

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL DARNELL MCBRIDE,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 233861

Muskegon Circuit Court

LC No. 00-045383-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of armed robbery, MCL 750.529, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to twenty-five to forty years' imprisonment on the armed robbery convictions to be served consecutively to a two-year prison term for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant and his brother, Deyonta Robinson, robbed at gunpoint a group of acquaintances who were gambling at the house of one of the victims. Defendant hit one of the victims on the side of his head with a beer bottle. Robinson then pulled out a gun and told everyone to lie down. Defendant then collected the victims' money. As defendant and Robinson were leaving, Robinson warned the group not to call the police. One of the victims did contact the police the following day.

Defendant first argues that he was denied effective assistance of counsel when defense counsel failed to object to one witness' testimony regarding his fear of testifying and objected for the wrong reason to another witness' similar testimony. We disagree. Because there was no evidentiary hearing on this claim of ineffective assistance of counsel, this Court's review is limited to the existing record. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). Constitutional questions are reviewed de novo. *People v Herndon*, 246 Mich App 371, 382-383; 633 NW2d 376 (2001).

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

The constitutional right to counsel is the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a 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). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 302.

Defendant asserts that the testimony of two witnesses regarding threats made to them by Robinson was inadmissible because the threats were not attributable to defendant, were not relevant, and were highly prejudicial. One witness testified that several weeks before the trial he ran into Robinson, who told him what his testimony should be at the trial. The second witness testified that on two separate occasions Robinson threatened to kill him if he testified at the trial. Both witnesses stated that they did not want to testify and were only doing so under court order.

Defendant contends that *People v Long*, 144 Mich 585; 108 NW 91 (1906), is controlling. In *Long*, our Supreme Court held that the testimony of a sexual assault victim that someone had offered her a reward for stopping the case, was inadmissible because the prosecution presented no evidence indicating that the offer was connected to the defendant. *Id.* at 585-586. Defendant argues that because Robinson made the threats and there was no evidence connecting the threats to defendant, the testimony was inadmissible.

It is well recognized that evidence of a defendant's threats against a witness is generally admissible to show a consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). In this case, the prosecution was not offering the witnesses' testimony to prove knowledge of defendant's guilt, but rather as relevant to the witnesses' credibility and to explain the evident resistance to testifying. Therefore, whether the threats were attributable to defendant is irrelevant and *Long*, *supra*, is inapplicable.

"A witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). Moreover, as our Supreme Court noted in *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), evidence may be admitted to assist in the evaluation of the credibility of a witness. "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *Id.* The reason why the witnesses did not want to testify, as it bore upon their credibility, was relevant to the case. Their testimony was also substantially more probative than prejudicial, given that there was no attempt to attribute Robinson's actions to defendant. Therefore, because the testimony was admissible, defense counsel's failure to object or to object for the "proper" reason was not error. Trial counsel is not required to make a futile objection. *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998). Regardless, considering the substantial evidence against defendant, we cannot say that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Defendant next argues that the trial court erred when it denied his motion for directed verdict on the felony-firearm charges. We disagree. Defendant argues that his actions in collecting the money from the victims while Robinson pointed the gun at the victims cannot

constitute aiding and abetting as a matter of law. To be convicted of felony-firearm on an aiding and abetting theory, the prosecutor must show that the defendant procured, counseled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining the possession otherwise obtained. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981); *People v McGuffey*, 251 Mich App 155, 157; 649 NW2d 801 (2002).

Here, defendant's actions could be deemed assistance in the retention of the firearm. Defendant and Robinson worked directly in tandem during the robbery relative to the handling of the firearm and the act of taking the victims' money. Implicitly, defendant and Robinson were acting at the direction of the other based on the other's movements during the robbery. Robinson was able to hold the weapon on the victims in a steady attentive manner with *all* of his focus on holding the victims at bay, including pointing the weapon in a cocked position to the back of the head of one of the victims, because defendant undertook the collection of the money. Had defendant not collected the money, Robinson would have been forced to handle the gun and attempt to collect the money himself, thereby reducing to some degree his focus and ability to retain the gun. An important factor in rendering our decision is that the robbery took place in a confined area, a living room, with six to seven persons, including defendant and Robinson, being in close proximity to each other. Defendant's presence and assistance in the crime, which included striking one of the victims with a beer bottle, necessarily helped keep the firearm and the robbery under defendant's and Robinson's control. We note with significance that at one point, the gun went flying out of Robinson's hand into a corner of the room, and it would not be unreasonable to infer that defendant's presence and aggressive behavior with the beer bottle inhibited the victims from making any attempts to overpower Robinson at that moment. It would not be unreasonable to infer that defendant knowingly performed these acts with the intent to assist Robinson in keeping possession of the firearm. We conclude that the issue was appropriately left in the hands of the jury.

Last, defendant argues that the sentencing court misscored offense variables 1 and 7 regarding his armed robbery convictions. However, defendant is foreclosed from challenging the scoring of his guidelines because he did not raise the purported error "at or before sentencing" as required by MCR 6.429(C). *McGuffey, supra* at 164-166. Regardless, we find that the trial court properly interpreted the language contained in the offense variables at issue in relation to the facts of the case. Therefore, we affirm defendant's sentences on the armed robbery offenses.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof