STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2010
V	No. 291016 Wayne Circuit Court
DESHAWN CARY HENDRIX, Defendant-Appellant.	LC No. 08-014944-FC

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

Deshawn Cary Hendrix appeals as of right his convictions of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Hendrix was sentenced to 8 to 15 years' imprisonment for the armed robbery conviction, 5 to 20 years' imprisonment for first-degree home invasion conviction, and two years imprisonment for his felony-firearm conviction. We affirm.

Hendrix initially contends his right of confrontation was violated when evidence was admitted that police had received information from an anonymous source implicating his involvement in the offenses. At trial, two police officers testified that the anonymous source provided information that included Hendrix's name, and the prosecutor referenced the receipt of the anonymous information during her opening statement and rebuttal argument. This Confrontation Clause challenge is not properly preserved because Hendrix failed to object on the same basis in the trial court. *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994). Whether admission of evidence constitutes a violation of a defendant's Confrontation Clause rights involves a question of constitutional law that we review de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). Whether evidence is admissible under a statute or the rules of evidence also involves a question of law that we also review de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Unpreserved constitutional issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The Confrontation Clause guarantees the accused in a criminal prosecution of the right "to be confronted with witnesses against him." US Const Am, VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause excludes "admission of testimonial statements of a witness who did not appear at trial unless he was

unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id*. at 53-54. Although, "[a] statement by a confidential informant to the authorities generally constitutes a testimonial statement," *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 US at 59 n 9.

A review of the evidence leads us to conclude that the prosecutor did use evidence obtained through the anonymous source to prove the truth of the matter asserted by the informant, i.e. that Hendrix was the gunman. Both police officers testified that the informant provided police with Hendrix's name, and during her opening statement and rebuttal argument the prosecutor referenced the anonymous information in an effort to bolster her case against Hendrix. Use of the evidence to prove the truth of the matter asserted constituted inadmissible hearsay. MRE 801; MRE 802. Because Hendrix did not have an opportunity to cross-examine the informant, introduction of the hearsay evidence violated his right of confrontation. *Crawford*, 541 US at 42, 53-54.

Despite this impropriety we find that the admission of the evidence fails to rise to the level plain error affecting Hendrix's substantial rights. *Carines*, 460 Mich at 763-764. One of the crime victims testified that she had a prolonged opportunity to view Hendrix during the robbery. The victim was in close physical proximity to Hendrix during the home invasion, and she immediately selected his picture from the police photographic array. The victim again identified Hendrix as the gunman at trial. Both of the crime victims testified that the gunman had tattoos, one of which included the letters "R.I.P." Police photographs of Hendrix showed that he had tattoos including one with the letters "R.I.P." While we find that the hearsay evidence was improperly admitted, we conclude that it did not impact Hendrix's substantial rights because it did not affect the outcome of the lower court proceedings. *Id*.

Hendrix also contends that he was denied the effective assistance of counsel because his attorney failed to object to the prosecutor's introduction of the improper hearsay evidence. Because Hendrix failed to preserve his claim of ineffective assistance of counsel for appellate review through a request for a *Ginther*[1] hearing or a new trial, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Whether a defendant was denied his right to the effective assistance of counsel generally presents "a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact are reviewed for clear error and issues of constitutional law are reviewed de novo. *Id.*

To successfully demonstrate that he was denied the effective assistance of counsel, Hendrix must show that his trial counsel's performance was "deficient" and that he was prejudiced by the "deficient performance." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id*. at 600.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

We find that Hendrix was not denied his right to the effective assistance of counsel. Although counsel failed to object to the inadmissible hearsay evidence, Hendrix is unable to demonstrate that, but for his counsel's failure to raise this objection, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Hendrix also claims that the trial court abused its discretion in denying his post-judgment motion for a new trial because the jury verdict was against the great weight of the evidence. We review a trial court's ruling on a motion for a new trial for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Mere disbelief of the prevailing party's witnesses is not grounds for "repudiating a jury's verdict." *People v Lemmon*, 456 Mich 625, 636; 576 NW2d 129 (1998). "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *Id*. at 637. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647. "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or [that it] contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646 (citation omitted).

There was evidence that one of the victims had the opportunity to observe Hendrix throughout the duration of the robbery. At one point, one of the victims stood in very close physical proximity to Hendrix while an accomplice searched her home. This same victim immediately identified Hendrix as the perpetrator from the police photographic array and as the gunman at trial. Hendrix had tattoos that matched descriptions given by the victims. The trial court did not abuse its discretion in denying Hendrix's motion for post-judgment relief as the evidence did not preponderate "so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219. We note that the record fails to support Hendrix's contention that the inculpatory evidence was so far impeached that "it was deprived of all probative value or that the jury could not believe it." *Lemmon*, 456 Mich at 645-646 (citation omitted).

Hendrix asserts that he was denied his constitutional right to a properly instructed jury and his right to due process when the trial court refused his counsel's request to provide the jury with the deadlocked jury instruction after deliberations had initiated. Following several hours of deliberation, the jury sent a note to the trial court indicating it had reached an impasse. The trial court instructed the jury to continue its deliberations. The following day, the jury once again sent a note to the trial court indicating that it had reached an impasse. The trial court indicated it would adjourn the proceeding for the weekend and provide the jury with the transcripts that it had requested when deliberations resumed. Within two hours of the provision of the requested transcripts and the resumption of deliberations, the jury returned a unanimous verdict. "This Court reviews de novo questions of law arising from jury instructions." *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009). "To warrant reversal of a conviction, the defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict." *Id*.

After a jury begins deliberations, a trial court "*may* give additional instructions that are appropriate." MCR 6.414(H) (emphasis added). "The extent of additional instructions to the jury is within the discretion of the trial court." *People v Perry*, 114 Mich App 462, 467; 319 NW2d 559 (1982). At the outset, we find that the trial court was not required to provide the deadlocked jury instruction when the jury indicated it was at an impasse, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985); MCR 6.414(H), and that any subsequent instruction by the trial court that deviated from CJI2d 3.12 does not necessitate automatic reversal. *People v Hardin*, 421 Mich 296, 314-316; 365 NW2d 101 (1984).

Hendrix also asserts that the trial court's requirement that the jury continue its deliberations was unduly coercive. An instruction to a deadlocked jury is unduly coercive if it could "cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement[.]" *Hardin*, 421 Mich at 314. Pressure, threats and embarrassing assertions can rise to the level of undue coercion. *Id*. at 315. Other factors indicative of coercion include a trial court's requirement that a jury deliberate for an unreasonable length of time. *Id*. at 316.

The trial court initially instructed the jury that it "must continue deliberations." When the jury again indicated it had reached an impasse, the court informed the jury that it would recess for the weekend and that it would be provided copies of the transcripts it had previously requested when deliberations resumed. This was not unduly coercive, as the trial court did not use pressure or threats and did not force the jury to deliberate for an unreasonable length of time. *Hardin*, 421 Mich at 314, 316. Because we find that Hendrix was not denied his right to a properly instructed jury or his right to due process his assertion of error by the trial court on this issue cannot be sustained.

In his Standard 4 brief, Hendrix contends that the district court denied him a fair preliminary examination when the judge briefly corrected the prosecutor's characterization of the testimony of one of the victims. Hendrix failed to object to the trial court's interjection. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Because sufficient evidence supported Hendrix's convictions at trial, his contention of error at the preliminary examination is rendered moot and he is not entitled to any relief. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). We also reject this as a basis for any claim of ineffective assistance of counsel.[2]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

[2] This is not to suggest that we find any merit to Hendrix's allegation of error by the district court regarding the conduct of the preliminary examination.