

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE LAMAR BROWN,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 266206

Ingham Circuit Court

LC No. 05-000509-FC

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316, and conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529. For the reasons stated below, we affirm.

After a series of telephone calls, defendant rode with four others to a parking lot near the victim's residence because they learned that the victim had a large amount of marijuana. Defendant and two of his companions knocked on the victim's door and, when the door opened, one of defendant's companions rushed inside with a handgun. A struggle ensued and the victim and defendant's companion exchanged gunshots. The victim later died. At trial, Sergeant Del Kostanko testified that, after the shooting, the victim's girlfriend told him that, about ten minutes before defendant arrived at the victim's house, the victim received a phone call in which the caller told him that "Dre Brown," presumably defendant Andre Brown, was coming over to shoot him. At trial, the victim's girlfriend testified that she did not remember making this statement.

Defendant contends that he was denied the effective assistance of counsel when his attorney failed to object to Sergeant Kostanko's hearsay testimony and that the testimony was so prejudicial that it denied him his right to a fair trial. In *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003), this Court stated that "[a]n erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony." Here, overwhelming evidence established defendant's role in the crime. His co-defendants testified that defendant and his companions planned the crime: they drove past the victim's home several times and discussed the number of people present in the house and the location of the drugs, guns, and money. Also, a witness testified that one of the guns involved in the shooting belonged to defendant and he handed it to the shooter just before the incident. In light of this

evidence, Sergeant Kostanko's hearsay testimony was cumulative and was not significantly prejudicial. Accordingly, defense counsel's failure to object to it did not amount to ineffective assistance of counsel.

Defendant also contends that trial counsel was ineffective because he failed to object to a jury instruction regarding how the jury should use the hearsay evidence. To establish this claim, defendant had to show prejudice and that the prosecutor or court improperly suggested to the jury that it should rely on the hearsay evidence for the truth of the matter asserted. *People v Hodges*, 179 Mich App 629, 632; 446 NW2d 325 (1989). The instruction did not suggest that the jury should consider the evidence for the truth of the matter asserted. Moreover, because the evidence was merely of cumulative of other, substantial evidence, defendant was not prejudiced by the instruction. Therefore, defense counsel's failure to object to the jury instruction did not deprive defendant of his right to effective assistance.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Kurtis T. Wilder