

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DMITRI ANDERSON,

Defendant-Appellant.

UNPUBLISHED

October 7, 2010

No. 291962

Ottawa Circuit Court

LC No. 08-032882-FC

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. He was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment for two counts of first-degree murder and 450 to 675 months in prison for the armed robbery conviction, all sentences to be served concurrently.¹ Defendant now appeals as of right. We affirm.

Defendant's convictions arise from the shooting deaths of Robert Karell and Louis Paparella during a robbery at R. K. Jewelers in Grand Haven on July 2, 2008. Also charged in the offense was defendant's brother, Darick Anderson. The two brothers were tried separately, with defendant's trial proceeding first. Defendant did not dispute that a robbery occurred, during which two people were killed. However, he claimed that his brother Darick committed the offense, and that he (defendant) was neither present during nor otherwise involved in the offense.² The evidence at trial indicated that the offense was committed sometime between 3:00

¹ Because defendant's murder convictions arose from the deaths of only two individuals, two of the convictions were effectively vacated and defendant was sentenced on only two counts of first-degree murder.

² Darick Anderson was also convicted by a jury of two counts of first-degree premeditated murder, two counts of first-degree felony murder, and armed robbery. Codefendant Darick Anderson's appeal in Docket No. 292072 has been submitted for a decision along with this appeal.

and 3:30 p.m. Evidence was presented linking defendant to his brother Darick during this timeframe. Evidence was also presented that defendant confessed his involvement in the offense to two jailhouse cellmates, Anthony Wright and Darnell Barnes, although Wright later recanted his account of the conversation.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to present sufficient evidence to support his convictions for the charged offenses. We disagree.

We review a challenge to the sufficiency of the evidence de novo by viewing the evidence presented at trial in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crimes charged were proven beyond a reasonable doubt. *People v Harrison*, 283 Mich App 374, 377-378; 768 NW2d 98 (2009).

The elements of first-degree premeditated murder are an intentional killing of a human with premeditation and deliberation. *People v Unger*, 278 Mich App 210, 223, 229; 749 NW2d 272 (2008). “The elements of first-degree felony murder are (1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in MCL 750.316(1)(b).” *People v Watkins*, 247 Mich App 14, 32; 634 NW2d 370 (2001). Robbery is a listed felony. MCL 750.316(1)(b). “The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon.” *Watkins*, 247 Mich App at 33. A person who aids and abets in the commission of an offense may be convicted and punished as a principal. *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). The elements that must be proven to convict a defendant as an aider and abettor are (1) the crime charged was committed by the defendant or some other person, (2) the defendant aided and abetted the commission of the crime, and (3) the defendant intended to aid the charged offense and knew that the principal intended to commit the charged offense or the charged offense was a natural and probable consequence of the commission of the intended offense. *Id.* at 67-68; *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006).

Defendant does not dispute that any of the crimes occurred or that codefendant Darick Anderson committed them. Rather, he focuses on the lack of physical and eyewitness evidence connecting him to the crimes, the inconsistent witness testimony connecting him with Darick on the day of the offense, inmate Anthony Wright's recantation of his prior testimony, and the lack of credibility of Darnell Barnes, another jail inmate. However, circumstantial evidence is sufficient to prove the elements of a crime and all conflicts in the evidence must be resolved in favor of the prosecution. *Unger*, 278 Mich App at 223. Further, this Court may not “interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses.” *Id.* at 222.

Barnes testified that defendant confessed to him that he shot the victims. Wright previously testified that defendant confessed his participation in the crimes, but recanted his prior testimony at trial. Wright admitted that personal items were stolen from his cell after he testified against defendant at the preliminary examination, and that he thereafter feared for his family's safety. The jury could have determined, then, that Wright's recantation was motivated by fear of

reprisal. Patricia Rogers's testimony placed defendant with codefendant Darick Anderson in Muskegon Heights shortly after a heavy rainstorm, which was approximately 2:45 p.m., according to witness testimony, which would have given defendant and Darick sufficient time to reach Grand Haven, a 15-minute drive, to commit the crimes between 3:00 and 3:30 p.m. The jury was free to reject defendant's wife's estimation of when defendant left their home that afternoon, which she claimed was around 3:10 p.m. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant committed the crimes with codefendant Darick Anderson, and was guilty as either a direct principal or as an aider and abettor.

II. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. DUTY TO INVESTIGATE

Defendant argues that the police and the prosecutor both should have done more to investigate the case before charging him. Because defendant did not raise this issue in a motion below or otherwise present it to the trial court, it is not preserved. This Court reviews unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is not warranted unless defendant is "actually innocent or . . . the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Contrary to what defendant argues, neither the police nor the prosecutor have a duty to investigate on behalf of a defendant, or to seek and find exculpatory evidence. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995); *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). Also, the prosecution is not required to negate every theory consistent with a defendant's innocence. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Accordingly, defendant cannot establish a plain error.

The cases cited by defendant are inapplicable. In *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the Supreme Court held that a criminal defendant has a due process right to obtain "evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment." *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady*, 373 US at 87. Here, defendant does not allege that the prosecutor possessed or sought to suppress evidence favorable to his case. Therefore, defendant's reliance on *Brady* is misplaced. In *People v Jordan*, 23 Mich App 375; 178 NW2d 659 (1970), this Court addressed whether laboratory testing of a handkerchief with stains of uncertain origin was required in order to establish a proper foundation for its admission into evidence in a sexual assault case. The case did not involve whether the prosecutor or the police had a duty to test the handkerchief. *Id.* at 385-389. In this case, defendant does not challenge the foundation for any admitted evidence. Accordingly, we reject this claim of error.

B. DNA EVIDENCE

Defendant argues that he is entitled to have the DNA evidence that was collected in this case retested pursuant to MCL 770.16. Because defendant did not raise this issue, it is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763; *Knox*, 469 Mich at 508. None of the DNA evidence that was detected on items that were connected to this case implicated defendant. Defendant was either definitively excluded, or the DNA results were inconclusive or no DNA could be developed. Further, defendant has not met the statutory prerequisites for retesting of any DNA pursuant to MCL 770.16. He has not established that any previous DNA material would be subject to new DNA testing technology that was not previously available, or that retesting with current technology would likely result in conclusive results. MCL 770.16(1)(c) and (4)(b)(ii). Also, there is no basis for finding that DNA evidence is material to the issue of defendant's "identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction." MCL 770.16(4)(a). To be "material" within the meaning of subsection (4)(a),³ the "defendant must link the DNA-stained evidence to both the crime and the criminal." *People v Barrera*, 278 Mich App 730, 738; 752 NW2d 485 (2008). The only DNA results that were inconclusive were those from the ballistics evidence, which consisted of two fired and two unfired cartridges. Because they were found at the scene, they are related to the crimes. However, DNA evidence on the cartridges would not necessarily identify the perpetrator, especially where, as here, defendant was also charged as an aider and abettor. Accordingly, we reject this claim of error.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that trial counsel committed numerous errors that deprived him of the effective assistance of counsel. Because defendant did not raise these claims in an appropriate motion before the trial court, our review is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). 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 Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). A court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant first argues that trial counsel was ineffective for failing to investigate and learn of the prosecutor's tendency to withhold exculpatory evidence. Because defendant does not identify any evidence that allegedly was withheld in this case, he has not satisfied his burden of

³ Former subsection (3)(a) was renumbered to subsection (4)(a) when the statute was amended pursuant to 2008 PA 410.

establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). To the extent defendant refers to the prosecution's alleged failure to discover exculpatory evidence, as previously discussed in section II(A), the prosecutor has no such duty. Thus, there is no merit to this claim.

Second, defendant asserts that trial counsel was ineffective for failing to prepare for trial and for failing to adequately familiarize himself with the case and pursue leads provided by defendant. Although a defense attorney's failure to reasonably investigate a case can constitute ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), defendant here does not specify what counsel was unfamiliar with or what leads he failed to pursue. Thus, defendant has failed to show either the requisite deficient performance by counsel or any resulting prejudice. *Hoag*, 460 Mich at 6; *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Third, defendant asserts that trial counsel was ineffective for failing to file a motion for a change of venue based on pretrial publicity. However, defendant has not provided any evidence of the pretrial publicity that this case received, or any evidence suggesting that the jurors were not impartial. Thus, he has not established the factual predicate for this claim. *Hoag*, 460 Mich at 6. Further, by failing to provide any supporting argument for his position, he has abandoned review of this claim. *Coy*, 258 Mich App at 19-20. Accordingly, this claim cannot succeed.

Fourth, defendant asserts that trial counsel was ineffective for failing to file a bill of particulars. However, a bill of particulars was unnecessary because the preliminary examination adequately informed defendant of the charges against him. *People v Harbour*, 76 Mich App 552, 557; 257 NW2d 165 (1977).

Defendant also asserts that counsel was ineffective for failing to file a motion for discovery, but the record discloses that such a motion was filed. Defendant's argument appears to be focused more on counsel's non-use of the DNA evidence on the office safe from which he was excluded as a donor. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2008). The failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

The absence of defendant's DNA on the office safe does not mean that defendant was not at the store, only that he did not touch the safe or did not leave DNA material. Because neither party presented the evidence, defense counsel was able to argue that there was no physical evidence of defendant's presence at the crime scene. Defense counsel's decision not to present the negative DNA results was reasonable trial strategy, which did not deprive defendant of a substantial defense. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Payne*, 285 Mich App at 190. Accordingly, this ineffective assistance of counsel claim is without merit.

Fifth, defendant asserts that trial counsel was ineffective for failing to object to Herkie Jewell's repeated hearsay testimony regarding statements made by codefendant Darick Anderson. Defendant contends that the statements unfairly prejudiced him and violated his right of confrontation. A decision not to object to evidence can be sound trial strategy. *Unger*, 278 Mich App at 242, 253. Here, defendant has not overcome the presumption that defense counsel reasonably allowed Jewell to testify regarding Darick Anderson's statements as a matter of trial strategy, in order to deflect culpability from defendant and portray Darick as the person with knowledge of the store, and then idea of how to commit the crimes. Indeed, this was consistent with the defense theory at trial. Therefore, defendant has failed to establish that counsel was ineffective. *Payne*, 285 Mich App at 190.

We also reject defendant's argument that Darick Anderson's statements violated the Confrontation Clause. "The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination." *Id.* at 197, citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Statements are testimonial when they are made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use in a later trial or criminal prosecution. *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005), citing *Crawford*, 541 US at 51-52. In this case, Darick made the challenged statements in the presence of defendant and Jewell. There is no indication that he expected the statements to be used in a later trial or criminal prosecution. Thus, the statements are non-testimonial and their admission does not violate the Confrontation Clause.

Sixth, defendant asserts that trial counsel was ineffective for failing to learn of the prosecution's deal with Jewell in exchange for his testimony. However, the record fails to disclose that any deal existed, the prosecution explicitly denies any such deal, and defendant has not provided any evidence of any deal. Thus, defendant has failed to establish the factual predicate for this claim. *Hoag*, 460 Mich at 6.

Seventh, defendant asserts that trial counsel was ineffective for failing to effectively impeach witnesses Jewell, Rogers, Barnes, and Wright. The record discloses that counsel attempted to impeach each of these witnesses. Defendant does not explain how defense counsel's cross-examination could have been more thorough. Again, therefore, defendant has failed to establish the factual predicate for his claim.

Eighth, defendant asserts that trial counsel was ineffective for failing to call witnesses to bolster defendant's alibi, or to do so through testifying witness Bradley Nelson.⁴ Although defendant contends that "Rock" would have testified that he was with defendant from 10:30 a.m. to 1:15 p.m., because the evidence showed that the crimes were committed later in the afternoon, Rock's testimony would not have aided an alibi defense. Thus, counsel's failure to call this witness did not deprive defendant of a substantial defense.

⁴ Defendant does not specify the nature of his alibi other than to cite cell phone records that placed him in Muskegon Heights at 3:40 p.m.

Defendant also contends that trial counsel should have done more through Nelson to establish that he was never connected with codefendant Darick Anderson on the day of the offense. Nelson did not know if defendant spoke to Darick during the time they were together that day. His testimony that he saw the car that Darick drove outside his home did not establish that Darick was inside the home or that defendant was subsequently with him. Nelson further stated that he never saw Darick when he dropped off defendant, who was still outside when Nelson drove away. Defendant does not suggest, nor does the record indicate, how additional cross-examination of Nelson could have resulted in more definitive answers showing that Nelson did not see defendant with Darick. Accordingly, defendant has not overcome the strong presumption that defense counsel's conduct was sound trial strategy.

Ninth, defendant asserts that counsel was ineffective for failing to call witnesses to rebut the prosecution's timeframe for when the crimes occurred. However, the witness who heard gunshots did not specify what time he heard them, only that he received a call at 3:57 p.m. informing him of the store shootings. Another witness told the police that he saw a suspicious person in a black truck leave the scene sometime between 3:00 and 4:00 p.m. Additionally, the police discovered that the time stamp on the store's credit card machine was 30 minutes fast after a company representative explained to an officer the machine's internal verification process. Thus, contrary to what defendant argues, the evidence indicated that the last credit card purchase was at 3:01 p.m., not 3:31 p.m. Defendant does not suggest that the police investigation was flawed. Therefore, defendant has failed to show that any of the alleged witnesses would have aided in rebutting the prosecution's timeframe. Accordingly, defense counsel was not ineffective for failing to call these witnesses.

Tenth, because we have not found any instances in which trial counsel was ineffective, defendant's assertion that counsel's cumulative failures denied him a fair trial lacks merit. *Unger*, 278 Mich App at 258.

D. MOTION FOR NEW TRIAL

Defendant asserts that the results of polygraph examinations could significantly assist the trial court in determining issues of credibility, and that any such results purportedly would be in his favor. He seeks to have this Court compel Wright and Barnes to submit to polygraph examinations and, if they refuse, direct that their testimony cannot be used in future proceedings. The results of polygraph examinations may be considered by a court in deciding a motion for a new trial only if they are voluntarily taken. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994), citing *People v Barbara*, 400 Mich 352, 412; 255 NW2d 171 (1977). Defendant cites no authority in support of his argument that he is entitled to compel other witnesses to submit to a polygraph examination, or that any sanction properly may be imposed if a witness refuses to do so. It is not for this Court to make defendant's argument for him. *Coy*, 258 Mich App at 19-20.

Defendant also seeks a remand to allow him to file a motion for a new trial based on newly discovered evidence that would be supported by polygraph results. However, any such

motion would be premature because no polygraph examinations have yet been conducted. Accordingly, a remand for this purpose is not warranted.⁵

E. MOTION FOR SUBSTITUTE APPELLATE COUNSEL

Lastly, defendant argues that the trial court erred in denying his request for substitute appellate counsel. Essentially, he contends that the trial court's denial of his motion has deprived him of the effective assistance of appellate counsel. The test for ineffective assistance of appellate counsel and trial counsel is the same. *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). In order to provide effective assistance, appellate counsel must be an active advocate, "rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim," although he need not advance every possible argument for review. *People v Johnson*, 144 Mich App 125, 131; 373 NW2d 263 (1985), quoting *Evitts v Lucey*, 469 US 387, 394; 105 S Ct 830; 83 L Ed 2d 821 (1985).

To the extent that defendant complains that appellate counsel raised only one argument on appeal, appellate counsel may legitimately discard weaker arguments in order to focus on the arguments that are more likely to prevail. *Uphaus*, 278 Mich App at 186-187. Further, even if appellate counsel was deficient for failing to raise additional issues, defendant has been permitted to raise additional issues on appeal in his Standard 4 brief. We have examined those issues to the extent permitted by the existing record and have concluded that none are potentially meritorious. Thus, defendant was not prejudiced by counsel's alleged deficiency. See *People v Pratt*, 254 Mich App 425, 430-431; 656 NW2d 866 (2002). Defendant has failed to show a potentially meritorious issue that appellate counsel failed to investigate or raise. Accordingly, defendant has not established that he was denied the effective assistance of appellate counsel.

Affirmed.

/s/ Peter D. O'Connell

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro

⁵ We note that in the event defendant obtains any polygraph examination results, he would be free to file an appropriate motion for relief from judgment in accordance with MCR 6.502, and submit as support any polygraph examination results he has obtained from willing participants for the trial court to consider at its discretion. *People v Cress*, 250 Mich App 110, 124; 645 NW2d 669 (2002), vacated in part on other grounds 466 Mich 883 (2002), rev'd on other grounds 468 Mich 678 (2003).