

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 25, 2014

v

WILLIAM DEANGELO EVANS, JR.,

Defendant-Appellant.

No. 317353
Genesee Circuit Court
LC No. 12-030601-FC

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of two counts of second-degree murder, MCL 750.317. We affirm.

I. SUMMARY OF FACTS

On January 19, 2012, Flint Police Officers discovered the bodies of Amyre Aikins and Oscar Knuckles, Jr. in an unlit parking lot. An autopsy of Knuckles, Jr. established that he had been shot three times by a shotgun. He had shotgun wounds on his chest, abdomen, and head. The shotgun that fired the slugs that killed Knuckles, Jr. was recovered from defendant's home, and DNA testing established that defendant was a major donor of the DNA on the shotgun. Further, a firearm examiner testified that the shells recovered from the scene were fired from defendant's shotgun. Aikins had been shot six times. She had gunshot wounds on her abdomen, chest, forearm, upper back, middle back, and shoulder. A firearm examiner testified that several shell casings recovered from the scene were fired by a .380-caliber semiautomatic pistol that was recovered from codefendant, Steven Webster. After waiving his *Miranda*¹ rights, defendant gave a statement to the police. In the statement, he admitted to being present during the shooting. He said something to the effect that he asked codefendant for a gun and that he would do something if the "car" started shooting at him. He also said something to the effect that he heard shots ring out. However, in his statement, he did not expressly admit to shooting anybody.

II. SUFFICIENCY OF THE EVIDENCE

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In criminal cases, due process requires that the evidence must have shown the defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). Challenges to the sufficiency of the evidence are reviewed de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). Due process requires that when the evidence is viewed in the light most favorable to the prosecution, a reasonable trier of fact could find each element of the crime established beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). It is the trier of fact's role to judge credibility and weigh the evidence. *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011).

“In order to convict a defendant of second-degree murder, the prosecution must prove: ‘(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.’ ” *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) quoting *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). “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 wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* “Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *Id.* (quotation marks omitted). “The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences.” *Id.* Further, “[a]iding and abetting” describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime.” *People v Bulls*, 262 Mich App 618, 625; 687 NW2d 159 (2004). The elements of aiding and abetting 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 the aid and encouragement. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010); see also MCL 767.39.

Defendant argues that, while he admitted to having been present at the scene and his DNA was recovered from one of the two guns used in the shooting, there were “too many variables to be sure” that he was the shooter. At trial, a forensic scientist opined that if the shotgun had “a different owner and someone else shot the gun,” then determining who fired the gun would depend on “a lot of variables.” However, “[t]he evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide,” and “the prosecutor need not negate every reasonable theory consistent with innocence.” *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011).

Moreover, while the prosecution “need not present direct evidence linking a defendant to the crime in order to provide sufficient evidence to support a conviction,” *id.*, it did so in this case: the shotgun that fired the shells that killed Oscar Knuckles, Jr. was found in the closet in defendant's bedroom. The evidence admitted at trial showed that defendant was the major donor of the DNA found on the shotgun. Additionally, during his police interview defendant was shown a letter codefendant had written to him. The letter referred to the same model of vehicle (a Chevy Avalanche) that Knuckles, Jr. had been driving on the night of the shootings. In the letter, codefendant warned defendant to hide the shotgun. In his interview, defendant said he told codefendant to give him a gun because he thought someone in the car was going to try to do

something. He then said “that bullshit went down.” When Detective Herfert asked him to tell her about “the bullshit that went down,” defendant said he asked codefendant for a gun, but codefendant told him “no, I got this.” He then said that he said he was going to do something if the car started shooting at him; he told Detective Herfert that what he said to codefendant was not incriminating, but was something like give me a gun. He then said something to the effect that he heard “shots . . . ring out.” Viewed in the light most favorable to the prosecution, the evidence supports defendant’s convictions. First, based on the testimony that defendant was the major donor of the DNA on the shotgun that killed Knuckles, Jr. and the testimony that the gun was recovered from defendant’s house, the jury could infer that defendant fired the shotgun that killed Knuckles, Jr. Further, based on his statements that he asked codefendant for a gun and that he was going to do something to the people in the car, the jury could infer that he actually shot the gun, thereby killing Knuckles, Jr. Further, the firearm examiner testified that the .380-caliber shell casings found at the scene were fired by the pistol recovered after a police chase involving codefendant. From that evidence, the jury could reasonably have determined that defendant aided and abetted the murder of Aikins because defendant admitted to Detective Herfert that he asked codefendant whether he had a gun and because he said something to codefendant indicating that he wanted a gun so he could do something to the people in the car. The jury could have reasoned, based on this evidence, that defendant encouraged codefendant Webster to shoot Aikins and “intended the commission of the crime or had knowledge that [Webster] intended its commission at the time that the defendant gave aid and encouragement.” *Bennett*, 290 Mich App at 472. Considering the record evidence in the light most favorable to the prosecution, a rational jury could have found that each element of second-degree murder had been proved beyond a reasonable doubt. *Harverson*, 291 Mich App at 175.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his trial counsel rendered ineffective assistance when he failed to object to the prosecution’s reference to the anonymous tip that led to the search of defendant’s home. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move, in the trial court, for a new trial or a *Ginther*² hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Because defendant did not move for a new trial or a *Ginther* hearing, “our review is limited to mistakes apparent on the record.” *Id.*

The United States and Michigan Constitutions guarantee criminal defendants the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). “To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008); *Strickland v Washington*, 466 US 668,

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defense counsel is “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,” *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012), and is given “wide discretion in matters of trial strategy,” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009); *Strickland*, 466 US at 689.

Furthermore, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” US Const, Am VI; Const 1963, art 1, § 20. Out-of-court “testimonial” statements by nontestifying witnesses are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness. *People v Nunley*, 491 Mich 686, 698; 821 NW2d 642 (2012); *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Nontestimonial statements do not implicate the Confrontation Clause and are subject to traditional hearsay rules. *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008); *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Statements made to police investigators “are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Taylor*, 482 Mich at 377-378.

Here, when the prosecutor asked Detective Herfert how she had made the decision to search defendant’s house, Herfert testified that she had received an anonymous tip that “referenced the homicide and the subjects that were responsible for the homicide.” She said that in response to the tip, she went to defendant’s house. The content of the tip was never revealed. Even if this answer was testimonial, defendant’s rights under the Confrontation Clause were not violated because the information relating to the tip was introduced to explain why Detective Herfert took the steps she did and not to prove that she received the tip or that the tip accused defendant of being involved in the homicide. The Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Crawford*, 541 US at 59 n 9. Trial counsel is not required to advance a meritless position. *Ericksen*, 288 Mich App at 201.

Moreover, even if the statement had been erroneously admitted and trial counsel’s performance fell below an objective standard of reasonableness in failing to object, defendant cannot show that he was prejudiced by the error, as the remainder of the evidence against defendant, reviewed above, would have been considered by the jury in the absence of an explanation concerning how the investigation turned toward defendant. *Uphaus*, 278 Mich App at 185. Further, not objecting to this introductory question and answer may have been reasonable trial strategy to the extent that counsel did not want to draw undue attention to the source and content of the tip. Had the prosecutor sensed the trial court’s willingness to overrule defense counsel’s objections in this area, the jury could have heard more inculpatory evidence against defendant. This Court does not substitute its judgment for that of trial counsel on matters of trial strategy. *Payne*, 285 Mich App at 190.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood