

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES HENRY ARTHUR,

Defendant-Appellant.

UNPUBLISHED

September 29, 2005

No. 254056

Saginaw Circuit Court

LC No. 03-022745-FC

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions on two counts of first-degree premeditated murder, MCL 750.316(a), one count of conspiracy to commit first-degree premeditated murder, MCL 750.157a, 750.316(a), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, 750.529, carjacking, MCL 750.529(a), conspiracy to commit carjacking, MCL 750.157a, 750.529(a), felony firearm, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because his attorney did not adequately question a critical witness, did not call a critical witness, failed to properly use telephone record evidence, and failed to discover a letter referenced in a police report. After de novo review, we disagree. See *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). A trial counsel's decisions concerning which questions to ask a witness, what evidence to present, and whether to call or question witnesses are presumed to be sound trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to present additional evidence only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Here, all of defendant's ineffective assistance of counsel claims involve decisions that are presumed to be sound trial strategy and this Court does not second-guess such decisions with the

benefit of hindsight. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Further, he has failed to show that such strategy deprived him of a substantial defense. See *Daniel, supra*. In brief, (1) although defense counsel did not cross-exam Christine Ray regarding the discrepancies in her trial testimony compared to her statements to police, he discussed them at length in his closing statements which prevented her from testifying that she did not tell the police all that she knew until after she was granted immunity; (2) Vanessa Green's testimony would not likely have helped the defense; (3) the relevant telephone records were admitted into evidence; and (4) defendant has failed to properly argue the merits of the issue whether some alleged letter referenced in a police report should have been discovered. In sum, defendant has failed to overcome the presumption that his counsel's actions constituted sound trial strategy and he has failed to establish that the strategy deprived him of a substantial defense. Further, no factual dispute exists that a *Ginther* hearing might resolve in defendant's favor; thus, remand is not necessary. See *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973).

Next, defendant argues that repeated references to him as "Frank Nitty" was improper and denied him a fair and impartial trial. We disagree. Because the lay witnesses only knew defendant as "Frank Nitty," reference to this alias "was necessary to show that defendant was the person to whom the testimony pertained." See *People v Pointer*, 133 Mich App 313, 316; 349 NW2d 174 (1984); see, also, *People v Griffis*, 218 Mich App 95, 99; 553 NW2d 642 (1996).

Next, defendant argues that the trial court abused its discretion when it permitted inadmissible double hearsay in the form of statements made by his codefendant, Lou Smith. After review for an abuse of discretion, we disagree. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

In particular, defendant claims that (1) "[Shantell] Draine was allowed to testify that Smith took cell phone calls, and that he stated that the calls were from 'Frank Nitty;'" (2) "Bridgitt Neal was allowed to testify that, inside the Knights Inn motel, Smith was seen taking cell phone calls and then stated that they were from [defendant];" and (3) "though she hears no part of the conversation, Christine Ray is also allowed to testify that Smith tells her that [defendant] called and wanted them to go to the Inn after she observed the bodies in the Suburban."

With regard to the first two claims, they do not constitute double hearsay since Smith did not convey to Draine and Neal what defendant said. Further, under MRE 801(d)(2)(E), the statements are not hearsay because they were made by defendant's coconspirator, Smith, during the course of and in furtherance of the conspiracy. Evidence of the conspiracy included (1) the cell phone records indicating contact between defendant, Smith, and one of the victims days before and on the day of the murders, and (2) the eyewitness testimony that defendant and Smith were together on the day of the murders, discussed committing the murders, and both had guns, as well as blood on their clothes. See *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982). With regard to the third claim, it is unpreserved and, although it is double hearsay, defendant cannot establish that its admission constituted plain error affecting his substantial rights. See *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). Accordingly, this issue is without merit.

Next, defendant argues that the trial court should have granted his request to query the jury after they reached a verdict as to whether they were intimidated by codefendant Smith's family and friends who were sitting in the courtroom. We disagree.

A defendant tried by jury has a right to a fair and impartial jury. *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The right to a fair trial means that the jury deliberations and verdict must be based solely on evidence introduced at trial and not on extraneous factors or influences. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Accordingly, to establish error warranting reversal, the defendant must prove that (1) the jury was exposed to extraneous influences, and (2) there was a real and substantial possibility that these influences could have affected the jury's verdict. *Id.* at 88-89. Here, defendant has failed to prove that the jury was exposed to extraneous influences. That codefendant Smith's family and friends were allegedly in the audience at the beginning of the trial "staring or glaring" at the jury, in open court, alone, is too speculative to lead to a conclusion of intimidation. Thus, the trial court properly denied defendant's request.

Next, defendant argues that his murder and carjacking convictions were not supported by sufficient evidence. After de novo review, and viewing the evidence in the light most favorable to the prosecution, we disagree. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

It appears that defendant is claiming that the evidence did not establish that he participated in the murder and carjacking crimes because Ray's testimony was incredible and the phone records were deficient in that they do not indicate that defendant was the person placing the calls. However, all reasonable inferences and credibility determinations must be drawn in favor of the jury verdict. *People v Gonzalez*, 468 Mich 636, 640-641, 664 NW2d 159 (2003). Circumstantial evidence and reasonable inferences arising from the evidence may sufficiently prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In this case there was ample evidence of defendant's participation in the crimes. In brief, the evidence included: (1) Draine's testimony that (a) Smith picked up defendant and brought him to the motel room, (b) Draine heard Smith and defendant speaking about committing the crimes, (c) Smith and defendant left the motel and then later returned with blood on their clothes, wearing rubber gloves and, (d) shortly thereafter Draine saw the blood and dead bodies in the Suburban; (2) Neal testified that she spoke to defendant on Smith's cell phone, saw defendant in the motel room, and spoke to defendant on the motel phone several times that night; (3) Ray testified that she saw defendant at her house and drove him and Smith to the motel after they cleaned up a "mess," and later she saw defendant at the motel and he was wearing a jogging suit that she purchased from Kmart; (4) stereo and other equipment from the Suburban was found at Carlton Tinsley's house and Smith's house, and (5) the cell phone records indicate several calls placed by defendant and Smith to one of the victims days before the murder and on the day of the murder. In sum, there was sufficient evidence for a rational trier of fact to have found all the elements of murder and carjacking proved beyond a reasonable doubt.

Next, defendant claims that his post-conviction request for transcript excerpts from codefendant Smith's trial should have been granted. After review for an abuse of discretion, we disagree. See *People v Cross*, 30 Mich App 326, 336; 186 NW2d 398 (1971).

Pursuant to MCR 6.433(A), an indigent defendant taking an appeal of right is entitled to the transcripts of the underlying proceedings without cost. However, “where a defendant requests that the state provide him with a free transcript of the separate trial of a codefendant, the defendant must show that that transcript will be valuable to him.” *People v Brown*, 126 Mich App 763, 769; 337 NW2d 915 (1983). Defendant argued that the requested excerpts would allow him to impeach the credibility of some witnesses who testified at his trial. But, on appeal, this Court defers to the credibility determinations made by the jury and will not interfere with those determinations. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Therefore, defendant failed to establish that the requested excerpts of the transcripts would be valuable and the trial court did not abuse its discretion in denying the request.

Finally, defendant argues that the evidence did not support his carrying a concealed weapon conviction. We disagree. Defendant was charged in Count IX of the Information under MCL 750.227(2), which provides:

A person shall not carry a pistol . . . whether concealed or otherwise, in a vehicle operated or occupied by the person

There was sufficient evidence from which a jury could find, beyond a reasonable doubt, that defendant possessed a gun while operating or occupying a vehicle. In brief, first, Draine testified that Smith picked defendant up in his vehicle and defendant arrived at the motel with a gun. They then went in a vehicle to an apartment and got another gun before returning back to the motel. Second, the expert in serology testified that the female victim was likely in the back seat area when she was shot on the right side of her head. He also testified that the male victim was shot two times on the right side of his head, at close range, and was likely in the driver’s seat when he was shot. In light of this evidence, the jury could have determined that defendant was in the passenger seat of the Suburban when he shot either or both of the victims on the right side of their heads. In other words, viewed in the light most favorable to the prosecutor, there is evidence of at least two scenarios in which defendant could have had a gun “in a vehicle operated or occupied by” defendant. Therefore, a rational trier of fact could have found all the elements of the CCW charge proved beyond a reasonable doubt.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens