STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORAN V. PETERSON,

Defendant-Appellant.

UNPUBLISHED
October 1, 2002

No. 229705
Wayne Circuit Court
LC No. 00-003324

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of life without parole for the murder conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm.

An eyewitness, who was working with decedent at a gas station, testified that defendant came to the station three times on the day of the shooting and that defendant and decedent had cursed at each other. The third time defendant came to the station he shot decedent while the eyewitness watched from a bulletproof area less than ten feet away. At the time of the shooting, defendant was wearing a mask, but the eyewitness could see his eyes and hear his voice, and defendant was wearing the same clothing he had worn earlier in the day. The eyewitness was certain of his identification because defendant had been a regular customer at the gas station for about a year.

I

On appeal, defendant raises numerous claims of ineffective assistance of counsel. Because no *Ginther*[1] hearing was held, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). This Court will not assess counsel's performance with the benefit of hindsight. *Rockey, supra* at 76-77.

Defendant asserts that counsel was ineffective because he failed to impeach the eyewitness with inconsistent statements regarding whether the mortally wounded victim could have chased defendant out of the store. The eyewitness testified through an interpreter at the preliminary examination that decedent tried to chase defendant out of the store before dying, while the medical examiner testified that decedent's wounds would have killed him "almost immediately." Not every inconsistency requires exploration at trial. At issue was whether defendant was the person who committed the crime, not how long the decedent survived before dying of his wounds. Decisions regarding the examination of witnesses are matters of trial strategy, which this Court will not second guess. *Rockey, supra* at 76; *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant also claims that counsel was ineffective because he failed to raise objections to allegedly prejudicial testimony of certain witnesses. Defendant challenges counsel's failure to insist on a proper foundation for the eyewitness' testimony that he recognized defendant's voice. In light of the witness' testimony that he knew defendant, such an objection would have been futile. Defense counsel is not required to make futile objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defendant also argues that counsel should have moved to strike the testimony of the officer-in-charge on cross-examination that defendant's mother was afraid of her son. On the record before us, there is no basis to conclude that counsel erred in choosing not to emphasize the officer's statement. See *Rockey, supra* at 76-77.

Defendant further asserts that counsel should have objected to testimony that he was arrested wearing a wig and "distinctive red lipstick." Evidence that defendant may have been trying to conceal his identity to avoid arrest was admissible to show consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 399-401; 504 NW2d 666 (1993), overruled in part on other grounds, *People v Edgett*, 220 Mich App 686, 691-692; 560 NW2d 360 (1997). Therefore, counsel was not ineffective for failing to object to this evidence. *Darden, supra*. Defendant also suggests that it was improper for defense counsel to imply in closing argument that defendant might be a cross-dresser. Counsel made this argument in response to the prosecutor's theory that defendant was disguised as a woman and was fleeing to avoid arrest. Counsel was attempting to provide an innocent explanation for defendant's behavior. This was a matter of trial strategy, which we will not second-guess. *Rockey, supra* at 76; *Avant, supra.* The fact that counsel's strategy may not have worked does not constitute ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also claims that counsel was ineffective for failing to move to exclude the evidence seized from the home where defendant resided. Although the home was searched with the consent of defendant's mother, defendant argues that she was not authorized to give consent because she did not live there at the time. Contrary to defendant's suggestion that he lived in the home alone, there was evidence that defendant's mother, who owned the home, also resided in the home. Ammunition of the type used in the shooting was found in plain view on the kitchen floor. Trial counsel tried to establish that defendant did not regularly reside in the house and that there was nothing to link defendant to the ammunition found there by police. It is not apparent from the record before us that counsel's conduct was unreasonable. *Rockey, supra.*

Defendant also claims that counsel should have moved to suppress the identification testimony of the eyewitness and should have demanded a corporeal lineup. Defendant has not identified any basis on which the eyewitness' identification testimony could have been suppressed. Moreover, counsel was not deficient in failing to request a lineup where the eyewitness testified that he had known defendant for over a year. Defense counsel is not required to make useless motions. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). Defendant also faults counsel for failing to obtain the gas station surveillance tapes. There is, however, no evidence that any surveillance tapes existed. Defendant has not overcome the presumption that counsel's actions were reasonable. *Rockey, supra.*

Defendant further asserts that counsel advised him not to testify in his own behalf. Counsel's advice involved a matter of trial strategy, and the record makes clear that defendant agreed to rest at trial without testifying. Defendant has not overcome the presumption of sound strategy. Defendant also contends that counsel failed to present a defense. It is clear from the record that counsel's strategy was to attack the identification evidence. Defendant does not indicate what other defense should have been presented. Defendant has not overcome the presumption that counsel's actions were reasonable. *Rockey, supra.*

Finally, defendant contends that counsel was ineffective for failing to interview a witness who told the police that he saw two men running in the area of the shooting. The prosecutor could not locate the witness. The record indicates that the witness could not be located even before the preliminary examination. It is not apparent from the record that counsel was deficient in his efforts to locate this witness. *Rockey, supra*.

II

Next, defendant argues that the trial court erred in refusing to grant a mistrial or allow counsel to withdraw in the middle of trial. As the basis for his motion, defendant complained that counsel refused to file "motions for in court identification, evidentiary hearing, also a motion to suppress evidence, a motion to suppress witness statement." Defendant claimed that counsel belittled him, laughed in his face and called him stupid. Defendant also claimed counsel ignored his objection to admission of testimony from decedent's sister-in-law, who identified the body, when the prosecutor said at the preliminary examination that witness was not expected to take the stand.

A trial court's decision regarding substitution of counsel is reviewed for an abuse of discretion. *People v Traylor,* 245 Mich App 460, 462-463; 628 NW2d 120 (2001). The court's grant or denial of a motion for mistrial is also reviewed for an abuse of discretion. *People v Dennis,* 464 Mich 567, 572; 628 NW2d 502 (2001). An indigent defendant is not entitled to the attorney of his choice, and substitute counsel is only warranted upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Traylor, supra*, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

Substitution in this case would have caused a mistrial and, as noted previously, defendant has not shown that counsel was ineffective in his representation of defendant, despite defendant's complaints regarding strategy. Moreover, we note that defendant withdrew his request for new counsel. After defendant interrupted the trial and made an outburst in the jury's presence, defense counsel offered to withdraw and defendant asked to either have new counsel or represent

himself. Defendant wanted the trial court to recall the eyewitness so that he could "recross-examine" the witness himself, and the trial court attempted to do so but was unsuccessful. When defendant learned that the eyewitness had returned to his home in Yemen after being discharged and, therefore, could not be recalled for defendant's personal examination, defendant decided not to represent himself and told the court that he would "go with [his] lawyer." Under these circumstances, the trial court did not abuse its discretion in denying defendant's requests for a mistrial or new counsel.

III

Defendant also argues that the trial court erred in allowing the prosecution to remove witness Kenneth Taylor from its witness list. According to a statement that is attached to defendant's brief, but was not submitted at trial, although Taylor "didn't get a good look," he saw two men, one with a gun, run through the gas station parking lot sometime before the police arrived. Defendant sought a favorable missing witness instruction. Contrary to defendant's contention, the prosecutor no longer has a duty to produce res gestae witnesses and may add or delete a witness at any time by leave of the court for good cause shown. MCL 767.40a(4); *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Kevorkian*, 248 Mich App 373, 441; 639 NW2d 291 (2001). The prosecutor must provide notice of known witnesses and give reasonable assistance in locating them if the defendant requests assistance. MCL 767.40a(5). Here, the officer in charge testified that he had been unable to locate Taylor to serve a subpoena even before the preliminary examination and that he began to look for him three months after the shooting. The officer testified that he went to Taylor's purported residence several times, made several calls to the medical examiner, jails and hospitals, and contacted the post office, utility and phone companies. Although the officer did not personally go to the car wash where Taylor said he worked, he did learn that Taylor had moved and left no forwarding address. The trial court did not abuse its discretion in permitting the prosecutor to strike Taylor from its witness list or in refusing to give the favorable missing witness instruction. MCL 767.409; *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000).

IV

Defendant also raises two issues in propria persona, arguing that the circuit court lacked jurisdiction over this matter because the district court did not state on the record that there was probable cause to bind over defendant. These claims lack merit. It is well settled that a court speaks through its orders. *People v Batten*, 9 Mich App 195, 203; 156 NW2d 640 (1967). Here, although the district court did not use the phrase "probable cause" in its decision from the bench, its written order clearly reflects its determination that there was probable cause for charging defendant of these crimes. We find no error.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White