

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENICHLOS DEANGELO PORTER, a/k/a
DENICHLOS PORTER, a/k/a NICK PORTER,
a/k/a DENICHOLAS PORTER,

Defendant-Appellant.

UNPUBLISHED

January 20, 2005

No. 250229

Wayne Circuit Court

LC No. 03-006294-01

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 11 to 20 years' imprisonment for the carjacking conviction, 3 to 7-1/2 years' imprisonment for the felon in possession conviction, and 3 to 6 years' imprisonment for the felonious assault conviction, to be served consecutive to a two-year prison term for the felony firearm conviction. He now appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that evidence of alleged out-of-court statements made by a nontestifying accomplice (Jackson) to the complainant (Smith) was inadmissible hearsay and its admission violated his constitutional right of confrontation. The prosecution concedes that Smith's testimony concerning Jackson's statements was inadmissible hearsay because there was an inadequate showing that the declarant, Jackson, was unavailable, or that the statements were against Jackson's penal interest. MRE 804(b)(3).

With respect to defendant's preserved nonconstitutional claim of evidentiary error, i.e., that Jackson's statements were inadmissible hearsay, we "examine the nature of the error and assess its effect in light of the weight and strength of the untainted evidence." *People v Phillips*, 469 Mich 390, 396-397; 666 NW2d 657 (2003) (citations and internal quotation marks omitted). Defendant must overcome the presumption that the error was harmless by showing that it is more probable than not that the error was outcome determinative. *Id.*

Defendant has not made that showing. The principal issue at trial was defendant's identity as one of the perpetrators. The evidence established that Smith had known defendant for many years and had ample opportunity to observe him, Jackson, and the other perpetrators during the crime. Although the defense presented alibi witnesses (his girlfriend and her sister, who were also Jackson's cousins) who claimed that both men were with them the entire evening, Smith's girlfriend identified Jackson as one of the men involved in the incident. Even though Smith's girlfriend's testimony corroborated Smith's account in part, ultimately, the prosecution's case depended on Smith's credibility. The circumstances of this case required the trial court, sitting as the trier of fact, to determine whether Smith was telling the truth or was deliberately lying; the facts and Smith's familiarity with defendant left no possibility of misidentification. The challenged testimony allowed Smith to bolster his primary account of the incident with a secondary account of an alleged discussion with Jackson in which Jackson acknowledged that he and defendant were involved in the incident. Considered in this context, we are not persuaded that it is more probable than not that this secondary account had any impact on the trial court's assessment of Smith's credibility or the verdict. Smith's claimed account of a discussion with Jackson was no more compelling than his account of the incident itself. Had the court disbelieved Smith's primary account, it would have also disregarded the secondary account as a further embellishment of Smith's story. Nothing in the court's findings of fact suggest that the court was influenced by the secondary account. For these reasons, we are not persuaded that the alleged error affected the verdict. Because any alleged error does not require reversal, it is unnecessary to squarely resolve whether the evidence was admissible in the first instance. *People v Whittaker*, 465 Mich 422, 423; 635 NW2d 687 (2001).

With respect to the constitutional aspect of defendant's claim of error, defendant did not preserve the issue by objecting on constitutional grounds below and, therefore, we review the constitutional issue for plain error pursuant to *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). In light of our conclusion that any error did not affect the outcome of the proceedings, we similarly conclude that defendant has not established that any constitutional error affected his substantial rights, a prerequisite to relief under *Carines*.

Finally, defendant has not established that he was denied the effective assistance of counsel because counsel failed to object to or request a mistrial when Smith referred to gang hierarchy and testified that he and defendant were involved in dealing drugs. Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review of this issue is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). The record indicates that defense counsel actively pursued this line of questioning and used it in closing argument to attack Smith's credibility. Defendant has not overcome the strong presumption that counsel's decision in this regard was sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Furthermore, this was a bench trial and a trial court "is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling." *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). Because there is no reasonable probability that the verdict was influenced by the evidence of drug-dealing and gang involvement, defendant has not established the requisite prejudice to prevail on a claim of ineffective assistance of counsel. *Toma, supra*, pp 302-303.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello