

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN ANTWAN MAGETT,

Defendant-Appellant.

UNPUBLISHED

August 27, 1996

No. 178838

LC No. 93-049483-FC

Before: MacKenzie, P.J., and Saad and C.F. Youngblood*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree murder, MCL 750.317; MSA 28.549, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to twenty-five to fifty years' imprisonment for the murder convictions, to be served consecutively with the mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of the July 15, 1993, shooting deaths of Derrick Westbrook and Marvin Briggs, teenage cousins who shared a bedroom in the basement of Marvin's mother's house. Both were shot once in the head with a .38 caliber gun, and, according to responding officer Jeff Mabry, it appeared as if both were asleep when shot. The following October, defendant and Michael Wright, a friend of defendant's, were both questioned about the murders after they were arrested on an unrelated stolen vehicle complaint. Wright told the police that on the morning of July 15, 1993, defendant had a .38 revolver and indicated to Wright that he had killed the victims. Defendant also spoke with the police and told them that he shot the victims after Marvin threatened him with a gun. However, at trial both Wright and defendant recanted their statements. Defendant testified that he never saw the victims on the day they were killed.

Defendant contends in two arguments that he was denied the effective assistance of counsel at trial. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that counsel's

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

performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Applying this standard, we conclude that defendant was not denied the effective assistance of counsel when his attorney brought out defendant's prior criminal record on direct examination. The questioning was a matter of trial strategy that this Court will not second-guess. *People v Fernandez*, 153 Mich App 743, 749-750; 396 NW2d 517 (1986); *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990). Further, defendant was not denied the effective assistance of counsel due to his attorney's failure to challenge the validity of defendant's October 1993 arrest. The police had reasonable suspicion that the car in which defendant and Wright were traveling was stolen, justifying the stop of the vehicle. Defendant's subsequent arrest was based on probable cause that the vehicle was stolen and was also proper. Because defendant's arrest was valid, he was not prejudiced by counsel's failure to raise the issue. Defendant therefore was not denied effective assistance. *Pickens, supra*.

Defendant also claims that the trial court abused its discretion when it allowed officer Mabry to testify that the victims appeared to be sleeping when they were killed. We reject defendant's argument that the testimony constituted improper opinion evidence. The testimony was admissible under MRE 701. See *People v Oliver*, 170 Mich App 38, 50-51; 427 NW2d 898 (1988). Furthermore, the evidence was cumulative of the testimony of other witnesses, and its admission therefore does not warrant reversal. Compare *People v Derrick Smith*, 87 Mich App 584; 274 NW2d 844 (1978).

Defendant argues that the trial court abused its discretion in allowing the eight-year-old brother of Marvin Briggs, who resided in the house where the murders occurred, to testify that he saw defendant at the house with a gun the week before the shootings. Because the evidence was relevant, we find no abuse of discretion. See *People v Hall*, 433 Mich 573, 580; 447 NW2d 580 (1989). Even if there were error, it would be harmless since there was other testimony that defendant was in possession of or had access to a .38 caliber revolver at the time of the murders. *Derrick Smith, supra*.

Defendant's remaining claim is that the trial court erred in allowing the prosecutor to impeach Michael Wright with questions concerning his criminal history after Wright had volunteered on cross-examination that he was under indictment in Ohio. Again, the error, if any, was harmless. *People v Clemons*, 177 Mich App 523, 527; 442 NW2d 717 (1989). Wright volunteered the information that he was under indictment and also volunteered that he had lied to the police and did not wish to "put down" defendant. Thus, the most damaging testimony with respect to Wright's credibility came from Wright himself. Because neither the court nor the prosecution did anything to exacerbate the damage, reversal is not warranted on this ground.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Henry William Saad