

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS WAYNE MEXICOTT,

Defendant-Appellant.

UNPUBLISHED

April 3, 1998

No. 195720

Monroe Circuit

LC No. 95-26970-FC

Before: Young, Jr., P.J., and Michael J. Kelly and Doctoroff, JJ.

PER CURIAM.

Defendant was charged and convicted of first-degree murder, MCL 750.316; MSA 28.548, carjacking, MCL 750.529a; MSA 28.797(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2) following a four-day jury trial . He was sentenced to life imprisonment without the possibility of parole for the murder conviction, life imprisonment for the carjacking conviction, and two years' imprisonment, to be served consecutively, for the felony-firearm conviction. He appeals as of right. We affirm.

First, defendant argues that the trial court erred in finding that the Monroe police had probable cause to believe that defendant had committed this murder. In reviewing a claim that a police officer lacked probable cause to arrest, the reviewing court must determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspect has committed a felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *People v Harper*, 365 Mich 494; 113 NW2d 808 (1962). The lower court's determination that probable cause existed is reviewed for abuse of discretion. *People v Wirth*, 87 Mich App 41, 44; 273 NW2d 104 (1978).

The trial court did not abuse its discretion in determining that the arresting officers had probable cause to believe that defendant had committed a felony. Defendant and Tony Raper were identified by two witnesses as the last people to be seen with the victim, Raymond Jablonski, before his body was discovered, they had subsequently been reported to be in possession of the Blazer that Jablonski had borrowed from his sister and that she had reported missing just hours after his murder, and defendant

was seen with a shotgun as he, Raper and Jablonski left witnesses David Boudrie and Dolly Fisher, never to return.

Defendant contends that the police had seen the autopsy by the time they arrested defendant, and because the autopsy placed the time of death as sometime around 9:00 a.m. on July 14, the police could not have probable cause to believe defendant was a suspect. However, defendant provides no support for this argument, and it is therefore insufficient to negate the probable cause that resulted from the other information obtained in the police investigation.

The second issue raised is whether the arrest violated MCL 764.15; MSA 28.874 because Monroe police did not communicate the facts establishing probable cause to the Muskegon police. The trial court's finding that the officers had probable cause to execute a warrantless arrest will not be reversed absent an abuse of discretion. *People v Carey*, 110 Mich App 187, 194; 312 NW2d 205 (1981).

MCL 764.15(f); MSA 28.874(f) allows the police to arrest a suspect without a warrant in a situation in which they have received a broadcast of information from another police agency detailing the facts that give probable cause to arrest that suspect. That is exactly what happened here. Both the testimony presented at trial and the police report make it clear that the Muskegon police had sufficient "positive information" by way of the broadcast from the Monroe police to support the warrantless arrest that was effected. The trial court did not abuse its discretion in finding probable cause for Muskegon police to conduct this warrantless arrest.

Third, defendant argues that the trial court erred in finding that the Muskegon police arrested defendant pursuant to a valid search warrant because the state failed to provide any evidence that Monroe Police informed Muskegon of any warrant prior to defendant's arrest. Based on the conclusion that there was sufficient probable cause to arrest defendant for Jablonski's murder, this issue need not be reached.

Fourth, defendant argues that he was denied effective assistance of counsel. The *Strickland* test "places the burden on the defendant to show, with regard to counsel's performance, 'that [1] counsel made errors so serious that counsel was not functioning as 'the counsel' guaranteed the defendant by the Sixth Amendment . . . [and] that [2] the deficient performance prejudiced the defense.'" *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant claims that he was denied his right to allocution by his attorney's advice not to address the court during sentencing. Defense counsel stated that he had instructed his client that the court did not have any discretion with respect to sentencing defendant to life without parole, and that defendant should remain silent. Though defendant's right of allocution requires strict compliance, and the court must specifically ask the defendant separately if he wishes to address the court, *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980), defense counsel's advice in this matter did not result in a denial of defendant's constitutional rights. The trial court gave the defendant, defense counsel, the prosecution, the victim, and anyone on behalf of the victim the chance to speak, as required, and

strictly complied with defendant's rights. Though defendant may have been ill-advised to not participate in this fundamental element of sentencing, defendant cannot show that this deficient performance prejudiced the defense. Though the trial court retained discretion with respect to the sentence imposed for the carjacking conviction, it had no discretion with respect to the murder sentence. Accordingly, defendant's ability to influence the judge with respect to the remainder of his sentence would not have changed the outcome. Defendant was not denied his right to effective assistance of counsel.

Defendant also argues that defense counsel failed to effectively voir dire the jurors to elicit information about if and how the media influenced their objectivity. Defendant fails to show that defense counsel's error was so serious as to prejudice defendant, and that the outcome of the case would have been different but for defense counsel's failure to ask certain questions.

Finally, defendant argues that defense counsel failed to perform adequately by deciding not to subpoena Lieutenant Parker to testify about what facts he knew before arresting defendant. Additionally, defendant states that counsel failed to cross-examine Detectives Redmond and Snow as to what was actually communicated to Muskegon vis a vis probable cause or warrants. First, given this Court's conclusion that there was sufficient probable cause to uphold defendant's arrest, the issue of what Parker knew with respect to the warrants or what Snow and Redmond communicated to Muskegon is irrelevant. Moreover, decisions as to what evidence to present and whether to call or question witnesses are presumed to be a matter of trial strategy, *People v Mitchell*, *supra*, 454 Mich 163, and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). These decisions made by defense counsel were a matter of sound trial strategy and do not constitute ineffective assistance of counsel.

Fifth, defendant argues that the trial court abused its discretion when it admitted testimony regarding gang practices. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Defendant objected to certain evidence offered at trial by Sergeant Berg that was intended to provide background information about gang activity and the meaning behind the type of murder that was at issue in this case. We believe that the descriptions of gang-identifying characteristics was relevant to certain testimony presented at trial. The issue of gang membership was central to the prosecution's explanation about the motive for this murder. Moreover, Sergeant Berg's testimony was not so excessive or inflammatory that the probative value was substantially outweighed by the prejudicial effect. His testimony was limited to the facts necessary to explain defendant's participation and motives and was presented in an unbiased, informational manner. The admission of Berg's testimony was not an abuse of discretion.

Finally, defendant argues that the state failed to prove the essential element of carjacking that Jablonski's car was taken by the use of force and in Jablonski's presence. Defendant argues that the evidence shows that Jablonski voluntarily left his car and the first use of force upon Jablonski occurred one-half mile from his car. This issue has recently been addressed by this Court in the case involving defendant's co-defendant, Tony Raper. This Court, in *People v Raper*, 222 Mich App 475; 563 NW2d 709 (1997) held that the "presence" requirement of the carjacking statute was met on the facts of this case. Defendant, in his statement to the police, admitted that Raper shot Jablonski "so that he could take his truck and leave, and he could get more status in the gang." Therefore, it is reasonable for the jury to conclude that, "but for defendant's act of violence, Jablonski would have retained his control over the Blazer, despite that the automobile was at least two hundred yards away." *People v Raper, supra*, 222 Mich App 483. Consequently, the evidence was sufficient to support the jury's finding that the State proved the elements of carjacking, including the "presence" requirement, beyond a reasonable doubt.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff