

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT CARTER,

Defendant-Appellant.

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UNPUBLISHED

December 18, 1998

No. 199979

Recorder's Court

LC No. 96-002619

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment for the felony murder conviction, twenty to forty years' imprisonment for the armed robbery conviction, which sentence was vacated, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant first argues that he was denied his due process rights to a fair trial and effective assistance of counsel because counsel failed to investigate various witnesses, conduct sufficient discovery, and present certain evidence.

We have reviewed both the trial and *Ginther*<sup>1</sup> hearing records and find that defendant has failed to overcome the strong presumption that the actions of his trial attorney constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Therefore, defendant has not shown that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and, thus, he was not denied the effective assistance of counsel. *Id.*

Defendant next argues that the only evidence presented by the prosecution in support of the charges was the testimony of Norman Mackin, an inmate who resided with defendant while defendant was being held at the Muskegon Correctional Facility before this trial, and that this evidence was insufficient to sustain defendant's convictions.

Mackin's testimony established that defendant killed the store's proprietor with a shotgun and took money from the store. Mackin testified that defendant told him that he killed the proprietor because the proprietor would have been able to identify defendant. Therefore, this testimony establishes that defendant, with a shotgun, assaulted and killed a human being with the intent to take money from the store, in satisfaction of the elements of armed robbery, felony murder, and felony-firearm. *People v Davis*, 216 Mich App 47; 53 NW2d 1 (1996); *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). The jury, in its rightful role, assessed this testimony as credible. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). Therefore, sufficient evidence exists to sustain defendant's convictions and the trial court did not err in denying defendant's motion for directed verdict. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant next argues that the trial court abused its discretion in refusing the jury's request to review witness testimony, and that the court's refusal constituted error requiring reversal.

Fifteen minutes after the jury initially retired to deliberate, the trial court received a note requesting the testimony of police officers Collins, Presley, and Rice, as well as that of Mackin. The trial court discussed its proposed response with the attorneys, recalled the jury into the courtroom, and instructed it as follows:

*Court:* The court received a note at 12:50, just prior to you breaking. . . . The note reads as follows: Dale Collins' testimony, Mackin's testimony, pictures and illustrations, Presley's testimony and Rice's testimony. . . . With regard to the remainder of the note, which again asks for various people's testimony, again, that being Dale Collins, Mack and Presley and Rice's testimony, one of the things the court explained to you in the beginning, that the transcripts will not be typed for some weeks and months way into the future and you must listen very carefully because you must rely on your collective memories to resolve any issues with regard to that. So that is the court's response to your question. You now may return to the jury room and resume your deliberations.

Although the decision to reread trial testimony to a jury is within the general discretion of the trial court, MCR 6.414(H) specifies that the court may order the jury to deliberate further without the requested review only if "the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." The response provided to the jury foreclosed that possibility and was error. *People v Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976).

Further, we cannot say that the trial court's error, when reviewed in the context of the entire record, was harmless. MCL 769.26; MSA 28.1096; *People v Howe*, 392 Mich 670, 675-677; 221 NW2d 350 (1974). The jury requested the testimony of Mackin, the person to whom defendant was alleged to have confessed his crime, and police officers Collins, Presley, and Rice. Defendant's primary strategy at trial was to impeach the credibility of Mackin and argue that he received his information

about the crime from sources other than defendant. Both Rice and Collins were questioned regarding whether information about the crime was communicated to other agencies. Presley was the first police officer to learn that Mackin had information regarding the case, after which time he flew to the Upper Peninsula to speak with Mackin and obtain a statement. Defendant's comments to Mackin constituted the only direct evidence against defendant.

Of the eighteen witnesses who testified, the jury requested the testimony of the witness who provided the only direct evidence against defendant, the witnesses who testified regarding whether Mackin could have received the information elsewhere, and the police officer who first met with Mackin to take his statement shortly after he learned that Mackin possessed relevant information. Therefore, the testimony of three of the police officers was relevant to defendant's main defense—that Mackin received the information elsewhere, while Mackin's and Presley's testimony supported the prosecution's case. In fact, Mackin's testimony was the only direct evidence of defendant's guilt. The jury's request for the testimony of the witnesses who provided direct testimony in support or contravention of the prosecution's and defendant's respective theories indicates the possibility that their deliberations regarding defendant's guilt may well have been affected had the testimony been presented for their review. Accordingly, the trial court's refusal of the jury's request, coupled with its foreclosure of possible future review of the testimony, constituted error requiring reversal. MCL 769.26; MSA 28.1096; *Howe, supra*, pp 675-677.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Donald E. Holbrook, Jr.

/s/ Barbara B. MacKenzie

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).