

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEQUIEANTIA RAMONE MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED

April 12, 2011

No. 295358

Oakland Circuit Court

LC No. 2009-227031-FC

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of second-degree murder, MCL 750.317, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

This case arose from a double homicide that took place in Pontiac. The victims were found dead in the front seats of a parked vehicle. Each victim was shot once in the head. Two spent .22 caliber shell casings were found in the vehicle, one on the driver's side and one on the passenger's side of the vehicle. It was determined that both shell casings were fired from the same gun. Defendant admitted to the police that he fired shots into the vehicle, but indicated that he did so in self-defense after the passenger pulled out a gun and shot at him while defendant was in the back seat of the vehicle. According to defendant, it was after he jumped out of the vehicle that he fired shots into the car, dropped his .22 caliber gun, and took off running. He had believed that he was going to be robbed by the victims. The police investigation failed to reveal any evidence that defendant was shot at while he was in the back seat of the vehicle, i.e., there were no bullet holes inside the vehicle or the seat cushions, and the windows were not broken. Defendant's gun was never recovered.

Defendant was charged with two counts of first-degree murder, on alternative theories of premeditation and felony murder predicated on robbery or attempted robbery. See *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). The prosecution's theory of the case was that defendant shot the victims in the course of a drug transaction and robbery or

attempted robbery. Defendant presented a theory of self-defense. During the course of the trial, a witness named Johnaquin Keys was called by the prosecution. Outside the presence of the jury, Keys invoked his Fifth Amendment privilege against self-incrimination.

Then, during cross examination of Detective Jeff Buchmann, of the Pontiac Police Department, Buchmann was asked if he interviewed Keys, and Buchmann replied that he did not, but that Sergeant Hunt interviewed him. On redirect examination, Buchmann was questioned about Keys as follows:

Q. Along with, Anthony, this Johnaquin Keys, the one [defense counsel] talked about. I want to talk about him a little bit, Mr. Keys. You spoke with Mr. Keys; did you not?

A. Yes, I did.

Q. Give you some information about potential, a robbery? Not you, I mean Sergeant Todd did; yes?

A. Yes, Hunt.

Q. Sergeant Hunt?

A. Sergeant Hunt interviewed him and then relayed the information that he got to me.

Q. And your investigation from that discussing with Mr. Keys talking to that witness indicated a potential robbery; yes?

A. Yes.

Q. Do robberies like this sometimes go bad?

A. Oh, yes.

Sergeant Hunt did not testify at the trial. During closing arguments, the prosecution referenced the testimony of Detective Buchmann, including that through his investigation it was determined that “[i]t was a plan to rob.” The jury returned a verdict finding defendant guilty of two counts of second-degree murder and two counts of felony firearm.

On appeal, defendant argues that his trial counsel’s failure to object to the hearsay testimony about an alleged plan to rob constituted ineffective assistance of counsel. In the alternative, defendant argues that the admission of this hearsay testimony constituted plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). In showing that counsel's representation was deficient, a defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy under the circumstances. *Id.* at 687.

We agree with defendant that his counsel's failure to object to the challenged testimony constituted performance below an objective standard of reasonableness. To the extent that the declarant was implicating defendant in criminal conduct, such communication was testimonial in character and thus inadmissible even if some hearsay exception applied. See *Crawford v Washington*, 541 US 36, 53-54, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). But a hearsay exception did not apply. Detective Buchmann's testimonial account of what Sergeant Hunt had told him that Mr. Keys had told Sergeant Hunt is clearly not admissible under any hearsay exception. See MRE 803-805. Further, the presumption that counsel's failure to object constituted sound trial strategy is defeated. The failure to object to inadmissible motive testimony did not constitute sound trial strategy. Nevertheless, defendant has not established the requisite prejudice. He has not shown there is a reasonable probability that, but for counsel's failure to object to the hearsay testimony, the result of the proceedings would have been different.

Defendant was charged with two counts of first-degree murder, on alternate theories of premeditation and felony murder predicated on robbery or attempted robbery. However, the jury rejected both of these charges and, therefore, the evidence of robbery or attempted robbery. The felony murder charge was the only charge that put the question of robbery at issue and defendant was not convicted on that charge. Defendant argues, however, that the inadmissible hearsay testimony also supplied the motive for the murders—robbery.

It is true that, while not necessarily an element of murder, proof of motive may be relevant to establish the requisite intent of the crime. *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). Here, defendant was found guilty of two counts of the lesser included offense of second-degree murder. The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "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 willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464.

In this case, defendant admitted that he fired shots into the victims' vehicle, at very close range, and in the direction of both victims. Clearly, the first three elements of second-degree murder were established even without any reliance on the inadmissible hearsay testimony, i.e., the requisite intent—malice—was established without the "motive testimony." And although defendant argued that he fired the shots in self-defense, this theory was rejected by the jury, just as they rejected the prosecution's robbery theory. Thus, there is no reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Further, even if we concluded that the admission of the hearsay testimony constituted plain error, we would not reverse defendant's convictions because we are not persuaded that he is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Carines*, 460 Mich at 763.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto