficient evidence to support defendant's felony-firearm conviction. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." MCL 750.277b; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Second-degree murder is a felony, and testimony established that defendant committed this felony through the use of a firearm. See MCL 750.7; MCL 750.317.

Although defendant argues that Wynn made inconsistent statements regarding some of the facts of the shooting, there was more than sufficient evidence to support the prosecution's theory and the jury's determination that all elements of both crimes were proven beyond a reasonable doubt. See *Hampton*, *supra* at 366; *Aldrich*, *supra* at 122.

II

Next, defendant argues that the verdict was against the great weight of the evidence because Wynn made inconsistent statements. Wynn's testimony that the shooter used his right hand made it impossible for defendant, who is left-handed, to have been the shooter. We disagree.

A trial court's decision to grant or deny a motion for new trial is reviewed for abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). When reviewing the denial of a motion for a new trial on the basis that the verdict is against the great weight of the evidence, the test is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). A trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). New trial motions based on a claim that the verdict is against the great weight of the evidence because of witness credibility are not favored and should be granted only with great caution and in exceptional circumstances. *Lemmon, supra* at 639 n 17. If the issue involves credibility and there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Id.* at 642-643; *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 519; 679 NW2d 106 (2004). Conflicting testimony, even when impeached to some extent, is not a sufficient ground for granting a new trial. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). A narrow exception exists when testimony contradicts "indisputable physical facts or laws" or "defies physical realities." *Lemmon, supra* at 643, 647.

Wynn initially told police that she did not know who the shooter was and that she was standing behind her screen door at the time of the shooting. At trial, Wynn testified that she initially lied and kept defendant's identity from police because she was afraid of retribution from defendant and others in her neighborhood. However, Wynn testified that she changed her mind and told police the truth the day after the shooting. At trial, Wynn identified defendant as the man who shot Wells and testified that she could see the entire incident clearly from her porch. Further, a prosecution witness rebutted Todd's testimony that defendant was in a different location at the time of the shooting. This issue of credibility, which does not "weigh more heavily in [the defendant's] favor than against it," should be left up to the factfinder. *Lemmon, supra* at 644-645. Further, Wynn testified that the shooter pulled a gun from the right side of his waist, and Carter testified that he had no recollection regarding which hand defendant used to point the stick. The jury's conclusion that the left-handed defendant was the shooter in light of this testimony does not violate any indisputable physical facts or laws or defy physical realities: defendant may have, in fact, used his left hand to shoot Wells or defendant may be ambidextrous. Thus, it is not "inherently implausible" that defendant was the shooter. See *id.* at 643-644.

Defendant also argues that the police could have obtained statements from witnesses who were present at the scene after the incident occurred. Police testimony indicates that these witnesses either refused to cooperate with police or claimed not to have witnessed the shooting. Defendant takes issue with the fact that the police did not do ballistics testing on the bullet and shell casing found; however, police testimony indicated that such testing was not necessary because no gun was ever found.

Following our review, we conclude that the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. See *Gadomski, supra* at 28. Therefore, the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

III

Third, defendant argues that evidence of threats that Wynn received was improperly introduced into evidence. We disagree. Specifically, defendant contends that testimony that Wynn was threatened, police moved her out of her apartment because of these threats, she was afraid to testify, and police were escorting her to and from the courtroom was (1) irrelevant, and (2) if relevant, then it should not have been admitted because its prejudicial effect outweighed any probative value.

Defendant argues four instances when evidence of threats was allegedly improperly admitted. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *Aldrich, supra* at 113, citing MRE 103(a)(1). Defendant has not preserved three instances of the allegedly improper introduction of evidence because either an objection was made on grounds different than asserted on appeal or no objection was offered. Defendant has, however, preserved his objection to one instance that he highlights on appeal because, at trial, defendant put forth a timely objection based on the same grounds he now asserts on appeal. MRE 103(a)(1); *Aldrich, supra* at 113.

In the absence of an objection preserving the issue at trial, review of an evidentiary issue is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003). For a defendant to obtain reversal of a conviction under the plain error standard, (1) the defendant must show that a plain error affecting his substantial rights has occurred, and (2) the appellate court, in its discretion, must find that the plain error either resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *Carines, supra* at 763; *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002). Where defendant has preserved his objection to witness testimony, this Court will review the trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence, which this Court reviews de novo. *Id.*; *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

"'Relevant evidence' means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Hawkins*, 245 Mich App 439, 449; 628 NW2d 105 (2001) (emphasis in original). Generally, all relevant evidence is admissible, unless otherwise provided by law. *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004). Relevant evidence, however, "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." MRE 403; *Fletcher, supra* at 553.

Wynn testified specifically that defendant threatened her. She stated that defendant and his friends were “all staying in my face,” that she was afraid, and that, because of this fear, she did not initially tell police that defendant was the shooter. Our Supreme Court has explained:

A defendant’s threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt. . . .

[A] threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case. [*People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996) (citations omitted); see also *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998).]

This testimony not only tended to make the fact that defendant actually shot Wells more probable, but it also made it more probable that Wynn had a motive or incentive to initially lie to police. The evidence was offered to aid the factfinder in evaluating Wynn’s credibility regarding her prior statements to police and, ultimately, identification of defendant as the shooter. “If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact.” *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212; 539 NW2d 504 (1995). Further, evidence that police agreed to give Wynn protection and re-locate her and her son supports Wynn’s decision to come forward. Accordingly, we conclude that the testimony was relevant and that the danger of unfair prejudice, confusion of the issues, or misleading the jury did not substantially outweigh the probative value of the evidence. See MRE 403; *Fletcher, supra* at 553.

IV

Fourth, defendant argues that the police unjustifiably conducted a photographic showup for Wynn, without defendant’s counsel present, when defendant could have been compelled to attend a corporeal lineup.² Again, we disagree.

Defendant did not object below to the admission of Wynn’s photographic showup identification and, thus, has not preserved this issue for appeal. MRE 103(a)(1); *McCray, supra* at 638. Because this issue is unpreserved, we review it for plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764; *McCray, supra* at 638.

When an accused is in custody or can be compelled to appear, identification by photographic showup should not be made unless a legitimate reason for doing so exists. *People v Kurylczyk*, 443 Mich 289, 298 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993); *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). Circumstances which might justify use

² Police also conducted a photographic showup for Carter; however, defendant does not dispute the validity of that showup on appeal.

of a showup include: (1) it is not possible to arrange a proper lineup; (2) there is an insufficient number of persons available with the accused's physical characteristics; (3) the case requires immediate identification; (4) the witnesses are distant from the location of the accused; and (5) the accused refuses to participate in a lineup and by his actions seeks to destroy the value of the identification. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004); *People v Davis*, 146 Mich App 537, 546; 381 NW2d 759 (1985).

We hold that the identification by photographic showup did not violate defendant's constitutional rights where defendant was not in custody and could not otherwise be compelled to appear for a corporeal lineup. See *Kurylezyk, supra* at 298 (Griffin, J.), 318 (Boyle, J.); *Strand, supra* at 104. Evidence indicates that police were conducting diligent and various efforts to locate defendant following the shooting. Defendant's presence, however, could not be obtained until more than two weeks after the incident, when defendant presented himself to the police. Further, testimony at trial indicated that defendant and his girlfriend were aware that the police were looking for defendant but continued to reside outside the neighborhood. Thus, the photographic lineup was properly conducted, and it was not error affecting defendant's substantial rights to admit the photographic lineup identification at trial.

Also, defendant's argument that he was denied the right to counsel at the photographic showup is without merit. "In the case of photographic identifications, the right of counsel attaches with custody." *McCray, supra* at 639, quoting *Kurylezyk, supra* at 302 (Griffin, J.). At the time that the police conducted the photographic showup, defendant was not in custody.

V

Defendant argues on appeal that he was denied the effective assistance of counsel when defense counsel failed to move to suppress the evidence of photographic identification, object to the introduction of photographic identification, and move for a mistrial when evidence that defendant pointed a stick at Wells and said "boom-boom" was introduced. We disagree.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* However, because the trial court did not conduct an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To support his claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the result of the proceeding was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *Toma, supra* at 302.

As previously discussed, the photographic showup was proper because defendant was not in police custody and could not be compelled to engage in a corporeal lineup at the time that it was conducted. Because the photographic lineup was not in error, defendant could not have been harmed by counsel's failure to seek suppression of the evidence or object to its entry into evidence at trial. Trial "counsel is not required to make motions that have no merit." *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Likewise, "trial counsel is not ineffective when failing to make objections that are lacking in merit." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). We, therefore, conclude that defendant was not denied the effective assistance of counsel on this basis.

Defendant also contends that he received ineffective assistance of counsel when counsel failed to move for a mistrial when Carter testified that defendant pointed a stick at Wells and said "boom-boom." We disagree. Defendant specifically objects to Carter's testimony that defendant pointed a stick at Wells and said "boom-boom." Carter initially testified that defendant made this statement as he pointed the stick, but then later testified that he never actually heard defendant make this statement himself, but was told by Wells that defendant made the statement. As soon as Carter testified that he did not have firsthand knowledge of defendant's statement, defense counsel's objection on hearsay grounds was sustained. It is defendant's position on appeal, however, that defense counsel should then have moved for a mistrial.

We conclude that defendant has not sustained his burden of demonstrating both deficient performance by counsel and prejudice. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). First, once it was evident that the statement may have had a hearsay basis, defense counsel timely objected to the testimony on hearsay grounds. Second, on this record, defendant has not established a reasonable probability that a motion for a mistrial was warranted and would have been successful. *Id.*

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra