

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRICK DESHAWN MOSS,

Defendant-Appellant.

UNPUBLISHED

November 16, 2010

No. 293428

Wayne Circuit Court

LC No. 09-003073-FC

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 40 to 60 years for the murder conviction and three to ten years for the felon-in-possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Cardell Lewis during a drug territory dispute. The principal evidence implicating defendant was the testimony of Rodney Maudlin, who testified that he was with the victim when the two of them were approached by defendant and defendant's brother, Derek Moss. Defendant was carrying a pistol, accused Maudlin and the victim of stealing his narcotic sales, and struck Maudlin in the head with the gun. As Maudlin and the victim fled in different directions, Maudlin heard four gunshots and then saw defendant jump into Derek's Jeep and flee the area. The victim was thereafter found in a nearby alley. He died from a single gunshot wound. Defendant did not dispute firing his weapon during the episode, but claimed that he did so only toward the ground in self-defense, because Maudlin and the victim were chasing him and Maudlin was shooting at him.

I. RES GESTAE WITNESSES

Defendant first argues that reversal is required because the prosecution violated MCL 767.40a by failing to list all res gestae witnesses on its witness list and by failing to provide him with reasonable investigative assistance in locating and serving those witnesses. Defendant also argues that the police investigation was inadequate because the police did not obtain the names and addresses of each person in the crowd that was present at the crime scene when the police arrived. Defendant did not argue below that the prosecution failed to identify or produce

additional res gestae witnesses. Further, there is no indication in the record that defendant ever requested assistance in locating or producing any witnesses for trial, or that defendant raised any claim that the police were negligent for failing to obtain the names of witnesses. Therefore, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant's argument confuses the prosecutor's duty to list known res gestae witnesses with a duty to discover, identify, and produce unknown witnesses. In pertinent part, MCL 767.40a imposes an obligation on the prosecutor to attach to the information a list of all res gestae witnesses known to the prosecution and investigating officers, and to provide reasonable assistance to the defense in locating witnesses upon request. MCL 767.40a(1) and (5). The statute does not require the prosecution to discover, identify, or produce unknown people who might be witnesses to a crime. *People v Burwick*, 450 Mich 281, 287-289, 293; 537 NW2d 813 (1995).

In this case, the responding police officer testified that a crowd of 20 to 30 people were present when he arrived. The officer secured the crime scene and asked if anyone had seen what happened. Only Maudlin responded that he saw what happened and he was listed by the prosecution and produced at trial. The prosecution did not have a duty to identify or disclose the names of the other unknown people who had gathered around the crime scene where there was no evidence that they had witnessed any part of the crime. Even on appeal, defendant has not provided any basis for concluding that any additional witnesses actually existed. Further, because defendant never requested any investigative assistance in locating or serving any particular witness, there was no duty to provide any such assistance. In sum, defendant has not shown that the res gestae witness statute was violated and, accordingly, has failed to establish a plain error.

Within this issue, defendant also contends that the police investigation was incomplete because the responding officer failed to obtain the names and addresses of the 20 to 30 people who had gathered around the crime scene. While an investigating officer's lack of due diligence or reasonable effort in identifying witnesses is imputed to the prosecution, *People v DeMeyers*, 183 Mich App 286, 293; 454 NW2d 202 (1990), defendant has not established that the police inaction was unreasonable. As previously indicated, the responding officer secured the scene and then asked the group if anyone had witnessed the incident. Only Maudlin stated that he had witnessed the shooting. Some people in the crowd identified themselves to the officer as friends and family of the victim. The officer spoke to Maudlin and took his statement. Under these circumstances, there is no basis for concluding that the police acted unreasonably by not obtaining the names and addresses of the additional 20 to 30 spectators who were present where there was no indication that they had witnessed any part of the criminal transaction. Consequently, defendant has failed to establish a plain error in this regard as well.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In a related claim, defendant argues that defense counsel was ineffective for failing to request the prosecution's assistance in locating res gestae witnesses. Again, we disagree. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Effective assistance of counsel is presumed

and the defendant bears a heavy burden of proving otherwise.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for counsel’s error, there is a reasonable probability that the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

We find no merit to defendant’s claim that defense counsel was ineffective for failing to request assistance in locating res gestae witnesses pursuant to MCL 767.40a(5). As previously indicated, there is no basis for concluding that additional witnesses actually exist. Further, “[n]either the prosecution nor the defense has an affirmative duty to search for evidence to aid the other’s case.” *Burwick*, 450 Mich at 289 n 10. Because the prosecution was not required to locate and produce unknown witnesses, and because there is no basis for concluding that other known witnesses actually existed, any request for assistance would have been futile. Counsel was not required to make a futile request. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III. SUFFICIENCY OF THE EVIDENCE

Defendant lastly argues that there was insufficient evidence that he was guilty of second-degree murder because Maudlin was not credible. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

The elements of second-degree murder are “(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death.” *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). “Malice is defined as ‘the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.’” *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted).

In this case, Maudlin testified that defendant confronted him and the victim and accused them of invading defendant’s drug territory while brandishing a 40-caliber Glock semiautomatic pistol. According to Maudlin, defendant hit him in the head with the pistol, after which Maudlin and the victim ran in different directions. Seconds after fleeing, Maudlin heard four continuous gunshots. He then saw defendant emerge from the direction of where the victim had fled and flee into his brother’s vehicle. The victim died from a single gunshot wound that entered the back of his right thigh and perforated his femoral artery. A blood trail led from the front of 1849 Edsel to the area where the victim died. Two .40-caliber spent shell casings were recovered from the curb in front of 1849 Edsel and a third casing was located in the driveway. After the shooting, defendant left the state and evaded law enforcement for more than four months.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to reject defendant's claim of self-defense beyond a reasonable doubt and, instead, find that defendant ran after the unarmed victim and shot the victim in the back of the leg while the victim was fleeing. Although defendant argues that the trial court should have believed his version of the events and disbelieved Maudlin's version, the trial court found that defendant's "assertion of the shooting and claim of self-defense is not credible." This Court will not interfere with the trier of fact's role of determining the credibility of witnesses. *Wolfe*, 440 Mich at 514-515. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Accordingly, the evidence was sufficient to sustain defendant's conviction of second-degree murder.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Douglas B. Shapiro