

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAFAEL BASS,

Defendant-Appellant.

UNPUBLISHED

May 6, 2010

No. 289299

Wayne Circuit Court

LC No. 08-010348

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DREMARIS ANDREW JACKSON,

Defendant-Appellant.

No. 289875

Wayne Circuit Court

LC No. 08-010353-FC

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Following a joint trial with separate juries, defendants, Rafael Bass (Bass) and Dremaris Andrew Jackson (Jackson), were each convicted of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Bass was sentenced to a single term of life imprisonment without parole for the first-degree felony murder conviction, and two years' imprisonment for the felony-firearm conviction. Jackson was also sentenced to a single term of life imprisonment without parole for the first-degree felony murder conviction, and two years' imprisonment for the felony-firearm conviction. Bass appeals as of right in Docket No. 289299, and Jackson appeals as of right in Docket No. 289875. These appeals have been consolidated pursuant to MCR 7.211(E)(2). We affirm.

Bass first argues that he is not criminally liable for the victim's death because the victim's grossly negligent driving, which resulted in him crashing into a tree, was an intervening cause his death. We disagree.

A challenge to the sufficiency of evidence is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must “view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.*, quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of first-degree felony murder are: “(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b),” here robbery. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (internal quotations and citations omitted).

To prove causation in a criminal case, the defendant’s conduct must be both the factual cause and the proximate cause of the result. *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005), overruled in part on other grds *People v Derror*, 475 Mich 316. Factual causation is established if the result would not have occurred “but for” the defendant’s conduct. *Schaefer*, 473 Mich at 435-436. Proximate cause is established if the victim’s injury is a “direct and natural result” of the defendant’s conduct. *Id.* at 436. However, if there was an intervening cause that superseded the defendant’s conduct, then the causal link between the defendant’s conduct and the victim’s injury is broken, and the defendant’s conduct is not deemed to be the proximate cause. *Id.* at 436-437.

An intervening cause supersedes a defendant’s conduct as the proximate cause if it was not reasonably foreseeable. *Derror*, 475 Mich at 437-438. Although “an act of God or the gross negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, ordinary negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable.” *Id.* at 438-439 (emphasis in original).

In this case, there is no dispute that Bass’s conduct was the factual cause of the victim’s death because there is evidence that Bass was one of the shooters and the victim would not have driven away at a high rate of speed and crashed had he not been shot. In addition, Bass’s conduct was the proximate cause of the victim’s death because it was the direct and natural result of Bass’s conduct. The victim driving his car away at a high rate of speed and crashing into a tree is not an intervening cause that severs the causal link. It was reasonably foreseeable that, after being shot twice in the leg while in the driver’s seat of his car, the victim would try to quickly get away from his assailants to either escape or seek medical attention. His ability to maneuver the car would have been hampered by his wounds and the fact that the windshield had been shattered by gunfire. As a result, it was reasonably foreseeable that the victim would lose control of his vehicle and crash.

Although the victim’s driving may have contributed to the crash, the victim’s driving was no more than mere negligence, which was reasonably foreseeable under the circumstances. Therefore, the evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that Bass’s acts were a proximate cause of the victim’s death. See *People v Bailey*, 451 Mich 657, 676-677; 549 NW2d 325, amended 453 Mich 1204 (1996).

Bass also argues that because the victim's death did not occur in the course of the armed robbery, he is not criminally liable. However, Bass's argument is unavailing. The conduct that caused the victim's death, as addressed above, was the shooting of the victim, which Bass was involved in. Because the shooting took place during the course of an armed robbery, the armed robbery was a cause of the victim's death.

Next, Bass argues that the prosecutor improperly informed the jury about the content of an anonymous call, which violated his right to confrontation. We disagree.

Whether a defendant's Sixth Amendment right of confrontation was violated is a question of constitutional law that we review *de novo*. *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2009). The confrontation clause of the United States and Michigan Constitutions provides a criminal defendant with the constitutional right to confront witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 42, 58, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). However, the confrontation clause is not implicated unless the elicited testimony is offered for the truth of the matter asserted. *Crawford*, 541 US at 36.

During his opening statement, the prosecutor stated:

Investigator [Dale] Collins does some investigation. He takes the tape from the gas station that videoed this incident in hopes that maybe he can get a lead. He puts it on the news, the news is shown. Someone anonymously calls Investigator Collins. Investigator Collins puts it together, does his work.

Then he takes the photos – once he pulls the photos and got the names and everything, he takes the photos to Mr. Lewis. He asks Mr. Lewis, “Can you identify the shooters?” “Well, they look – these are the people they look like.”

The confrontation clause is not implicated by the prosecutor's opening statement. The prosecutor merely stated that Collins received an anonymous tip and what Collins did in response to the tip. The prosecutor's statement did not address the substance of the tip. Further, it did not constitute hearsay because it was not presented for the truth of the matter asserted. Rather, it was mentioned to show the effect on Collins in how it led him include Bass in the photo array. Again, the confrontation clause is only implicated by substantive use of hearsay. *Crawford*, 541 US at 36. Thus, Bass's right to confront the witnesses against him was not infringed.

Jackson first argues that the victim's grossly negligent driving caused the car crash that resulted in his death. We disagree. As addressed above, there is sufficient evidence to show that Jackson's involvement in the shooting of the victim, like Bass's involvement, was the factual and proximate cause of the victim's death.

Next, Jackson argues that he was denied the effective assistance of counsel by defense counsel's failure to request an independent autopsy and failing to interview and call as a witness

the emergency room physician. He contends that these failures resulted in the denial of a substantial defense on the intervening cause of death. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. “A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *Cline*, 276 Mich App at 637. “Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise.” *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). To establish the ineffective assistance of counsel, a defendant must show: “(1) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable.” *People v Mesik (On Reconsideration)*, 285 Mich App 535, 543; 775 NW2d 857 (2009).

Defense counsel has wide discretion regarding matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Further, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel’s competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *Payne*, 285 Mich App at 190. A substantial defense is one that might have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Jackson has failed to establish that he was denied a substantial defense regarding an intervening cause of death. First, Jackson does not make an offer of proof regarding what an independent autopsy would show. A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Second, even if the emergency room physician would have testified that the car accident injuries were the cause of death, Jackson has failed to establish that this testimony would have made a difference in the outcome because, as we concluded above, Jackson’s involvement in the shooting of the victim was the factual and proximate cause of the victim’s death. *In re Ayres*, 239 Mich App at 22.

Jackson also argues that his counsel was ineffective for failing to object to the trial court’s repeated improper instruction to the jury that the cause of the victim’s death was a gunshot. We disagree.

Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). When instructing the jury in the charges of first-degree premeditated murder, felony murder, and second-degree murder, the trial court stated each time:

First, that the defendant caused the death of [the victim], that is, that [the victim] died as a result of gunshot.

This instruction did not misrepresent to the jury that there was no possibility of another cause of death or instruct the jury to assume that the gunshots were the sole cause of the victim's death. Rather, the instruction properly advised the jury that, in order to convict the defendants, it had to find that the victim's death was caused by the gunshots from Bass and Jackson. Further, as the prosecution notes, the trial court also gave the instruction from CJI2d 16.15 by stating:

There must be more than – there may be more than one cause of death in this particular case, as reflected by some of the testimony presented in this particular matter. It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of [the victim] was caused by the defendant, you must find beyond a reasonable doubt that the death was the natural and necessary result of the defendant's act.

The jury was properly instructed on the intervening cause of death and a review of the jury instructions does not show otherwise. Therefore, because there is no error in the jury instructions, Jackson's claim is meritless and he was not denied the effective assistance of counsel. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Next, Jackson argues that the trial court's failure to define the phrase "great bodily harm" in the jury instructions constituted plain error affecting Jackson's substantial rights because it permitted the jury to speculate in rendering its verdict. This issue has been waived on appeal because, following the jury instructions, Jackson's counsel stated that he was satisfied with the instructions given to the jury. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

Jackson also argues that the trial court erred by giving an instruction on flight and that his counsel was ineffective for failing to object to this instruction. We disagree.

Jackson waived appellate review of his challenge to this instruction by accepting, on the record, the instructions as given. *Matuszak*, 263 Mich App at 57. Further, his counsel was not ineffective for failing to object. The trial court gave the following instruction to the jury:

There's some evidence that the defendant tried to run away after the alleged crime and this evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may also run or hide because of what we call consciousness of guilt. You must decide whether the evidence is true and, if true, whether it shows the defendant had a guilty state of mind.

The trial court's instructions mirrored the model jury instruction on flight, CJI2d 4.4, cited with approval in *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992). Further, there was

a sufficient evidentiary basis to justify the instruction. Kenneth Lewis testified that the perpetrators ran from the scene after the shooting. Also, Quantrez Sawyer testified that Bass and Jackson came back to his vehicle in a hurry and urged him to drive away quickly. Therefore, the instruction was proper. Defense counsel is not required to advocate a meritless position, *Mack*, 265 Mich App at 130, and thus, Jackson was not denied the effective assistance of counsel.

Next, Jackson argues that the cumulative errors from trial denied him a fair trial. We disagree. Because Jackson has failed to show any errors of consequence at trial, Jackson's cumulative affect argument lacks merit. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Jackson raises additional issues in his Standard 4 brief. First, Jackson argues that his counsel's failure to obtain the underlying data for the medical examiner's opinion and cross-examine the medical examiner on this data constituted ineffective assistance of counsel. We disagree.

Jackson makes no offer of proof regarding the contents of the underlying data or how cross-examining the medical examiner on this data would have aided his defense. Jackson has the burden of establishing the factual predicate for his claim. *Hoag*, 460 Mich at 6. Therefore, because Jackson failed to demonstrate that he was deprived of a substantial defense due to counsel's alleged failure, he has not overcome the presumption that counsel's actions constituted sound trial strategy.

Jackson also argues that defense counsel's failure to call an expert regarding why there was not any gunshot residue on Jackson's hands constituted ineffective assistance of counsel. The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *Payne*, 285 Mich App at 190. A substantial defense is one that might have made a difference in the outcome of the trial. *Ayres*, 239 Mich App at 22.

As the prosecution argues, because Jackson was arrested almost two weeks after the incident, whether he had gunshot residue on his hands would have been of little or no probative value. Regardless, Jackson did not identify an expert that should have been called and provides no supporting documentation. Therefore, he has failed to show that his counsel's decision was not sound trial strategy.

In addition, Jackson argues that his counsel was ineffective for not doing criminal background checks on testifying witnesses. However, Jackson again has failed to establish the factual predicate for his claim, *Hoag*, 460 Mich at 6, because he has not identified which witnesses had criminal backgrounds of consequence to his trial. Therefore, his claim is without merit.

Lastly, Jackson argues that the prosecutor committed misconduct denying him a fair trial by calling him names and expressing his belief in his guilt. We disagree.

Because the errors of prosecutorial misconduct that Jackson alleges were not preserved by a contemporaneous objection and a request for a curative instruction, this issue is reviewed for plain error affecting Jackson's substantial rights. *People v Callon*, 256 Mich App 312, 329;

662 NW2d 501 (2003). “The test for prosecutorial misconduct is whether, after examining the prosecutor’s statements and actions in context, the defendant was denied a fair and impartial trial.” *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Jackson fails to cite to any statement or question by the prosecutor that supports his claim. Further, the portions of the transcript that Jackson does cite to are not relevant to his claim. In addition, a review of the record does not reveal where the prosecutor called Jackson names or expressed his personal belief in Jackson’s guilt, and Jackson does not explain what he is referring to. Without any support in the record for Jackson’s claim of prosecutorial misconduct, his argument must fail.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder