STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WATKINS,

Defendant-Appellant.

UNPUBLISHED
April 14, 1998

No. 190187
Recorder's Court
LC No. 94-008319 FC

Before: Holbrook, Jr., P.J. and White and R.J. Danhof,* JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of three counts of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of thirty to sixty years' imprisonment for the second-degree murder convictions and a consecutive two-year term for the felony-firearm conviction. We reverse.

We first consider defendant's claim that insufficient evidence was presented to support his second-degree murder convictions. When determining whether sufficient evidence was presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Credibility is a matter for the trier of fact to ascertain and this Court will not resolve it anew. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

In order to convict a defendant of second-degree murder, the prosecution must prove that that the defendant caused the death of another person with malice and without justification, mitigation or excuse. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Malice may be established by showing either (1) an intent to kill, (2) an intent to inflict great bodily harm, or (3) an intent to create a

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

very high risk of death with knowledge that the act probably will cause death or great bodily harm. *Id.* A person who aids and abets the commission of a crime is guilty as a principal. MCL 767.39; MSA 28.979. To support a finding of guilt under an aiding and abetting theory, the prosecution must show (1) that the crime charged was committed by the defendant or some other person, (2) that the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) that the defendant intended the commission of the crime or had knowledge that the principle intended its commission at the time he gave aid or encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

In this case, the evidence revealed that three individuals were shot to death while inside a car that had just pulled out of the driveway of Terrance Young's house. Terrance Young was one of the three individuals who was killed. The three victims sustained a total of eleven gunshot wounds. According to Derrick Harris, who was present in the car, the "gunshots just started coming into the car." Officer Rudolph arrived at the scene and observed shell casings on the ground in the vicinity of the shooting. They were "long casings" and, according to Rudolph, "appeared to be from a rifle of some sort." A witness, Donald Hall, testified that he saw defendant on the night of the shooting; he was at a house with three or four others and was carrying a long, rifle-size gun. Hall heard defendant make a statement about not needing one of the others to carry some guns or clips. The prosecutor also called Tracey Hardy as a witness. Although Hardy denied having any conversation with defendant on the day after the shooting, the prosecutor presented Hardy's preliminary examination testimony wherein Hardy testified that defendant told him that he and Maria Penkins had gone over to Terrance Young's house and "there was some shooting." Viewed most favorably to the prosecution, this evidence was sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that defendant was involved in the shooting deaths of the three victims, either as a direct participant or as an aider and abettor, and that he participated in the offense with an intent to cause either death or inflict great bodily harm. Accordingly, there was sufficient evidence to support defendant's second-degree murder convictions.

We next consider defendant's claim that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To show deficient performance, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must also overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Stanaway*, *supra* at 687-688. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Pickens*, *supra* at 314. Defendant need not show that counsel's deficient conduct more likely than not altered the outcome. *Strickland*, *supra* at 693.

Defendant first argues that defense counsel was ineffective because he failed to present an alibi defense. We disagree. A defendant is entitled to have his counsel prepare, investigate, and present all

substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990) To prevail at a post-trial evidentiary hearing, a defendant alleging ineffective assistance of counsel based on trial counsel's failure to present a defense must show (1) that he made a good-faith effort to avail himself of this right and (2) that the defense of which he was deprived was substantial. *Id.*; *People v Hubbard*, 156 Mich App 712, 714-715; 402 NW2d 79 (1986); *People v Lewis*, 64 Mich App 175, 183-185; 235 NW2d 100 (1975). A substantial defense is one that might have made a difference in the outcome of the trial. *Kelly*, *supra*. At the post-trial hearing in this case, defense counsel testified that she did not present an alibi defense because defendant never informed her that he had an alibi. Defendant did not testify at the hearing. Although defendant's girlfriend testified that she informed defense counsel of her willingness to testify as an alibi witnesses, a fact defense counsel denied, the trial court found that any such contact did not occur until after the trial had begun, at which time it was too late to file a notice of alibi. On this record, we conclude that defendant has failed to show that he made a good-faith effort to communicate his desire to assert an alibi defense. Accordingly, ineffective assistance of counsel has not been established. *Kelly*, *supra* at 526; see also *People v Herndon*, 98 Mich App 668, 673-674; 296 NW2d 333 (1980).

Second, defendant argues that defense counsel was ineffective for failing to object to Officer Rudolph's opinion testimony regarding the source of the spent shell casings (i.e., that they appeared to be from "a rifle of some sort"). We disagree. A witness not testifying as an expert may testify in the form of an opinion when the opinion is rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or to a determination of the fact at issue. MRE 701; *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988), modified on other grounds, 433 Mich 862 (1989). In this case, Officer Rudolph's opinion testimony was based on his observation of the shell casings. Moreover, even if defendant had objected to Officer Rudolph's testimony, it is possible that Officer Rudolph could have provided a sufficient foundation for his opinion testimony, especially considering that he was a police officer and presumably had experience with firearms. Defendant did not present any evidence at the post-trial hearing suggesting that Officer Rudolph was not competent to provide the testimony in question. On this record, we conclude that defendant has failed to establish a reasonable probability that an objection to Officer Rudolph's testimony would have resulted in its exclusion. Accordingly, ineffective assistance of counsel has not been established.

Finally, defendant argues that defense counsel was ineffective because she stipulated that David Pauch, a firearm's expert, examined the recovered shell casings and determined "that they were from a long gun." We agree. Contrary to defense counsel's stipulation, Pauch's report does not indicate that the shell casings came from a long gun. Moreover, trial counsel's testimony at the post-trial hearing reveals that the decision to stipulate to Pauch's testimony was based on a misunderstanding of the evidence rather than on any notion of trial strategy.

The trial court ruled that defense counsel's erroneous stipulation did not constitute ineffective assistance of counsel because, even if there had been no stipulation, the prosecutor could have called Pauch as a witness and had him testify "that the casings did probably come from a long gun." However, the record does not factually support this conclusion. At the post trial hearing, Pauch testified that he was never asked to make a determination as to the type of weapon used to fire the recovered

shells. He also testified that he never informed the police or the prosecutor that the shells came from a long gun. More significantly, while Pauch admitted that it was possible that the shells came from a "long gun," he also stated that he was unable to give any probability as to whether a long gun was the most likely source of the shells.[1]

By stipulating to nonexistent evidence probative of defendant's guilt, we conclude that trial counsel's performance was deficient. *Strickland*, *supra* at 690-691. We also conclude that defendant was prejudiced by the erroneous stipulation. The evidence linking defendant to the crimes in question was entirely circumstantial and by no means overwhelming. The stipulation was significant because it established that the recovered shells were consistent with the type of gun that defendant was observed carrying on the night of the shooting. Indeed, the trial court's guilty verdict was based, in part, on a finding that "*in fact* they were shells from a long gun." This finding, while supported by the erroneous stipulation, does not conform to the undisputed testimony at the post-trial hearing. Although Officer Rudolph testified at trial that the shell casings "appeared to be from a rifle of some sort," this opinion was based on a casual observation of the shells rather than a careful inspection. Moreover, Officer Rudolph admitted that he did not get a really good look at the shells. More importantly, the stipulation carried more weight because, unlike Officer Rudolph, David Pauch was held to be an expert in firearms identification, and Pauch's testimony was offered as a stipulation rather than contested evidence. Under the circumstances, defense counsel's mistake in stipulating to the erroneous evidence is sufficient to undermine confidence in the outcome of the trial. *Strickland*, *supra* at 694. Accordingly, we hold that defendant was deprived of the effective assistance of counsel and is entitled to a new trial.

Defendant also complains that the trial court erred when, sitting as the trier of fact, it expressly relied on portions of the preliminary examination transcript that were not admitted into evidence at trial. A judge in a bench trial must arrive at his or her decision based upon the evidence in the case, and may not go outside the record in determining a defendant's guilt. *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991). In *People v Ramsey*, 385 Mich 221, 225; 187 NW2d 887 (1971), our Supreme Court announced that "it is reversible error for the trial court sitting without a jury to refer to the transcript of testimony taken at the preliminary examination except under exceptions provided by statute." In this case, it does appear that the trial court considered portions of Donald Hall's preliminary examination testimony that were not introduced at trial. Because we have already concluded that defendant is entitled to a new trial on another ground, however, we simply direct the trial court on remand to consider only the evidence admitted at trial, in the event defendant is retried.

In light of our conclusion that defendant is entitled to a new trial, we find it unnecessary to address defendant's remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Robert J. Danhof

[1] Pauch testified at the post-trial hearing, in relevant part, as follows:

Q: Is it possible, sir, that the cartridges . . . could have been fired by a long gun?

Pauch: Yes, sir.

Q: Is it probable they were fired by a long gun?

Pauch: I cannot say the probability, sir.

Q: I'm sorry. I didn't hear.

Pauch: I could not give a probability. It's too vast.

Q: Because, are you saying then because these cartridges are oftentimes fired by long guns but there are so many weapons out there that could also fire that type of cartridge?

Pauch: That's right, sir.