STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OYD COLLINS MCCRAY,

Defendant-Appellant.

UNPUBLISHED
June 25, 1996

No. 181017
LC No. 94-003272

Before: O'Connell, P.J., and Sawyer and G.R. Corsiglia,* JJ.

PER CURIAM.

Defendant appeals by right his conviction of first-degree murder, MCL 750.316; MSA 28.424(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

Defendant makes several arguments on appeal. First, defendant argues that the trial court erred in limiting defendant's ability to impeach Perrin's eyewitness testimony on cross-examination with his prior inconsistent statements regarding the number of shots fired. We disagree. It is a fundamental principle that a party has the right to draw out any facts which tend to contradict, weaken, or affect the credibility of a witness' testimony. *People v Bell*, 88 Mich App 345, 349; 276 NW2d 605 (1979). Although the trial court prohibited defendant from repeatedly questioning Perrin as to the number of shots he remembered hearing, the trial court did not prevent defendant from presenting the jury with contradictory statements from the witness' preliminary examination testimony regarding the number of shots fired in order to challenge the witness' credibility. Thus, because defendant was allowed to draw out facts which tended to contradict, weaken, or effect the credibility of Perrin's testimony, the trial court did not abuse its discretion in prohibiting defense counsel from continuing to question the witness as to facts which he had already testified.

Second, defendant argues that the trial court erred in excluding as hearsay the testimony of Sanders, the show-up attorney, as to statements made by Perrin during the line-up. We agree. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or

hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Because, defendant sought to produce Sanders' testimony regarding Perrin's statements at the line-up not to prove that the statements were true, but to impeach Perrin's testimony as to the assailant's identity by demonstrating that he did not unequivocally and without error identify defendant as the shooter in this case, the testimony was not hearsay. Moreover, this Court has conclusively held that pursuant to MRE 801(d)(1)(C), "third-party identification testimony about the prior statement of a witness is not hearsay where the identifier is subject to cross-examination." *People v Miller*, 208 Mich App 495, 506; 528 NW2d 819 (1995). Thus, the trial court abused it discretion in excluding Sanders' testimony.

Although the trial court erred in excluding Sanders' testimony, reversal is not warranted because the error was harmless. MCR 2.613 (A). There was substantial other evidence presented which called the credibility of Perrin and his identification into question. There was also other eyewitness testimony identifying defendant as the shooter. Thus, we find that the trial court's erroneous exclusion of the testimony had no effect on the jury and did not deny defendant any fundamental element of an adversarial system and was therefore harmless error.

Next, defendant argues that the trial court's "state of mind jury instruction" which indicated that a firearm was used and specifically listed factors from which intent could be inferred, improperly invaded the province of the jury and created a conclusive presumption of intent which impermissibly shifted the burden of proof to defendant. We find that defendant's argument lacks merit. A determination as to the identity of the weapon used is not an essential element of first-degree murder, but is merely a factor to be considered in determining intent. CJI2d 16.1. Thus, the trial court did not invade the province of the jury by mentioning a firearm in its "state of mind" jury instruction. Additionally, although the trial court did list factors which the jury could consider in determining intent, the court did not indicate that intent was presumed from those factors but that intent merely could be inferred therefrom. Thus, there was nothing in the language of the trial court's instruction which could be construed as creating a conclusive presumption of intent or as impermissibly shifting the burden of proof to defendant. See *People v Wright*, 408 Mich 1, 18-20; 289 NW2d 1 (1980).

Defendant also argues that because the trial court erred in giving a specific intent instruction, CJI2d 3.9, the jury was not properly instructed as to the difference between first-degree murder, a specific intent crime, *People v Garcia*, 398 Mich 250, 259; 247 NW2d 547 (1976), and second-degree murder, a general intent crime, *In re Robinson*, 180 Mich App 454, 462; 447 NW2d 765 (1989). Although the trial court did not specifically give a specific intent instruction, it did give explicit instructions to the jury differentiating first- and second-degree murder. Thus, we find that the trial court appropriately instructed the jury as to the applicable law in a fair and understandable manner.

Lastly, defendant argues that his trial counsel was ineffective. Michigan law recognizes a strong presumption that the assistance received from counsel is sound, thus, the party alleging ineffective assistance of counsel carries the burden of overcoming this presumption by showing that his counsel's performance was deficient and that the deficiency resulted in an unfair trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d

275 (1988). Defendant alleges that his trial counsel made three errors which were deficient; however, because there was no evidentiary hearing before the trial court on these allegations, this Court is limited to reviewing defendant's claim only to the extent that counsel's alleged mistakes are apparent on the record.[1] *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

First, defendant alleges that his trial counsel failed to interview several possible defense witnesses. However, the failure to interview witnesses does not establish ineffective assistance of counsel absent a showing that the failure to interview resulted in the loss of valuable evidence which would substantially benefit the accused. *People v Caballero*, 184 Mich App 636, 642; 423 NW2d 275 (1990). Defendant did not produce any evidence from the lower court file or trial record which establishes that his trial counsel failed to interview witnesses or that the testimony of those witnesses would have yielded valuable evidence which would have benefited defendant.

Second, defendant argues that his trial counsel was ineffective because he failed to object to the trial court's erroneous "state of mind instruction" and failure to instruct the jury on specific intent. However, as previously discussed the trial court's instruction's were not erroneous. Thus, we find this failure to object was not deficient representation.

Lastly, defendant argues that he was denied effective assistance of counsel because his counsel failed to inform him that he had a constitutional right to testify. *Smith v Campbell*, 781 F Supp 521, 530 (MD Tenn, 1991). Nothing in the record indicates that defendant was not informed of his right to testify. Although defense counsel did not indicate on the record that defendant was informed of his right to testify and was waiving that right, the absence of such a declaration is not evidence that defendant had in fact not been informed of his rights. Because trial court's are not under an affirmative duty to determine whether a defendant's silence is the result of a knowing and voluntary decision not to testify, *Smith, supra* at 531, n 8; *Ortega v O'Leary*, 843 F2d 258 (CA 7, 1988), there is no requirement that defense counsel place a statement on the record indicating that defendant was informed of his right and was waiving it. Thus, because nothing in the trial court record supports any of defendant's allegations that the actions of this trial counsel were deficient, we can find no basis for defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ George R. Corsiglia

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[1] In support of his ineffective assistance of counsel claim, defendant relies on two affidavits signed by defendant himself. However, because these affidavits are not part of the lower court record, this Court is prohibited from considering them on appeal. See MCR 7.21, and *Barclay, supra* at 672.