

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 30, 2013

v

WALTER EDWARD STEPHENS, JR.,
Defendant-Appellant.

No. 310243
Genesee Circuit Court
LC No. 10-027998-FC

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of first-degree felony murder, MCL 750.316, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ Defendant was sentenced, as a third habitual offender, MCL 769.11, to life imprisonment for the felony murder conviction, 20 to 40 years' imprisonment for the armed robbery conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm because there was sufficient evidence to convict defendant and his trial counsel was not constitutionally deficient.

I. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence supporting his convictions. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). This Court considers the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find, beyond a reasonable doubt, that the elements of the crime were proven. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Felony murder predicated on armed robbery requires: “(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

¹ The jury found defendant not guilty of first-degree premeditated murder and carrying a concealed weapon.

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 [the statute, including armed robbery].” *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999) (citation omitted). To prove the crime of armed robbery, the prosecution must demonstrate: “(1) an assault, (2) a felonious taking of property from the victim’s presence or person, (3) while the defendant is armed with a weapon described in the statute.” *Id.* at 757 (citation omitted); see also *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). “Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime.” *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003) (citation omitted).

After reviewing the trial evidence, we conclude that there was sufficient evidence to support defendant’s convictions. A rational trier of fact could conclude that defendant was in the victim’s apartment, he participated in taking the television from the victim’s apartment, and he shot the victim in the process. Flint Police Sergeant David Bender saw defendant and another male near a white Chrysler Sebring parked by the apartment complex on July 7, 2010 around 12:45 pm. Each had his shirt around his face like a mask, and Bender saw the handle of a gun sticking out of defendant’s pocket. When Bender stopped his patrol car, the two men ran.²

When defendant was detained and arrested, he still had the gun, a .357-caliber Magnum revolver, in his front pocket and his shirt was around his shoulder. The trunk of the Chrysler contained a flat screen television, and defendant’s fingerprint was found on the television. The door to the apartment building was ajar, and the victim’s body was found in apartment nine. The victim’s apartment was disheveled and the television was missing from the entertainment center. The shirt defendant had when arrested had a pink stain on it, and police found an overturned cup containing a pink substance in the victim’s apartment. The pink stain on the shirt and the pink liquid in the cup were both food items and, although they contained many of the same compounds, each also contained one component not found in the other item. The expert who tested the two substances stated that the stain on the shirt could have been contaminated by other materials from the shirt. He could not say whether or not the stain was made by the liquid found in the apartment.

In addition, the bullet removed from the victim and the test bullet fired from the revolver that defendant possessed when arrested showed similar tool marks, indicating that the bullet that killed the victim was fired from the gun defendant possessed. Inside the white Chrysler Sebring, police found several live .38-caliber Specials rounds, which could be fired from a .357-caliber Magnum gun. The bullet removed from the victim was also in the .38-caliber class. The jury could infer malice from the use of the gun and the fact that defendant engaged in the armed robbery. *Carines*, 460 Mich at 759, 761 n 5.

² Although evidence of flight is insufficient to sustain a conviction when standing alone, it is probative evidence that supports an inference of consciousness of guilt. *People v Goodin*, 257 Mich App 425, 432, 432; 668 NW2d 392 (2003).

Moreover, several witnesses indicated that he was driving his girlfriend's white Chrysler Sebring that day. Defendant also made incriminating statements when he asked the police if they could "take him by his father's home" because defendant wanted to tell his father "goodbye because he wasn't going to see him for a long time."

Although defendant points to testimony by a different officer who admitted that he mistakenly testified at the preliminary examination that defendant was the suspect he arrested on July 7, 2010, and the suspect did not have a gun, the officer clarified at trial that he was mistaken and he actually arrested the other suspect, not defendant. We resolve any conflicting evidence in favor of the jury's verdict and we decline to disturb the jury's resolution of credibility issues. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *Harrison*, 283 Mich App at 377-378.

In addition, defendant's assertion that the other man must have had the gun used to kill the victim contradicted the trial evidence. The other man did not have a gun in his possession when arrested; only defendant did. Moreover, the test bullet fired from defendant's gun showed similar striation marks to the bullet found in the victim. Drawing all reasonable inferences in support of the verdict, this strongly suggested that defendant's gun was the one used to kill the victim. *Wolfe*, 440 Mich at 515.

Defendant also argues that Bender never saw defendant discard any shell casings and there were no casings in the gun when defendant was apprehended, suggesting that someone else shot the victim. The prosecution is not required to disprove "every reasonable theory consistent with innocence. Instead, the prosecution is bound to prove the elements of the crime beyond a reasonable doubt. . . . [The prosecution] need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide.'" *Nowack*, 462 Mich at 400, quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). Under the circumstances, the jury could reasonably have concluded that defendant disposed of any spent shell casings before Bender arrived. The fact that none were found does not render the case against defendant insufficient.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that his counsel's performance fell below that of constitutionally effective counsel when he failed to object to the investigating officer's testimony. Generally, a claim of ineffective assistance of counsel presents mixed questions of fact and constitutional law, which are reviewed for clear error and de novo, respectively. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Because this issue was not preserved in the trial court, our review is limited to any mistakes that are apparent on the record available. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In order to support a claim of ineffective assistance of counsel, a defendant must demonstrate that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136

(2012). Counsel is presumed to have rendered constitutionally effective assistance, and the defendant bears the burden of proving otherwise. *Lockett*, 295 Mich App at 187.

In the present case, the prosecutor questioned Flint Police Lieutenant Marcus Mahan, the officer in charge of investigating the case, regarding the gathering of DNA evidence, sending evidence in for testing, receiving reports from the laboratory, interviewing witnesses, and other actions he took as part of his investigation of the case. The prosecutor asked whether he had any other suspects in the case or whether he pursued any other suspects, and Mahan indicated that he did not. When the prosecutor asked why Mahan did not pursue any other suspects, he responded that “[t]here was [sic] no other suspects that we were advised of and all our—all the evidence pointed back to [defendant and the other man arrested that day].”

Opinion testimony by a lay witness is generally permitted if it is rationally based on the perception of the witness and helpful to the jury in gaining a clear understanding of testimony or a fact in issue. MRE 701. Nevertheless, “the issue of an accused’s guilt or innocence is a question for the trier of fact.” *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). See also *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007) (A witness may not comment on another witness’s credibility because credibility issues are for the jury to decide.).

Defense counsel did not render ineffective assistance in the present case. The prosecutor did not state that, in her personal opinion, defendant was guilty. See *People v Humphreys*, 24 Mich App 411, 418-419; 180 NW2d 328 (1970) (A prosecutor may not argue to the jury that he personally believes that the defendant is guilty or that the defendant would not be on trial if the prosecutor or police believed that the defendant was innocent). Nor did the challenged questions and testimony imply that the prosecutor had some special knowledge about Mahan’s truthfulness. *People v Bennett*, 290 Mich App 465, 476-478; 802 NW2d 627 (2010).

Mahan likewise did not offer his personal opinion regarding defendant’s guilt. Rather, his testimony related the actions he took with respect to his investigation. Under similar circumstances, this Court found no error when the prosecutor questioned the officer in charge about his investigation after defense counsel inquired whether the officer had shown witnesses pictures of other suspects. *People v Moreno*, 112 Mich App 631, 635-636; 317 NW2d 201 (1981). As in *Moreno*, the prosecutor’s questions in the present case responded to defendant’s assertion that the police focused him as a suspect because they could not catch the “real two guys” who were responsible. *Id.* at 635. Similarly, in *People v Heft*, 299 Mich App 69, 81-83; 829 NW2d 266 (2012), this Court concluded that the defendant’s counsel did not render ineffective assistance by failing to object to the officers’ testimony that they believed the defendant’s statement (that he was out for a walk) was untruthful, unreasonable, and did not make sense given that it was 1:30 a.m. and zero degrees outside. This Court held that the testimony did not constitute improper opinion about the defendant’s guilt because it explained their investigation from their personal perceptions. *Id.*

Accordingly, defendant has failed to demonstrate that counsel’s performance was deficient. *Trakhtenberg*, 493 Mich at 51. Because the prosecutor’s questions and Mahan’s responses were proper, counsel was not required to raise a futile motion or objection. *People v McGhee*, 268 Mich App 600, 627-629; 709 NW2d 595 (2005). Moreover, as stated *supra*, ample

evidence connected defendant to the crimes; defendant has not demonstrated a reasonable probability that the outcome would have been different, even assuming for the sake of argument that counsel should have objected. *Trakhtenberg*, 493 Mich at 51.³

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

³ Although defendant also argues that Mahan improperly testified regarding defendant's right to remain silent and his counsel failed to object to hearsay evidence, defendant failed to further elaborate upon these claims or otherwise cite controlling authority to support his contentions. Accordingly, defendant has abandoned these claims. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). In addition, defendant conceded in his brief on appeal that the hearsay related to uncontested facts and the trial court instructed the jury not to consider any testimony regarding defendant's refusal to give a statement.