

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE JAMES LAMBERT,

Defendant-Appellant.

UNPUBLISHED

October 23, 2008

No. 276993

Washtenaw Circuit Court

LC No. 06-000389-FC

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

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321, arson of personal property between \$1,000 and \$2,000, MCL 750.74(1)(c)(i), and conspiracy to commit arson of personal property between \$1,000 and \$2,000, MCL 750.157a(a). He appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant advances claims of ineffective assistance of counsel. Because defendant did not move for a hearing below as to these claims, and because this Court denied defendant's motion for a remand, "review is limited to errors apparent on the record." *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). To establish a claim of ineffective assistance of counsel a defendant must show that: (1) counsel's performance was deficient, and (2) there is a reasonable probability that but for the deficient performance the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant first argues that trial counsel was ineffective in failing to call as witnesses at trial any of four people who, according to a police report, told officers that they heard what sounded like a woman screaming for help at the time of the incident. Defendant essentially indicates that such testimony would have been evidence suggestive of Rachel Brumbaugh having been at the scene of the arson underlying this case, consistent with the defense theory that she, rather than defendant, was or could have been the person who solicited the decedent to commit the arson. Initially, defendant's argument relies on an excerpt of a police report attached to his brief on appeal that is not part of the lower court record. Thus, a claim of ineffective assistance cannot be established on this basis because review of such a claim is limited to the record. *Pratt*, *supra* at 430. However, even considering the content of the excerpts of the police report provided by defendant, they are not adequate to establish an ineffective assistance of counsel claim. A defendant has the burden of establishing the factual predicate for such a claim. *Carbin*, *supra* at 600. Defendant has provided no indication whether trial counsel interviewed the

potential witnesses to ascertain how they would have actually testified regarding the screaming they apparently heard. Accordingly, defendant has failed to overcome the presumption that all decisions relating to the calling of witnesses is a matter of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant would have us speculate that these witnesses were not interviewed and that their testimony would have been helpful to the defense. However, it is possible that trial counsel interviewed these witnesses and concluded that their testimony would not be desirable because with further questioning they may have indicated much uncertainty about whether the screaming they heard was actually from a woman or man and, accordingly, their testimony may have been of little value and, if presented by the defense, a distraction from stronger points made by the defense. Also, on cross-examination, trial counsel asked Kasey Mathews if she told Detective Gordon Ralph that she heard a female screaming. Mathews did not give a clear answer in reply. Trial counsel could reasonably have concluded that this strongly suggested to the jury that Mathews had told Detective Ralph that she heard a woman screaming (regardless of whether it was actually proper for the jury to draw such an inference), and that it was more useful to the defense to leave it at that rather than present further testimony about the screaming.¹

Next, defendant argues that trial counsel was ineffective in failing to object to the latter part of Kamie Rutledge's testimony that Keith Jefferson told her he was going to blow up a car because "[h]e had to do a favor for Kay." Defendant acknowledges that the first part of the testimony, i.e., that Jefferson stated he was going to blow up a car, was admissible under the state of mind hearsay exception, MRE 803(3), as a statement of intent, but argues that the testimony that Jefferson stated he was doing so because "[h]e had to do a favor for Kay" was a "statement of belief" not within the scope of MRE 803(3) or any other hearsay exception. Defendant's argument is contrary to any reasonable application of the plain language of MRE 803(3). MRE 803(3) provides that the following is not excluded by the hearsay rule:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, *motive*, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. [Emphasis added.]

Jefferson's statement (as testified to by Rutledge) was not a statement of belief to prove a "fact" believed within the common meaning of fact as an event or circumstance that actually occurred. Rather than being a statement of belief about an actual fact, i.e., an objective occurrence, it is a statement of defendant's state of mind, specifically his motive for intending to blow up a car. Indeed, a statement of motive is specifically noted as being admissible under MRE 803(3).

¹ We also deny defendant's alternative request for a remand as to his claims of ineffective assistance of counsel because he has not reasonably supported that request given that he has provided only excerpts of police reports with no indication of any attempt to contact the relevant potential witnesses. It is also readily apparent that the claims of ineffective assistance of counsel below may be appropriately addressed from the existing record. See *People v Hernandez*, 443 Mich 1, 21; 503 NW2d 629 (1993) (motion to remand need not be granted if requirements of MCR 7.211(C)(1) are not met).

Thus, trial counsel was not ineffective in failing to object to Rutledge's testimony about the statement at issue as inadmissible hearsay because such an objection would have been futile. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant next contends that trial counsel was ineffective in opening the door to evidence that Rutledge and Brumbaugh had passed polygraph tests. However, we conclude, in light of the compelling circumstantial evidence tending to corroborate Brumbaugh's basic account implicating defendant in the arson, that there is not a reasonable probability that but for any deficient performance by trial counsel the result of the trial would have been different.

First, the testimony of Martina Williams, who as the victim of the arson lacked an apparent motive to lie, that defendant told her that he and Brumbaugh were in Detroit at the time of the incident, which was false under either the defense or prosecution theory of the case, is consistent with defendant having consciousness of guilt and wishing to provide a false alibi to Williams. Further, cell phone records indicated a substantial number of calls between two cell phones in Brumbaugh's names (one of which Brumbaugh indicated was used by defendant) in the early morning hours after the incident which was consistent with Brumbaugh's testimony that defendant was calling her to give her directions to take the decedent to the hospital in Detroit. A hospital employee indicated that it was a female who transported the decedent to the hospital, which is consistent with Brumbaugh's version of events. In addition, motel records indicated that defendant checked into a motel room in Belleville the night of the incident, which is highly consistent with consciousness of guilt and a desire not to be found in his home in the vicinity of the incident in Ypsilanti. It would be a remarkable coincidence for there to have been an innocent explanation for the unusual conduct of defendant having obtained a motel room so close to his home in Washtenaw County on the night of the incident. Finally, Rutledge testified to a man named "Kay," which Williams and Brumbaugh both testified was defendant's nickname, having come to the home where she and the decedent were living on the night of the incident, and to the decedent having told her that he was going to blow up a car because he owed "Kay" a favor. Even without regard to Rutledge having passed a polygraph test (and also discounting her identification of defendant), her testimony in this regard seems highly credible because it is difficult to imagine how she would have known defendant's nickname or why she would have provided this information incriminating him if defendant had not actually come to her residence that night. Considering all of this circumstantial evidence of defendant's involvement in the incident, together with Brumbaugh's testimony, there was compelling evidence of defendant's guilt such that there is not a reasonable probability that any deficient performance by trial counsel with regard to eliciting or opening the door to testimony that Rutledge and Brumbaugh had passed polygraph tests affected the outcome of the trial. Thus, defendant is not entitled to relief. *Carbin, supra* at 599-600.

Finally, in his supplemental brief on appeal, defendant argues his counsel was ineffective because Brumbaugh had interviewed defendant's trial counsel for possible representation relating to this matter. Thereafter, defendant entered into an attorney/client relationship with his trial counsel. Defendant maintains this interview by Brumbaugh created a conflict of interest

that impermissibly prejudiced defendant. We disagree. Significantly, defendant's trial counsel never represented Brumbaugh. Moreover, the record reveals that trial counsel effectively cross-examined Brumbaugh. We conclude there exists no legal merit to defendant's argument.

Affirmed.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens