

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK A. DAVIS,

Defendant-Appellant.

UNPUBLISHED

March 3, 2011

No. 295396

Grand Traverse Circuit Court

LC No. 09-010846-FH

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a; felonious assault, MCL 750.82; interfering with electronic communications, MCL 750.540(5)(a); domestic violence (second offense), MCL 750.81(3); and resisting or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of 12 to 30 years for the home invasion, 5 to 8 years for the assault, 32 to 48 months for the interfering with electronic communications, 239 days for the domestic violence, and 32 to 48 months for the resisting or obstructing. Defendant appeals as of right. We affirm.

Defendant's convictions arose from an incident in which he broke into the apartment of the victim, his ex-girlfriend. He assaulted the victim, took her cellular telephone, threatened her with a knife, and then fled. The police located defendant running away from the apartment and ordered him to stop. Defendant stopped, but then began to run again. The police eventually subdued defendant and found the victim's telephone in defendant's possession.

Defendant first argues that the trial court erred by scoring ten points for offense variable (OV) 19¹ for conduct that occurred after the sentencing offense. However, our Supreme Court recently rejected this argument in *People v Smith*, ___ Mich ___; ___ NW2d ___ (2010) (Docket No. 140371, decided December 29, 2010). In *Smith*, the Court concluded, "[b]ecause the

¹ OV 19 requires scoring 10 points if "the offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c).

circumstances described in OV 19 expressly include events occurring after a felony has been completed, the offense variable provides for the consideration of conduct after completion of the sentencing offense.” ___ Mich at ___; Slip op p 9 (internal quotation and citation omitted). According to *Smith*, the trial court properly scored OV 19.

Defendant also argues that his constitutional right to a public trial was violated on the first day of trial, when his family and friends were asked to leave the courtroom. Because this assertion of error was not raised below, we review the assertion for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We are unable to find any evidence in the lower court record indicating that defendant’s family and friends were asked to leave the courtroom. Even assuming they were asked to leave, there is no indication that the trial court closed the courtroom to the remaining public during jury voir dire or during trial. Moreover, arguing this matter for the first time on appeal is untimely and precludes the grant of relief. *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (2010) (Docket No. 292385, slip op p 7), lv app pending, citing in part *Presley v Georgia*, 558 US ___; 130 S Ct 721, 723-724; 175 L Ed 2d 675 (2010).

Defendant next argues that the prosecutor committed misconduct when she gave the victim audio recordings of defendant’s jailhouse phone calls. We review this preserved issue de novo to determine whether defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). We find no impropriety here. The recordings included defendant’s conversations with another woman. Defendant does not assert that the victim was goaded by the recordings into offering perjurious testimony. Rather, defendant argues that the victim’s testimony was compromised, because her in-court demeanor had been affected by the recordings. Defendant offers no authority, however, for the proposition that influencing a witness’s demeanor constitutes prosecutorial misconduct. We note that the jury was apprised that the prosecutor gave the recordings to the victim, and that the victim testified about listening to the recordings. The jury was thus able to assess the victim’s in-court demeanor. We cannot undermine the jury’s assessment. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Defendant next argues that he was denied a fair trial on the ground that the prosecutor failed to present a proper foundation for admission of the recordings. Defendant’s argument is based on an outdated test announced in *People v Taylor*, 18 Mich App 381; 171 NW2d 219 (1969), which our Supreme Court overruled in *People v Berkey*, 437 Mich 40; 467 NW2d 6 (1991). *Berkey* concluded that MRE 901 controlled authentication of such recordings. *Id.* at 50-51.

MRE 901(a) provides, “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Before trial, in response to defendant’s request, the prosecutor provided a detailed account of 21 different jail conversations that she intended to introduce. At trial, a police officer testified regarding the recording procedure. The officer said that the recording system warns the inmates that the calls are being recorded. He verified that the system accurately records the number dialed, that he had listened to the CD that was to be entered into evidence, and that he believed the recorded calls came from a particular phone number. The officer also identified defendant’s voice on the recordings. Further, after defense

counsel cross-examined the officer regarding the authenticity of the recordings, counsel agreed with the prosecutor's representation of the identities of the participants recorded. This evidence was sufficient to authenticate the calls. See MRE 901(b)(6).

Lastly, defendant argues that he was denied his right to the effective assistance of counsel. Defendant contends that defense counsel failed to investigate all 27 hours of the recordings of defendant's jailhouse phone calls, failed to present exculpatory evidence contained in the recordings, failed to object to admission of the recordings, and failed to present additional exculpatory and supporting evidence. Defendant continues that counsel failed to preserve the issue of the ejection of defendant's family and friends from the courtroom.

To establish ineffective assistance of counsel, defendant bears the burden of showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated defense counsel's conduct. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Further, a reviewing court will not assess trial counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant's argument that his attorney failed to investigate the 27 hours of recorded phone calls is without merit. Defense counsel stated on the record that he was able to listen to all 27 hours of recordings. Defendant also asserts that counsel should have objected to "this improper evidence," but defendant fails to explain why he believes the evidence was improper. We assume defendant is asserting the same foundational arguments he asserted on the merits, which we have rejected. Given our rejection of defendant's arguments, we cannot deem counsel ineffective for failing to object to the recordings. See *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004) (counsel cannot be faulted for failing to make a futile or meritless objection).

Also meritless is defendant's assertion that defense counsel failed to obtain and present evidence that defendant lived in the victim's residence. Defendant maintains that counsel should have subpoenaed his former landlord, who would have verified that defendant and the victim broke their lease in order to move into the residence where the home invasion occurred. If this is so (and there is no evidence in the record that it is), the information would have been readily available to defendant. The same is true of defendant's assertion that he was receiving legal notices at the victim's residence regarding hearings scheduled on his breaking of the lease with the former landlord. Counsel cannot be deemed ineffective for failing to discover information readily available to defendant.

Similarly flawed is defendant's claim that his counsel was ineffective for failing to examine photographs and medical reports depicting the victim's alleged wounds. We find no persuasive evidence in the record to indicate that these photographs and records would have contradicted the victim's assertions of injury. Finally, as discussed above, the record does not support defendant's assertion that the trial court instructed his family and friends to leave the

courtroom on the first day of trial. In any event, defendant fails to explain how the result of his trial would have been different had his family and friends been in the courtroom.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Patrick M. Meter