

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT RAMSEY,

Defendant-Appellant.

UNPUBLISHED

April 17, 2007

No. 266371

Wayne Circuit Court

LC No. 04-007182-01

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Because the trial court did not err when it concluded that the prosecutor exercised due diligence in attempting to locate a missing witness, the trial court did not err when it denied defendant's request for a missing witness instruction, the evidence was sufficient for a reasonable jury to find that defendant aided and abetted in the commission of first-degree premeditated murder, and defense counsel was not ineffective, we affirm.

I. Missing Witness Instruction

Defendant argues that the trial court erred in denying his request for a missing witness instruction after the prosecution failed to produce witness LaRhonda Mims at trial. Related to this issue is whether the prosecutor exercised due diligence to produce LaRhonda Mims at trial. This Court reviews "a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). A trial court abuses its discretion when its decision falls outside of the range of reasonable and principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 372 (2006) (adopting the standard stated in *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) as the "default" abuse of discretion standard).

Under MCL 767.40a(3) and (4), a prosecutor has an obligation to list the witnesses he intends to call at trial, and may only amend his witness list by leave of court, for good cause shown or by stipulation of the parties. *People v Perez*, 469 Mich 415, 419 n 4; 670 NW2d 655

(2003). A missing witness instruction, CJI2d 5.12, “may be appropriate if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused.” *Id.* at 420. Conversely, where the prosecutor is unable to produce a listed witness after exercising due diligence, the prosecutor is free to strike the witness from the witness list, and the defendant is not entitled to a missing witness instruction. *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000). The due diligence “test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it.” *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). In other words, “due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness.” *Eccles*, *supra* at 391, citing *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

The record discloses that the police received information that LaRhonda Mims was bipolar, had stopped taking her medications, and was “living from friend to friend.” Her mother had not seen her for six weeks. The police questioned known acquaintances, checked several addresses, investigated LaRhonda Mims’s prior place of employment, and searched the Internet and social service records. They also staked out an after hours motorcycle club and a bar that she was known to frequent. Defendant identified additional leads that were not pursued, but they were old and had apparently not proven fruitful in the past. Under the circumstances, the trial court did not commit clear error in finding that the prosecutor made diligent, good-faith efforts to locate and produce LaRhonda Mims for trial. Because LaRhonda Mims could not be produced despite the exercise of due diligence, the trial court properly allowed the prosecutor to strike her from the witness list and defendant was not entitled to a missing witness instruction.

II. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence to convict him of first-degree premeditated murder under an aiding and abetting theory. 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, 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.

The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was “willful, deliberate, and premeditated.” MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem.” *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Both “characterize a thought

process undisturbed by hot blood.” *Id.* “While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable [person] an opportunity to take a ‘second look’ at his contemplated actions.” *Id.*; see also *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the killing itself, and the defendant’s conduct before and after a killing. *Furman, supra* at 308. Premeditation can also be inferred from the type of weapon used and the location of the wounds. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

To convict a defendant under an aiding and abetting theory, the prosecution needs to show that the defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and that he either intended to commit the crime or knew that the principal intended to commit the crime at the time he gave aid or assistance. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). The amount of aid or assistance given is immaterial as long as it had the effect of inducing or encouraging the crime. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974). Mere presence at the scene, even with knowledge, is insufficient. *People v Youngblood*, 165 Mich App 381, 386; 418 NW2d 472 (1988). Thus, to convict a defendant of premeditated murder under an aiding and abetting theory, “the prosecutor was required to show that at the time of the [killing] the defendant either had the premeditated and deliberate intent to kill the victim or that [he] participated knowing that the principal possessed this specific intent.” *Id.* at 387. “An aider and abettor’s state of mind may be inferred from all the facts and circumstances.” *Carines, supra* at 757-758

The evidence showed that defendant and codefendant Jackson both appeared at an apartment where marijuana was sold. Defendant was armed with a handgun and Jackson was armed with a high-powered assault rifle, that was powerful enough to penetrate the walls of the apartment. After the unarmed victim opened the front door, Brenda Mims saw Jackson’s gun and ran to the bedroom. Before she reached the bedroom, several shots rang out. Bullets came through the walls into the bedroom. Defendant appeared at the bedroom door, but another occupant, Derrick Steele, had grabbed a gun from under the bed and fired at defendant. Defendant was shot at least twice and ran away. The victim was shot seven times, including twice in the chest.

Considering that defendant and Jackson were both armed, the nature of the weapon possessed by Jackson, the short interval between the time the victim opened the apartment door and the time the shooting began, the number of times the victim was shot, that Jackson repeatedly fired through the bedroom walls into the bedroom after Mims ran to the bedroom, and that defendant also immediately proceeded to the bedroom armed with his gun, the evidence, viewed most favorably to the prosecution, was sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that defendant assisted Jackson as part of a premeditated plan to shoot and kill the occupants of the apartment, but that defendant and Jackson were forced to leave without fully accomplishing their purpose after defendant was shot by Steele. Thus, the evidence was sufficient to support defendant’s conviction of first-degree premeditated murder.

III. Effective Assistance of Counsel

Defendant finally argues that his trial attorney was ineffective for four separate reasons. This Court remanded this case for an evidentiary hearing with respect to defendant's claim that counsel deprived defendant of his right to testify. Thus, that issue is preserved. Defendant later filed a second, pro se motion to remand in order to raise his additional claims of ineffective assistance of counsel, but this Court denied the motion for failure to persuade of the need for a remand. Therefore, review of defendant's remaining claims is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question (i.e., that the error may have made a difference in the outcome of the trial). *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314.

A. Failure to Investigate

Defendant argues that counsel was ineffective because he failed to properly investigate this case, and because he told defendant that he did not want to hear his version of the facts. The failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant does not offer any factual support for his claim that defense counsel failed to properly investigate the case and prepare for trial. Defendant merely asserts that defense counsel refused to allow him to testify and give his version of the events. Our review of the record reveals that the trial court fully addressed defendant's claim that counsel refused to allow defendant to testify and found no merit to this claim. Thus, we find no support in the record for defendant's claim that counsel's investigation was inadequate, or that remand for further development of the record is warranted.

B. Motion to Sever

Defendant claims that defense counsel was ineffective for failing to move to sever his and codefendant Jackson's trials. But the record does not support defendant's claim that he and

Jackson had antagonistic or mutually irreconcilable defenses that would justify severance. MCR 6.121(C); *People v Hana*, 447 Mich 325, 331, 346-347, 349-350; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994). Hence, defense counsel was not ineffective by failing to pursue a futile motion to sever. *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

C. Defendant's Right to Testify

Defendant asserts that defense counsel was ineffective by depriving him of his right to testify. Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

At the hearing on remand, defendant testified that he was aware of his right to testify, and wanted to testify, but did not assert this right at trial because he did not want to undermine his attorney's trial strategy. Defense counsel testified that he advised defendant not to testify because he believed that the prosecutor had failed to prove defendant's involvement in the offense beyond a reasonable doubt, and because he believed that defendant's attempt to explain his presence at the apartment would present credibility issues and backfire. According to counsel, defendant accepted his advice and decided not to testify.

The trial court did not clearly err in finding that defendant chose to follow his attorney's advice and decided not to testify. Defendant has also failed to show that counsel acted unreasonably in advising defendant not to testify, due to credibility issues attendant to defendant's explanation of the facts. Therefore, defense counsel was not ineffective in this regard. Additionally, we find no support in the record for defendant's claim that the successor judge at the post trial evidentiary hearing on remand was distraught and did not want to hear this case.

D. Failure to Object

Defendant argues that defense counsel was ineffective for failing to object to evidence that Steele was robbed the day before the charged offense. The decision whether to object to evidence is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). An attorney is not ineffective for failing to make a futile objection. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Contrary to defendant's argument, evidence that Steele was robbed the day before the shooting was relevant to the *res gestae*. The evidence indicated that defendant and Jackson left the premises after Steele obtained a gun and shot defendant. The prosecutor's theory of the case was that Steele was anxious about having been robbed, and obtained a weapon to defend his household. There was no evidence that defendant or Jackson were the robbers, nor was the evidence offered for this purpose. Therefore, the evidence was not inadmissible under MRE

404(b)(1). Furthermore, defense counsel used the evidence of the prior robbery to argue that Steele was likely under stress and determined not to get robbed again, and that it was Steele who probably shot the victim by accident. Under the circumstances, defense counsel was not ineffective for failing to object to the evidence of the prior robbery.

Defendant also argues that defense counsel was ineffective for failing to object to various alleged misstatements by the prosecutor during closing argument. Defendant specifically argues that the prosecutor improperly attempted to mislead the jury by stating that defendant walked into the bedroom, that defendant's purpose in going into the apartment after the shooting stopped was to finish the job, and that defendant was taken to the hospital in a private car. "A prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor may argue all reasonable inferences relating to his theory of the case, and need not couch his remarks in the blandest possible terms. *Matuszak, supra* at 53, 56.

After reviewing the record, we conclude that the challenged remarks were reasonable inferences arising from the evidence presented at trial. The prosecutor stated that defendant walked "into the bedroom door," not into the bedroom. Further, Steele testified that he saw defendant standing at the doorway of the bedroom, holding a weapon. Defendant is correct that Steele testified that he saw defendant at the bedroom door during the shooting, not after the shooting stopped. Nonetheless, the prosecutor was justified in asking the jury to infer, from all the evidence, that defendant was present in the apartment, armed with a weapon, to assist Jackson if necessary. Defendant does not claim that he was taken to the hospital by ambulance, and the evidence showed that defendant fled the apartment and arrived at the hospital with a gunshot wound shortly thereafter. Defendant has failed to show that defense counsel was ineffective for failing to object to the prosecutor's comments.

Affirmed.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey