

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS MATTHEWS,

Defendant-Appellant.

UNPUBLISHED

April 14, 2011

No. 295307

Wayne Circuit Court

LC No. 09-011725-FC

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 720.227b(1). He was sentenced to 60 to 100 years' imprisonment for the second-degree murder conviction, 2 to 5 years' imprisonment for the felon in possession conviction, and 5 years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

First, defendant asserts there was insufficient evidence to support the second-degree murder conviction. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Phelps*, 288 Mich App 123, 131-132; 791 NW2d 732 (2010). The elements of the crime may be proven by circumstantial evidence and reasonable inferences arising from the evidence. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues in support of the jury verdict. *Id.* When assessing a challenge to the sufficiency of the evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

To establish the crime of second-degree murder, the prosecution must prove: (1) a death; (2) it was caused by an act of the defendant; (3) it was committed with malice; and (4) there was no justification or excuse. *People v Maynor*, 256 Mich App 238, 244; 662 NW2d 468 (2003). Malice is defined as “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be inferred from the use of a weapon, and it may be inferred from circumstantial evidence. *People v Roper*, 286 Mich App 77, 85-86; 777 NW2d 483 (2009).

Defendant asserts that there was insufficient evidence to convict because there was no “direct evidence” of his presence at the murder scene or that he physically participated in the murder. Indeed, defendant’s murder conviction was premised on the introduction of circumstantial evidence and reasonable inferences arising from the evidence. In the present case, the victim’s family members testified that the victim was operating a recording studio in his basement. The victim had \$400 in his possession and pawned jewelry to obtain an additional \$200. The victim was planning to make a major purchase on Thursday. On Wednesday, family members were unable to contact the victim. On Wednesday morning, defendant dropped his girlfriend off at work at 6:30 a.m. so he could use her vehicle, and she testified that he picked her up late at 2:50 p.m. that day. She testified that defendant, to her knowledge, did not have money earlier in the day, but when he picked her up, he repaid her \$60 dollars that he had borrowed and had additional money despite paying that debt. The girlfriend also noticed that a black barrel gun was on the floor, and she told defendant, a parolee, that he could not drive in her car with a gun. Defendant said that he would get rid of the gun.

Defendant’s girlfriend testified that defendant was arrested by Highland Park police on Wednesday evening. The police told her to retrieve her vehicle, a Monte Carlo, or be charged impound fees. When she picked up the vehicle, there were two mink coats in her back seat, but the gun was missing. The mink coats were not in her vehicle when defendant picked her up from work.

On Wednesday, the victim’s neighbor pulled into his own driveway. He was getting groceries out of his car when he observed a man pass by with an intimidating look on his face. The man entered an older model Monte Carlo and sped off. Early the next day, the neighbor noticed that the victim’s front door was cracked open despite the fact that it was cold. When he returned home that evening, another neighbor pointed out that the door was still cracked open. Neighbors went to the front door and observed a body lying on the floor. Police officers testified that the body had been dead for at least 24 hours in light of the dried blood that had seeped through the floor to the basement.

Defendant did not account for his whereabouts the entire day of the murder. An FBI agent concluded that cellular phone records and towers indicated that defendant was in the vicinity of the murder on two occasions during the day. Additionally, family members testified that the two mink coats that the victim owned were missing from his home. A hood to one of the mink coats was found near the front door.

Defendant’s girlfriend testified that defendant denied any involvement in the killing of the victim, his nephew. However later, he admitted to seeing the victim on the day of the

murder. Additionally, defendant instructed his girlfriend to discard the two mink coats that she found in her vehicle, and she placed them in a dumpster. She identified a photograph of one of the two mink coats that belonged to the victim. Family members testified that defendant spoke of “hitting a lick” even if a family member was the intended target of the robbery or theft. Defendant also asked family members to assist him in obtaining a gun. Finally, family members testified that there was discord between defendant and the victim regarding defendant’s son.

In the present case, there was sufficient circumstantial evidence and reasonable inferences to support the second-degree murder conviction. Defendant had made statements regarding his intent to rob an individual to obtain money even if a family member was the intended target and his attempt to obtain a gun. There was circumstantial evidence that the victim was earning income from his basement recording studio. Defendant was in the vicinity of the murder and was later seen with a gun and two mink coats that purportedly belonged to the victim. Once arrested, defendant asked his girlfriend to discard the two mink coats allegedly because he would be incarcerated for two years, but to keep his clothes. Defendant later made admissions to his girlfriend that he saw the victim on the day of the murder despite earlier denials. In light of the above, there was sufficient circumstantial evidence to support the convictions. *Railer*, 288 Mich App at 217.

Next, defendant contends that he was deprived of the effective assistance of counsel because of the failure to call and fully cross-examine witnesses. We disagree. Trial counsel’s decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court does not substitute its judgment for that of counsel addressing matters of trial strategy. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998).

On appeal, defendant contends that trial counsel was ineffective for failing to call the victim’s neighbor who established a “perfect alibi” for defendant. The neighbor gave a statement to police indicating that she heard a “pow or bang” sound at 3:30 a.m. on November 20, 2008. Additionally, the neighbor indicated that she saw someone bang on the victim’s door between 4:00 and 8:00 p.m. the day before. The victim’s friend gave a statement indicating that he knocked on the door the day that the victim was found, but there was no answer. These statements do not establish the factual predicate for a claim of ineffective assistance. A review of the record reveals that the victim was shot three times in the head. A neighbor’s statement that she heard a singular sound earlier that morning does not provide defendant with a perfect alibi. A review of the record reveals that trial counsel was aware of the statements that witnesses would provide at trial and was well aware of earlier statements given to police and at the preliminary examination because he impeached the witnesses at trial. On this record, defendant failed to meet the factual predicate for establishing his claim. *Hoag*, 460 Mich at 6.

Lastly, defendant alleges that the prosecutor’s statements during rebuttal were improper and denigrating and warrant a new trial. We disagree. When there is no objection and no request for a curative instruction in response to the prosecutor’s conduct during trial, appellate review is limited to ascertaining whether there was plain error that affected substantial rights.

People v Brown, 279 Mich App 116, 134; 755 NW2d 664 (2008). A prosecutor may not suggest that defense counsel is intentionally misleading the jury, but is free to argue the evidence and to respond to arguments made by defense counsel. *People v Unger*, 278 Mich App 210, 236-237; 749 NW2d 272 (2008); *People v Jones*, 468 Mich 345, 353-354; 662 NW2d 376 (2003). In the present case, defendant has failed to demonstrate plain error affecting substantial rights. Rather, a review of the prosecutor's rebuttal argument reveals that it was responding to arguments made by defense counsel. Further, the trial court instructed the jurors that the statements of counsel did not constitute evidence, and jurors are presumed to follow the instructions. *People v Parker*, 288 Mich App 500, 512; ___ NW2d ___ (2010).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray