

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFONSO BANKS,

Defendant-Appellant.

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UNPUBLISHED

July 30, 1996

No. 167039

LC No. 88-014567

Before: Neff, P.J., and Fitzgerald and C. A. Nelson,\* JJ.

PER CURIAM.

In 1989, following a bench trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to nineteen to forty years' imprisonment for the murder conviction, consecutive to the mandatory two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

The trial court initially granted defendant a new trial on the grounds of ineffective assistance of counsel. The prosecutor appealed and this Court reversed, finding that defendant was not denied effective assistance of counsel because of inadequate communication between defendant and trial counsel. See *Wayne County Prosecutor v Recorder's Court Judge (In re People v Alphonso [sic] Banks)*, unpublished opinion per curiam of the Court of Appeals, decided August 25, 1992 (Docket No. 125399). The Supreme Court affirmed in part and remanded for reinstatement of defendant's conviction and sentence. *In re People v Banks*, 441 Mich 926 (1993).

In this appeal, defendant alleges other bases for finding that counsel's assistance was ineffective. We disagree. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as the attorney whose assistance is guaranteed by the Sixth Amendment to the United States Constitution. Further, defendant must show that any deficiency was prejudicial to his case

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\* Circuit judge, sitting on the Court of Appeals by assignment.

such that counsel's error may have affected the outcome at trial. *People v Pickens*, 446 Mich 298, 302-303, 312, 314; 521 NW2d 797 (1994) We believe that defendant's claims of error can best be described as trial strategy. Counsel's strategy was to undermine the credibility of the prosecution's witness, Dedria LaRue, while not disputing defendant's presence at the scene. Trial counsel's strategy will not be second-guessed unless the defendant was denied a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In addition, the fact that a strategy did not work does not constitute ineffective assistance of counsel. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). We do not believe that defendant was denied a substantial defense due to trial counsel's actions. While defendant may have wished counsel to pursue a defense that he was not present at the crime scene, counsel testified at the *Ginther* hearing that defendant admitted he was at the scene. Therefore, as a matter of law, trial counsel cannot be deemed ineffective for failing to perpetrate a fraud on the court. See *People v LaVearn*, 448 Mich 207, 217-218; 528 NW2d 721 (1995).

Next, defendant argues that the trial court's findings of fact were insufficient. We disagree. Factual findings are sufficient as long as it appears that the trial court was aware of the issues and correctly applied the law. The court need not make specific findings of fact regarding each element of the crime. *People v Legg*, 197 Mich App 131, 134-135; 494 NW2d 797 (1992). The trial court properly inferred defendant's intent to kill from the circumstances and his use of a dangerous weapon. Moreover, the trial court noted that defendant killed the victim as the victim was turning around to leave and, therefore, rejected any claim of provocation, excuse or justification. In sum, we find the trial court's factual findings sufficient.

Defendant also argues that he was denied a fair and impartial trial due to the prosecutor's improper questioning of LaRue and his referencing her testimony during closing arguments. Defendant failed to object to the prosecutor's alleged misconduct, and we find that a proper instruction would have cured any resultant prejudice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Therefore, we find that no manifest injustice will result from our failure to review defendant's claims of prosecutorial misconduct.

Defendant further argues that he is entitled to resentencing because OV 6 and OV 9 were misscored at ten points each. We disagree. Even if the trial court abused its discretion in scoring OV 6 and OV 9, the sentencing guidelines' range would remain the same after defendant's suggested re-scoring and thus, any error in the scoring of OV 6 and OV 9 was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Additionally, defendant raises various issues in a supplemental brief filed in pro per. We will briefly address them.

First, defendant argues that there was insufficient evidence to support his conviction of second-degree murder. We disagree. In this case, there is no dispute that defendant purposefully shot at and killed the decedent with a dangerous weapon, which gives rise to an inference of malice. *People v*

*Martin*, 392 Mich 553, 561; 221 NW2d 336 (1974). Additionally, viewed in the light most favorable to the prosecution, defendant's belief that he was in danger is of doubtful honesty and is clearly unreasonable in light of the fact that the decedent was turning around to leave when he was shot. See *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Petrella*, 424 Mich 22, 268-270; 380 NW2d 11 (1985). Therefore, we conclude that there was sufficient evidence to find defendant guilty beyond a reasonable doubt of second-degree murder.

Defendant next argues that the prosecution and the police failed to disclose critical evidence prior to trial, which thereby denied defendant the opportunity to present an adequate defense. We disagree. In this case, there is no indication that the prosecutor or the police refused to produce evidence. Moreover, defendant fails to specify the exact nature of the undisclosed evidence. Defendant's allegations of misconduct are extremely unreliable given the fact that his motion for supplemental discovery was abandoned prior to trial. Furthermore, even assuming that the prosecutor violated a discovery order, defendant failed to show that he was prejudiced by the alleged nondisclosure of evidence. See *People v Matthews*, 143 Mich App 45, 62; 371 NW2d 887 (1985). This Court fails to see how the undisclosed evidence, if any existed, might have changed the outcome of this case, given the overwhelming evidence against defendant. See *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). Thus, no reversal is necessary as to this allegation of error.

Lastly, defendant argues that the trial court misinterpreted trial testimony which resulted in defendant receiving a disproportionate sentence. We disagree. Contrary to defendant's argument, the evidence adduced at trial supported the trial court's statement that a drug dispute was taking place when the decedent was shot. Accordingly, defendant fails to cite any truly inaccurate information upon which the trial court relied at sentencing. Furthermore, we find that the sentence imposed falls within the sentencing guidelines' range, and we find no unusual circumstances that would render it disproportionate. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994). Therefore, defendant's request for resentencing is denied.

Affirmed.

/s/ Janet T. Neff  
/s/ E. Thomas Fitzgerald  
/s/ Charles A. Nelson