

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE LAMAR WITHERSPOON,

Defendant-Appellant.

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UNPUBLISHED

March 1, 2007

No. 264711

Saginaw Circuit Court

LC No. 04-024025-FC

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, carrying a dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of life without parole on the murder conviction, 20 to 40 years on the assault conviction, and 2 to 5 years on the felon in possession and carrying a dangerous weapon convictions, to be served after completion of a consecutive two-year term for his felony-firearm conviction. We affirm.

Defendant's convictions arise from the death of Leonard Evans, who was shot during an attempted robbery. Defendant first argues that there was insufficient evidence to support his first-degree felony murder conviction. We disagree.

We review de novo challenges to the sufficiency of the evidence. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). When reviewing a sufficiency of the evidence claim in a criminal case, "this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt." *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004). This standard is deferential and requires that we "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Therefore, all conflicts in the evidence should be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Nowack, supra* at 400 (internal quotations omitted), quoting *People v Carines*, 460

Mich 750, 757; 597 NW2d 130 (1999). Further, the prosecution need not “negate every reasonable theory consistent with innocence.” *Nowack, supra* at 400.

To prove first-degree felony murder the prosecutor must establish the following elements:

(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, including robbery]. [*People v Carines, supra* at 758-759, quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 1995).]

“The facts and circumstances of the killing may give rise to an inference of malice. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Malice may also be inferred from the use of a deadly weapon.” *Carines, supra* at 759 (citations omitted). It was undisputed at trial that Evans died as a result of gunshot wounds sustained during a robbery attempt. Robbery is a predicate crime for felony murder. MCL 750.316(1)(b). Thus, there was sufficient evidence presented to allow a rationale trier of fact to conclude that Evans’s death constituted first-degree felony murder.<sup>1</sup>

It was also undisputed at trial that defendant’s partner in the robbery attempt, and not defendant, shot Evans. Therefore, defendant’s first-degree murder conviction is necessarily predicated on an aiding and abetting theory. The three elements necessary for a conviction under an aiding and abetting theory are:

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6 (citations omitted).]

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<sup>1</sup> Given that Evans was shot outside his home, as his assailants were attempting to flee, it may be that the assailants had effectively abandoned their effort to steal goods or money by the time of the shooting. However, “perpetration” as used in the felony-murder statute encompasses a murder committed in the *res gestae* of the predicate felony, which includes “a murder committed during the unbroken chain of events surrounding the predicate felony.” *People v Gillis*, 474 Mich 105, 125; 712 NW2d 419 (2006). In this regard, our Supreme Court concluded that deaths occurring during an escape attempt after a home invasion could reasonably be concluded to have occurred in the perpetration of the home invasion. *Id.* at 108-109. Similarly, there was sufficient evidence that the shooting death in this case occurred during an attempt to perpetrate a robbery because it occurred in direct connection with the robbery attempt.

As discussed above, the prosecution presented sufficient evidence to allow the jury to conclude that Evans was killed during an attempted robbery. Defendant does not assert otherwise. Rather, he argues on appeal that the prosecutor failed to show that he possessed the requisite malice to permit the jury to convict him of felony-murder predicated on his having aided and abetted that robbery attempt. However, our Supreme Court has recently held that “under Michigan law, a defendant who intends to aid, abet, counsel, or procure the commission of a crime, is liable for that crime as well as the natural and probable consequences of that crime.” *Robinson, supra* at 3 (emphasis in original). Therefore, if Evans’s death was one of the natural and probable consequences of the robbery attempt, then we must conclude that there was sufficient evidence to support defendant’s felony murder conviction. “Under the natural and probable consequences theory, ‘there can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it.’” *Robinson, supra* at 9 (quoting *People v Knapp*, 26 Mich 112, 114 (1872)). Our Supreme Court has held that “a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into murder.” *Id.* at 11.

Witnesses testified that defendant and his partner entered Evans’s home while armed, announcing “it’s a stickup.” Defendant held a gun to Evans’s girlfriend’s head, while his partner “tussled” with Evans. During the struggle, Evans specifically told defendant’s partner that “you’re going to have to kill me, you’re going to have to kill me, you’re not taking nothing from me.” Defendant came to the assistance of his partner as he was attempting to subdue Evans. Evans was shot while he struggled with defendant’s partner. Under these circumstances, Evans’s death was a natural and probable consequence of the events surrounding the robbery attempt. Therefore, there was sufficient evidence of defendant’s intent or knowledge to support his murder conviction.

Next, defendant argues that the trial court erred by denying his request that the jury be instructed on voluntary manslaughter. We disagree.

We review a trial court’s determination of whether an instruction was applicable to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Because manslaughter is a necessarily included lesser offense of murder, an instruction for voluntary manslaughter must be given if it is supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Both first-degree murder and voluntary manslaughter “require a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.” *Id.* at 540. The element that distinguishes murder from voluntary manslaughter is malice, which is negated by the presence of adequate provocation and the heat of passion. *Id.* In general, voluntary manslaughter requires (1) that the defendant killed the victim in the heat of passion; (2) that the passion was caused by adequate provocation; and (3) that there was not a lapse of time during which a reasonable person could regain control of his passions. *Id.* at 535. Thus, the trial court was required to instruct the jury on the lesser-included offense of voluntary manslaughter if, and only if, a rationale view of the evidence presented at trial supported the conclusion that Evans was shot in the heat of passion, caused by adequate provocation and without sufficient lapse of time to negate that passion.

Defendant argues that the eyewitness testimony adduced at trial supports a conclusion that Evans was shot while trying to prevent defendant's partner from leaving the scene and after defendant's partner was attacked by Evans's dog. Defendant contends that these facts are sufficient to negate the element of malice required for first-degree murder and constitute adequate provocation and heat of passion necessary to support a conviction on the lesser offense of voluntary manslaughter. However, a robbery victim's attempt at self-defense does not constitute sufficient provocation to reduce the assailant's murder of the victim to manslaughter. *People v Maclin*, 101 Mich App 593, 596; 300 NW2d 642 (1980). Therefore, a rational view of the evidence did not support an instruction on voluntary manslaughter, and the trial court did not err in refusing to instruct the jury thereon.

Finally, defendant, in propria persona, argues that he was denied the effective assistance of counsel at trial. Because defendant did not raise this issue in a motion for a new trial or evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record.<sup>2</sup> *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for counsel's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). In general, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which this Court will not second guess using the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant first asserts that he was denied the effective assistance of trial counsel by his counsel's decision not to use information supplied by a private investigator. However, defendant does not explain what this information was or how it would have benefited his case. His assumption that it may have been favorable to his defense is speculative. We note that it is just as likely that the evidence turned up by the private investigator was harmful, particularly

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<sup>2</sup> Defendant asks this Court to remand his case for the purpose of an evidentiary hearing on his claim of ineffective assistance of counsel. However, defendant has not met the timeliness requirement necessary for this Court to hear his motion. This Court "is not compelled to grant every motion to remand. The remand procedure is available only when the issue meets the requirements set forth in MCR 7.211(C)." *People v Hernandez*, 443 Mich 1, 3; 503 NW2d 629 (1993), abrogated in part on other grounds, *People v Mitchell*, 454 Mich 145, 176-178; 560 NW2d 600 (1997). Pursuant to MCR 7.211(C)(1)(a), an appellant may move to remand to the trial court within the time provided for filing the appellant's brief. MCR 7.212(A)(1)(a)(iii) gives an appellant 56 days from the later of the time that the claim of appeal is filed or the time that the transcript is filed with the trial court to file its brief with this Court. Defendant's in propria persona motion for remand was not filed until well after this allotted time. Therefore, we decline to remand the instant case for an evidentiary hearing because defendant failed to bring a timely motion under MCR 7.211(C).

considering the eyewitness testimony implicating defendant in these crimes. Accordingly, there is no basis for finding that defendant was denied the effective assistance of counsel by his trial counsel's strategic decision not to present this evidence.

Defendant also asserts that his trial counsel was ineffective because he "failed to pursue evidence that would have emphasized flaws in the State's case regarding discrepancies in the witnesses' identifications of [defendant]." However, our examination of the record indicates that trial counsel vigorously pointed out the flaws in the prosecution's case and continually challenged the accuracy of the eyewitness identifications. Trial counsel repeatedly questioned the reliability of the witnesses' memories and perspectives, as well as the accuracy of defendant's depiction in the photographic lineups. Counsel also emphasized alleged discrepancies between the witnesses' descriptions of the perpetrator and defendant's actual appearance and pointed out that, upon his arrest, defendant appeared not to bear any marks resulting from a struggle. Therefore, there is no basis for defendant's assertion that his trial counsel was ineffective in this regard.

Lastly, defendant argues that his trial counsel was ineffective in failing to request that the trial court appoint an expert witness to testify as to the reliability of witness identification. We disagree.

Trial counsel's determination whether to present an expert witness is "presumed to be a strategic one for which this Court will not substitute its judgment." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Further, trial counsel "is not ineffective for failing to advocate a futile or meritless position." *People v Walker*, 265 Mich App 530, 546; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006).

Generally, a trial court may appoint an expert witness for an indigent defendant where the defendant has demonstrated that there is a material witness in his favor within the jurisdiction of the court, and that without the expert's testimony the defendant cannot safely proceed to trial. MCL 775.15. In *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), our Supreme Court explained that, to obtain the appointment of an expert, an indigent defendant must demonstrate a "nexus between the facts of the case and the need for an expert" (quoting *People v Jacobsen*, 205 Mich App 302, 309; 517 NW2d 323 (1994) (Taylor, J., dissenting)). "It is not enough for the defendant to show a mere possibility of assistance from the requested expert. 'Without an indication that expert testimony would likely benefit the defense,' a trial court does not abuse its discretion in denying a defendant's motion for the appointment of an expert witness." *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003) (quoting *Jacobsen*, *supra* at 641).

Defendant points out in his brief to this Court the potential failings of eyewitness identification but he fails to establish that he could not safely proceed to trial without expert testimony on that point. Defendant argues that "[a]lthough defense counsel cross-examined the victims, the testimony of an expert witness was the only way to put before the jury the empirical evidence proffered by [the expert]" (quoting *Brodes v State*, 250 Ga App 323, 325; 551 SE2d 757 (2002)). However, as discussed above, defendant's trial counsel vigorously attacked the eyewitnesses' identification of defendant as one of Evans's assailants. Further, the jury was instructed on the credibility of witnesses and on factors to consider in relation to such identification. Therefore, defendant has failed to demonstrate the need for an expert in his case

or to explain how an expert could introduce any relevant testimony on the identification issue in this specific case. Moreover, defendant does not argue that there was a relevant expert within the jurisdiction of the trial court. Thus, the trial court would not have erred in failing to grant a motion for the appointment of an expert witness in this regard, and trial counsel did not err in failing to make the fruitless motion.

Further, given his counsel's vigorous challenge to the identification of defendant as one of Evans's assailants, defendant cannot establish that, had an expert testified as to the potential failings of eyewitness, the result of his trial would have been different. Thus, defendant has not shown that he was deprived of the effective assistance of counsel.

We affirm.

/s/ William C. Whitbeck  
/s/ Richard A. Bandstra  
/s/ Bill Schuette