

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY LEE BERRY,

Defendant-Appellant.

UNPUBLISHED

July 27, 2006

No. 259431

Wayne Circuit Court

LC No. 04-003608-01

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction for first-degree felony murder, MCL 750.316(b), assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to life in prison on his felony-murder conviction, to 15 to 25 years in prison for his assault with intent to rob while armed conviction, and to two years in prison for his felony-firearm conviction. We affirm.

On September 5, 2003, Antoine Hamilton shot and killed Octavio Hernandez during an attempted robbery at a gas station. Hamilton testified that it was defendant's idea to rob Hernandez and that defendant supplied the gun used in the robbery. According to Hamilton, he and defendant were driving around when defendant pulled into the gas station where Hernandez was pumping gas. Hamilton testified that defendant handed Hamilton the gun and told Hamilton to rob Hernandez. Hamilton approached Hernandez and asked for his money, and when Hernandez did not respond, Hamilton shot him.

Defendant argues that the prosecution violated both his Fifth Amendment right to remain silent and his right to due process by commenting on his failure to testify at trial. A prosecutor may not comment on a defendant's post-arrest silence. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003); *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). Prosecutorial comments, however, must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

During her rebuttal argument, the prosecutor stated that defendant had an "absolute right to say I am not guilty." The trial court initially interrupted the prosecutor and chastised her for commenting on defendant's silence. Upon further review, however, the trial court conceded that

it misunderstood the prosecutor's remarks and that they did not constitute a comment on defendant's silence. As the trial court correctly found, the prosecutor did not comment on defendant's decision not to testify and simply noted that defendant had an absolute right to maintain his innocence, which assertion is a basic proposition of criminal law. The prosecutor made the remark when she emphasized that defendant was being tried and had not admitted to the commission of a crime. Moreover, the prosecutor acknowledged that it was her burden to prove beyond a reasonable doubt that defendant was guilty of the crimes charged, a fact that the trial court repeated throughout the proceeding. Therefore, the prosecutor's remarks, considered in context, did not constitute an impermissible comment on defendant's silence.

Defendant argues that the trial court erred when it admitted the hearsay testimony of Kathy Carthron. The prosecutor concedes that the trial court may have erred in admitting the challenged testimony, but he asserts that any error was harmless. We agree.

An error in the admission of evidence is not ground for reversal unless, after reviewing the entire record, it affirmatively appears that it is more probable than not that such error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999); *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). Carthron testified that she heard Shaquita Mack tell her mother that Hamilton told her that defendant told him to shoot Hernandez. However, Hamilton himself denied making the comment and he testified that, while defendant told him to go rob Hernandez, defendant did not know that Hamilton was going to shoot Hernandez. In fact, Hamilton claimed that he did not intend to shoot Hernandez when he left the car. Similarly, Carthron's testimony differed from Mack's testimony regarding Hamilton's post-robbery statements. Because Carthron's testimony is inconsistent with the remainder of the evidence presented by the prosecution and the remainder of evidence was clearly sufficient for the jury to find that defendant aided and abetted Hamilton in the robbery, defendant cannot establish that the outcome of his trial would have been different if Carthron's testimony not been admitted. *Lukity, supra*.

Defendant asserts that the trial court abused its discretion when it admitted Hamilton's testimony that, after the failed attempt to rob Hernandez, defendant, with a gun in his pocket, approached a man at another gas station and intended to rob him. Defendant characterizes this testimony as other-acts evidence introduced to show his alleged bad character and propensity to commit the offense. He asserts that it the testimony was inadmissible under MRE 404(b) and was irrelevant and unfairly prejudicial. We disagree.

Defendant's conduct after the shooting was part of a continuous time sequence and displayed the same single intent and goal—to obtain money—as the attempted robbery of Hernandez. Therefore, that conduct is part of the same criminal episode or transaction that included Hernandez's murder. *People v Rodriguez*, 251 Mich App 10, 17; 650 NW2d 96 (2002). Accordingly, the evidence constitutes part of the *res gestae* of the charged offenses and the trial court correctly admitted it. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978); *People v Castillo*, 82 Mich App 476; 266 NW2d 460 (1978).

Moreover, Hamilton's testimony was relevant to establish defendant's intent and was not unfairly prejudicial. Evidence is generally relevant if it has any tendency to make the existence of a fact that is of consequence to the case more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Thus,

evidence is admissible if “it is helpful in throwing light on any material point.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Defendant’s subsequent attempt to rob someone at another gas station in a similar manner as Hamilton’s failed robbery of Hernandez has a tendency to make it more probable than not that defendant was involved in the attempted robbery of Hernandez and in the manner Hamilton described. The evidence demonstrated that defendant’s theory that Hamilton acted on his own in the Hernandez robbery after defendant sent him into the store to buy cigarettes, was less probable than the prosecutor’s theory that defendant aided and abetted Hamilton.

While relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence, *Aldrich, supra* at 114, evidence is not unfairly prejudicial simply because it is damaging to the defendant’s position at trial. *People v Houston*, 261 Mich App 463, 468; 683 NW2d 192 (2004), *aff’d on other gds*, 473 Mich 399 (2005). All relevant evidence will be damaging to the extent it tends to prove that the defendant is guilty of the charged offense. *Id.* Unfair prejudice is evidence having “an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.” *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Again, the disputed testimony was clearly relevant to establish defendant’s role in the earlier failed attempt to rob Hernandez, and there is no indication this testimony had any undue tendency to move the jury to decide the case on an improper or emotional basis. Therefore, the evidence was not inadmissible. MRE 403.

Defendant further argues that he was deprived of the effective assistance of counsel at trial because his retained counsel slept during jury instructions and closing argument, left the courtroom during the prosecutor’s rebuttal argument, and failed to obtain jail records to impeach Hamilton’s testimony that defendant initiated an altercation between Hamilton and defendant while the two were incarcerated. We disagree.

To establish ineffective assistance of his trial counsel, a defendant must show that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel’s errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his trial counsel’s performance was deficient, “defendant must overcome the strong presumption that his counsel’s action constituted sound trial strategy under the circumstances.” *Toma, supra* at 302. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Before trial, it became known that defendant’s retained counsel was facing criminal drug charges. Defendant was aware of his counsel’s circumstances and repeatedly stated that he wished to stay with his counsel. The trial court took the precautionary step of affording defendant appointed counsel to act as co-counsel throughout the proceedings. Appointed counsel filed pre-trial motions and was present at counsel’s table throughout the trial, including during jury instructions and closing arguments. Appointed counsel actually raised a concern with the jury instructions after they were read and the trial court addressed the concern.

Appointed counsel also moved for a mistrial based on the prosecutor's comments during rebuttal. We find that the record amply demonstrates that appointed counsel was present and took action on defendant's behalf at all times that defendant's retained counsel was allegedly absent or asleep. Defendant was fully represented by competent counsel, and he does not argue that his appointed trial counsel was ineffective. Therefore, defendant cannot demonstrate prejudice arising from his retained counsel's conduct. *Toma, supra*.

Defendant also asserts that his retained trial counsel was ineffective for failing to obtain jail records that would have impeached Hamilton's testimony that defendant initiated an altercation between the two men at the jail. Decisions regarding what evidence to present are presumed to be matters of trial strategy, and the failure to present evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1994).

Hamilton testified that defendant initiated the altercation. However, Hamilton acknowledged that he spent time in segregation as a result of the fight, and another inmate testified that Hamilton had admitted that he actually initiated the fight by hitting defendant in the mouth. Therefore, the jury was presented with evidence indicating that, contrary to his testimony, Hamilton initiated the altercation with defendant. Accordingly, defendant cannot establish that he was deprived of any substantial defense by retained counsel's decision not to introduce additional evidence that addressed the same issue. *Dixon, supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper