STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXIS DEVON-WESLEY SMITH,

Defendant-Appellant.

UNPUBLISHED
October 11, 2002

No. 230662
Ingham Circuit Court
LC No. 00-075786-FC

Before: Markey, P.J., and Cavanagh and R.P. Griffin*, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of first-degree felony murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life without parole for murder and two years' imprisonment for felony-firearm. We affirm.

Defendant first argues he was denied effective assistance of counsel. We review this constitutional claim de novo, *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999), limited to any errors apparent on the record, *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted). Effective assistance is presumed, and a defendant bears a heavy burden of proving otherwise. *Id*.; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's performance is measured against an objective standard of reasonableness without the benefit of hindsight. *Rockey*, *supra* at 76-77.

Defendant argues that counsel was ineffective for failing to request a jury instruction regarding the defense of abandonment. A court is required to instruct a jury with instructions pertaining to any theories or defenses that are supported by the evidence. *People v Lemons*, 454 Mich 234, 250; 562 NW2d 447 (1997). Abandonment is an affirmative defense, and a defendant bears the burden of establishing by a preponderance of the evidence voluntary and complete abandonment of the criminal purpose. *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368

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

(1991). Abandonment is voluntary when it is the result of repentance or a genuine change of heart. *Id.* Abandonment is not available when a defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances that increase the probability of detection or apprehension. *Id.*, quoting *People v Kimball*, 109 Mich App 273, 286; 311 NW2d 343, mod on other grounds 412 Mich 890, 891 (1981). Assuming arguendo that defendant could have raised the abandonment defense, no evidence in the record supported the defense. Although defendant left the house before the shooting occurred, there was no evidence that he voluntarily withdrew from the crime because of a change of heart. Therefore, counsel was not ineffective for failing to request an abandonment instruction.

Defendant next argues counsel was ineffective for failing to request a cautionary instruction regarding his codefendant's statement. Presumably, defendant refers to a taped conversation between codefendant Averell Williams and a fellow inmate. In *United States v Bruton*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the Supreme Court held that the use of a nontestifying codefendant's confession violates the defendant's constitutional right to confront adverse witnesses. However, this rule does not apply if, as here, the codefendant testifies at trial and is subject to cross-examination. *People v Johnson*, 167 Mich App 168, 175; 421 NW2d 617 (1988). Counsel elicited testimony that Williams had no personal knowledge about defendant's involvement in the murder. Moreover, no reference was made concerning defendant in Williams' statement. Defendant was not entitled to a limiting instruction; therefore, counsel was not ineffective for failing to request the instruction.

Defendant next argues counsel erred by allowing him to talk to the police before any formal charges were filed against him. Where the defendant has no constitutional right to appointed counsel, the defendant cannot claim constitutionally ineffective assistance of counsel. *People v Walters*, 463 Mich 717, 720; 624 NW2d 922 (2001). The Sixth Amendment right to counsel attaches at or after the initiation of adversarial criminal proceedings. See *People v Winters*, 225 Mich App 718, 723; 571 NW2d 764 (1998). The right to counsel under the Michigan Constitution likewise attaches only at or after the initiation of proceedings through a formal charge, preliminary hearing, indictment, information, or arraignment. *Id.*, quoting *People v Chetham*, 453 Mich 1, 9 n 8; 551 NW2d 355 (1996). In the instant case, although a warrant was issued against defendant and he was questioned with counsel present, the questioning occurred before the initiation of any adversarial proceedings. Therefore, an ineffective assistance claim is not viable. Moreover, had the questioning occurred postarraignment, defendant has not met his burden of proving counsel was ineffective for submitting to the questioning.[1]

Defendant next argues the trial court committed error requiring reversal when it overruled defense objections to the admission of a prior consistent statement of a testifying witness. Decisions to admit evidence are within the trial court's discretion and will not be disturbed on

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[1] We decline to address defendant's final argument regarding a letter allegedly written by a testifying witness indicating he may not have had first-hand knowledge of the murder because this letter is not part of the lower court record. MCR 7.210(A)(1); *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998). Moreover, defendant has produced no evidence that defense counsel had access to the letter or even knew of its existence.

appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unprejudiced person, considering all the facts, would conclude there was no justification or excuse for the ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Preliminary issues of law regarding the admissibility of evidence based on the construction of a statute or court rule are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The prosecution acknowledges that the court improperly admitted the statements because the witness's statements to the police were made after the witness's motive to lie arose. Therefore, the only issue in need of resolution is whether the error was harmless. The standard for reviewing preserved nonconstitutional errors was most recently address by the Supreme Court in *People v Whittaker*, 465 Mich 422; 635 NW2d 687 (2001), where the Court provided:

> "In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich 484, 485-496; 596 NW2d 607 (1999). An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict. See *People v Snyder*, 462 Mich 38, 45; 605 NW2d 831 (2000), citing *Lukity*, *supra* at 495-496. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. See *Lukity*, *supra* at 495; *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996)." [*Whittaker*, *supra* at 427, quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).]

Assuming the trial court abused its discretion in admitting evidence of the witness's prior consistent statements to the police, we find the error harmless. Although the witness was one of the prosecution's main witnesses and his credibility was at issue, there was sufficient evidence to corroborate the witness's trial testimony and to substantiate defendant's role. Moreover, defendant's own statements to the police corroborated the witness's testimony.

Finally, defendant argues insufficient evidence was produced to convict him of first-degree felony murder. Specifically, defendant argues that the prosecution failed to prove beyond a reasonable doubt that he knew that death or great bodily harm would be the probable result of his actions. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of first-degree felony murder include (1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in MCL 750.316(1)(b), which includes robbery. *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). Malice includes the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *Id*. at 758. The jury can infer malice from evidence that "the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*. at 759.

Although defendant is correct that the jury cannot infer malice solely from the fact that defendant intended to commit the underlying robbery, the jury can infer malice from the facts and circumstances surrounding the crime. By engaging in the robbery, defendant set in motion a force likely to cause death or great bodily harm. Defendant knowingly participated in the crime, armed with a gun. Even if defendant did not fire the fatal shot, sufficient evidence was produced to infer he acted with malice by participating in a robbery involving the use of guns, acting in wanton and willful disregard of the possibility that death or great bodily harm would result.

We affirm.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin