

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY L. JOHNSON,

Defendant-Appellant.

UNPUBLISHED

April 9, 2002

No. 229133

Wayne Circuit Court

LC No. 99-006752

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant Anthony L. Johnson, Stanley McCray, and Stacey McCray were jointly charged with first-degree murder, MCL 750.316 (during the commission of a larceny and with premeditation and deliberation) and possession of a firearm during the commission of a felony, MCL 750.227b, arising out of the fatal shooting of Eien Johnson. After a joint bench trial Stacey was acquitted of all charges; Stanley was found guilty of assault with intent to murder, MCL 750.83; armed robbery, MCL 750.529; and felony-firearm. Defendant was found guilty of second-degree murder, MCL 750.317; armed robbery, and felony-firearm. He was sentenced to concurrent prison terms of eighteen to thirty years for the second-degree murder conviction, fifteen to thirty years for the armed robbery conviction, and a consecutive two years for the felony-firearm conviction. Defendant appeals by right. We affirm.

Defendant first contends that the evidence at trial was insufficient to support his convictions. Due process requires that a prosecutor introduce evidence sufficient to justify the trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Thus, a claim that evidence does not meet this standard raises an issue of law that this Court reviews de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Sufficient evidence to find all the elements of an offense beyond a reasonable doubt may be derived from circumstantial evidence and reasonable inferences from the evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). This Court will not interfere with the factfinder's role in determining the weight of evidence or the

credibility of witnesses, whether the factfinder is a jury, *Wolfe, supra*, or the trial court, *People v Jackson*, 178 Mich App 62, 64-65; 443 NW2d 423 (1989).

The elements of armed robbery are: (1) an assault and (2) felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon. *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000); MCL 750.529. The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b. To convict a defendant of second-degree murder, the prosecutor must prove that the defendant caused the death of the victim without just cause or excuse and possessed one of three possible mental states: the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result. *Mayhew, supra* at 125; MCL 750.317. In the present case, sufficient evidence was presented at trial, when viewed in the light most favorable to the prosecution, for a rational factfinder to have concluded that all of the elements of each offense were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 269-270; 380 NW2d 11 (1985).

Defendant admitted to the police that he went to the drug house he had been evicted from intending to rob his drug-selling replacement. Defendant also admitted that he drew his gun (a .357-Magnum) on the victim and his accomplice pulled out a .22-caliber revolver. Meanwhile Stanley and Stacey went through the victim's pockets. Defendant further admitted that when the victim resisted, Stanley shot him six times.

Shanetta Boles testified that defendant was the first to draw his gun, which she had seen and heard previously, and demanded money from the victim. Boles saw and heard Stanley shoot the victim three times and then heard another louder gunshot that sounded like defendant's gun. Boles also testified she saw Stanley and Stacey take money and drugs from the victim while defendant pointed his gun at the victim and demanded that the victim give them what they demanded. Boles testified that after the shooting the victim complained of being numb, was clutching his chest and bleeding profusely, and could only limp with assistance. This evidence was clearly sufficient to establish all of the elements of armed robbery and felony-firearm.

Boles further testified that after defendant and the McCrays left the apartment through the front door, the victim was afraid to leave the apartment from the rear exit and instead broke a window and jumped to the ground. Seconds later, Boles heard additional gunshots and saw the victim dead in the street below. Boles also testified that before jumping from the apartment, the victim had no head wounds, but police testimony and the autopsy report revealed a large, obviously fatal, gunshot wound to the top of the victim's head. The victim's body was also riddled with six other gunshot entrance wounds, including a contact wound to the left arm that went through-and-through, reentering the victim's chest, fracturing ribs, damaging both lungs and the great vessels, as well as the left atrium, of the victim's heart.

In his statement to the police, defendant claimed that as he and Stanley and Stacey were leaving the apartment after the robbery they saw the victim climbing down from the second story window. Defendant further claimed that Stacey asked to use defendant's gun and Stacey then shot the victim two more times, with at least one gunshot to the victim's head. From this

evidence a rational factfinder could have reasonably inferred that defendant participated in gravely wounding the victim during the course of a robbery and then provided a firearm to an accomplice who shot and killed the victim.

It is clear, however, that the trial court did not accept defendant's claim that Stacey delivered the fatal head wound to the victim because the trial court acquitted Stacey of all charges. Thus, it appears the trial court credited Stacey's testimony. Stacey corroborated Boles' testimony as to the number and sound of gunshots in the apartment during the robbery, testifying that he heard three low gunshots and then one loud gunshot. Stacey also testified that as they were walking away from the building, defendant went back to the drug house and he heard glass break, heard three more gunshots and then saw defendant coming around the corner with a gun in his hand. This testimony was sufficient to find defendant guilty of second-degree murder.

At a bench trial the trier of fact determines the weight of the evidence and the credibility of the witnesses. *Jackson, supra* at 64-65. We conclude there was sufficient evidence at trial, when viewed in the light most favorable to the prosecution, for a rational factfinder to conclude that all the elements of armed robbery, felony-firearm, and second-degree murder were proved beyond a reasonable doubt. *Wolfe, supra* at 515; *Petrella, supra* at 269-270.

Defendant raises two additional issues in his supplemental brief, neither of which merit reversal.

Defendant argues he was prejudiced when his trial counsel erred by failing to move for a separate trial because the jointly charged defendants had antagonistic defenses. Defendant has not preserved this issue by filing a motion for new trial or moving for an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, appellate review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Under the two-pronged test to determine if counsel's performance fell below the constitutional standard, the defendant has the burden of overcoming the presumption that counsel was effective. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, counsel's deficient performance must have been so prejudicial that the defendant was deprived of a fair trial. *Strickland, supra* at 687-688; *Pickens, supra* at 309. To prove prejudice, defendant must show that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Pickens, supra* at 312. Moreover, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984). See also *People v Reed*, 449 Mich 375, 401 (Boyle, J.); 535 NW2d 496 (1995); *Pickens, supra* at 312 n 12.

Defendant bears a heavy burden of overcoming the presumption that his trial counsel provided effective assistance. *People v Carbin*, 463 Mich 590, 599; 523 NW2d 884 (2001); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Judicial review of alleged counsel errors must be undistorted by hindsight, and “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland, supra* at 689 (internal punctuation omitted).

Defendant claims counsel erred by not moving for a separate trial. The record reveals that one codefendant, Stacey McCray, moved for and was granted a separate trial. Further, counsel for defendant also moved for a separate trial but for reasons that do not appear in the record, defendant’s initial counsel was allowed to withdraw and substituted counsel did not pursue the motion. The record does reflect that all three codefendants and their counsels waived trial by jury on the same day and proceeded to a joint trial before the trial court without objection. The record suggests that defendant and his two codefendants, together with their counsel, were pursuing trial strategy.

On the facts and circumstances of this case, with no record in the trial court overcoming the presumption that the challenged omission might have been sound trial strategy, defendant has failed to meet his burden of proving the necessary first prong of ineffective assistance, an unprofessional error. The fact that the strategy pursued by counsel was unsuccessful does not mean he was ineffective. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). This Court will not second-guess counsel concerning trial strategy with the aid of hindsight or on the basis that the strategy was unsuccessful. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant has also failed to establish prejudice from the alleged error. The out-of-court statement of codefendant Stanley McCray indicated that the shooting that occurred inside the apartment was a self-defense shootout with McCray doing the shooting. Further, the trial court noted on the record that it would not use the out-of-court statements of one codefendant against the other. As for the in-court testimony of the codefendants, it was subject to cross-examination and there is no way of knowing, based on review of the record, whether the codefendants would or would not have testified at a separate trial of defendant. Moreover, the testimony of Boles and defendant’s own statement were alone sufficient to find defendant guilty of the offenses of which he was convicted. Thus, there is no basis to conclude that the outcome of the trial is “unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Strickland, supra* at 696. Defendant has not overcome the strong presumption of effective assistance and has failed to prove his claim of prejudicial error on the part of trial counsel. *Toma, supra* at 302-303.

Last, defendant’s claim that the record does not reflect that the trial court found him guilty of armed robbery is without merit. Findings are sufficient if it appears that the trial court was aware of the factual issues in the case and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995); *People v Porter*, 169 Mich App 190, 193; 425 NW2d 514 (1988). In this case, although the trial court’s legal conclusions were brief, it is clear

the trial court was aware of the factual issues to be decided and correctly applied the law to its factual findings. *Smith, supra*; *People v Rushlow*, 179 Mich App 172, 177-178; 445 NW2d 222 (1989), aff'd 437 Mich 149 (1991).

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot