STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD TOWNS, a/k/a GERALD K. TOWNS,

Defendant-Appellant.

UNPUBLISHED
May 5, 1998

No. 197200
Detroit Recorder's Court
LC No. 95-012841

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and felony-firearm. The trial court sentenced defendant to twenty to thirty years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

The evidence at trial showed defendant fired several shots at the victim's car, two of which struck and fatally wounded the victim. The passenger in the victim's vehicle at the time of the shooting was Adaline Ramsey, a woman who grew up with defendant and the victim. Ramsey identified defendant as the shooter. She also testified that the victim told her he had stolen money from defendant. Other witnesses testified defendant told them the victim had stolen money from him. Defendant told police he had gone out looking for the victim to get the money back when he discovered the money was missing. Defendant said he was "going to kick [the victim's] a**" for stealing the money, but he would not have killed the victim. A friend of defendant testified that at the time of the shooting defendant was with him at his girlfriend's house.

Defendant first argues the trial court reversibly erred when it denied his motion for a directed verdict on the first-degree murder charge. Defendant contends there was insufficient evidence of the element of premeditation and deliberation to submit this charge to the jury. We disagree.

Defendant told police he and another man went looking for the victim after he discovered the victim took the money and that he was going to "kick [the victim's] a**." However, the shooting did not occur until the next morning. Accordingly, a rationale jury could conclude beyond a reasonable doubt that defendant had ample time to take a "second look" at his actions. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Defendant's statement that he wanted to "kick [the victim's] a**" indicated that he intended to do harm. Moreover, the weapon used, a gun, was inherently dangerous. These are additional factors from which premeditation and deliberation may properly be inferred. *People v Kvam*, 160 Mich App 189, 193-194; 408 NW2d 71 (1987). Viewing the evidence presented up to the time of the motion in the light most favorable to the prosecution, we conclude a rational trier of fact could have found the prosecution proved beyond a reasonable doubt defendant committed the killing with premeditation and deliberation. Accordingly, the trial court properly denied defendant's motion for a directed verdict. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

Next, defendant argues there was insufficient evidence to sustain his second-degree murder conviction. Essentially, defendant argues Ramsey's testimony identifying him as the shooter was unreliable because she had been using alcohol and drugs up until five hours before the shooting and had told police she did not see the shooting on three occasions. Questions of witness credibility are for the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). The jury apparently believed Ramsey's testimony that defendant committed the shooting; therefore, there was sufficient evidence of his identity to sustain his second-degree murder conviction.

Defendants next two arguments concern an incident that occurred during jury deliberations. It appears that on the afternoon of the first day of jury deliberations, the foreperson sent the judge a note indicating that one of the jurors could not serve because of plans to go out of town on personal business. A note was returned to the jury essentially stating the judge expected the juror to report for duty the next morning. There is no indication in the record that the parties were informed of this communication with the jury.

Defendant first argues the trial court did not assure him his right to a fair and impartial jury because it did not inquire into the nature of the juror's business and whether the juror's impartiality would be affected. We disagree.

We find that the trial court was justified, pursuant to its duty to control the proceedings, in emphasizing the juror's duty to remain and continue deliberations. Accordingly, we find no abuse of discretion in the trial court's decision not to inquire further into the matter. See *People v Weatherspoon*, 171 Mich App 549, 560; 431 NW2d 75 (1988). Moreover, defendant has not shown any prejudice from the trial court's action. In his brief, defendant asks, but does not answer, the question whether the jurors reached the verdict the following morning in order to accommodate the juror's travel plans. This is insufficient to meet his burden of demonstrating prejudice. *Id.*

Defendant also argues reversal of his conviction is required because the communication between the trial court and the deliberating juror was done outside the presence of defense counsel. We disagree.

Defendant correctly states that MCR 6.414(A) prohibits communication with a deliberating jury. *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990). However, a communication with a jury contrary to this rule does not require automatic reversal but, instead, a showing of prejudice is required for relief. *Id.* The showing of prejudice depends upon whether the communication is classified as substantive, administrative, or housekeeping. *Id.* at 143-144.

We find the communication here was a matter consistent with general "housekeeping" needs; therefore, it is presumed not to have been prejudicial. *Id.* at 144. Defendant has not made "a firm and definite showing which effectively rebuts the presumption of no prejudice." *Id.* In his brief on appeal, defendant merely states that the "ex parte communication was more than possibly prejudicial. There was a problem with one juror that directly affected the deliberations, otherwise, the foreperson would not have send [sic] out the note." Defendant makes no showing of how the juror's problem affected the deliberations. We find no error.

Defendant further argues he was denied effective assistance of counsel. We disagree.

Effective assistance of counsel is presumed, and the defendant must carry the heavy burden of proving otherwise. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability, but for counsel's error, the result of the proceeding would have been different. *Id.* No evidentiary hearing on this basis was held below. Accordingly, this Court's review is foreclosed unless the record contains sufficient detail to support defendant's claims, and if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

In this case, defendant raises several claims of ineffective assistance of counsel. The existing record does not support defendant's allegations that counsel failed to adequately prepare for trial, that counsel improperly advised defendant not to testify on the basis that his criminal record would be used to impeach him, or that defendant's statement to the police should have been suppressed. Defendant's remaining claims relate to counsel's questioning of witnesses, his failure to call certain witnesses, or his failure to present evidence. Decisions on these matters were trial strategy, and this Court will not second-guess counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the counsel's strategy may not have worked does not constitute ineffective assistance. *Id.* In any event, defendant has not shown there is a reasonable probability that but for counsel's alleged errors, the jury would have acquitted him. Accordingly, his claim fails.

Next, defendant argues he is entitled to a new trial because the trial court allowed the victim's brother to testify that he had seen defendant in possession of a gun on two prior occasions. We disagree. Even if the trial court abused its discretion in admitting this other bad acts evidence, reversal is not required where the error is harmless. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). In light of the overwhelming evidence of defendant's guilt, including the positive identification of defendant as the shooter by Ramsey, we find the admission of Freeman's testimony regarding defendant's possession of the guns was harmless. *People v Mateo*, 453 Mich 203, 220-221; 551 NW2d 891 (1996). Accordingly, reversal is not required.

Defendant next argues the prosecutor interfered with defendant's right to present an alibi defense and his right to a fair trial by questioning a witness about defendant's alibi in the prosecution's case-in-chief. Defendant's argument is without merit. The record reveals the prosecutor called the witness, who was endorsed by the prosecution on its witness list, to testify about the theft of defendant's money and about defendant's vehicle. The prosecutor did not introduce defendant's alibi during direct examination of the witness. Moreover, defendant developed his alibi defense through the witness during cross examination. We find no error.

Finally, defendant argues his sentence was disproportionately harsh. Defendant's minimum sentence was within the guidelines range and; therefore, presumptively proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Defendant has failed to present any unusual circumstances to overcome that presumption. In any event, we find defendant's sentence proportionate in light of the severity of the offense and defendant's prior criminal record. Accordingly, the trial court did not abuse its discretion sentencing defendant. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski