STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2010
v	No. 294653 Wayne Circuit Court
LARRY GAVIN, Defendant-Appellant.	LC No. 07-11302

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm in the commission of a felony, MCL 750.227b. The trial court sentenced him to concurrent sentences of life imprisonment for the first-degree premeditated murder conviction and 40 months to 60 months' imprisonment for the felon in possession of a firearm conviction, both of which to be served consecutive to 2 years' imprisonment for the felony-firearm conviction. We affirm.

I. BASIC FACTS

This case arose from the 2001 shooting death of Andre Quarles. Durrell Foster, currently an inmate at the Milan Federal Detention Center (Milan), testified that he met defendant while in Milan in late 2006. He testified that he and defendant both believed that they knew the same person named, "Tone," who was from the east side of Detroit. Foster later discovered that he and defendant were not discussing the same Tone. Foster testified that defendant stated that he had killed Tone's brother "Dre." He testified that defendant also stated "he was locked up when this guy Tone got killed, but had he been out, [defendant] made the statement that he would have killed Tone—well, his exact words were, 'I'd have gave it to Tone, the same way I gave it to his brother." He testified that during another conversation defendant mentioned that Dre's last name was Quarles. Foster testified that defendant mentioned that Dre's father was a police officer, and that Dre's father had previously arrested him for stealing a car that belonged to Dre's grandmother. Foster testified that defendant said he almost hit the grandmother when stealing the car.

Foster testified defendant told him that, years later, Dre sold drugs from a house on Sheridan Street. He testified that defendant told him that Dre had a rule concerning the gate in the front yard; "if the gate was closed, nobody was supposed to come and knock on the door, or

make an attempt to purchase crack." Foster testified that defendant told him that he sent a woman to the Sheridan house to purchase crack. The woman knocked on the door when the gate was closed and Tone took her money and refused to provide her any drugs. Foster testified that defendant told him he went to retrieve his money and argued with Dre. He testified that defendant told him he left the Sheridan house but returned the next day with a gun. Foster testified that defendant told him that Dre was on the front porch with his girlfriend, saw defendant's gun, and ran. He testified that defendant shot Dre in the leg but Dre escaped. He testified that defendant turned around, "caught Dre [sic] girl and asked her 'So that's your guy? And she said, 'Yeah." And defendant stated, "Here, take this for your guy,' and shot her" in the chest. Foster testified that defendant preferred the ".38 Special," calling it his "bread and butter." He testified that after defendant voiced this preference, "I looked at him, and I made the statement, I was like, 'oh, that's probably what you killed Dre with huh?' And he looked at me, and made a motion like, 'yep.'"

Foster testified that defendant indicated that after he had shot Dre he was incarcerated on an unrelated matter. He testified that defendant said Dre was looking for him after he was released. He testified that Dre caught up with defendant and shot him.

In regard to the instant offense, Foster testified that defendant stated that he, a girl, and his brother went to Dre's home. Foster testified that defendant knocked on the door and defendant asked "what do you need." Defendant replied, "I need two rocks, and take these two with you," and shot through the door.

Foster testified that he informed a law enforcement official that defendant was "talking about how such a killer he is, and doing this and doing that," and that "[m]atter of fact, he mentioned something about he killed a police officer's son." He testified that he mentioned to the official that defendant likely used a .38 and that the victim had been shot twice through a door. He testified that his statements to the official prompted a conversation between him and a city of Detroit homicide detective.

Foster admitted that he entered a plea deal with the federal government in which if he cooperated with a narcotics investigation he hoped to receive a reduced term of imprisonment of 141 months. He testified that he ultimately received only 84 months' imprisonment. He believed that his sentence was reduced because he provided substantial assistance in the narcotics case, but admitted that cooperation in the instant case may have helped reduce his sentence although he was "not sure; this case is still ongoing."

Marcus Harvey testified that he was currently incarcerated at Milan. He testified that he had not been offered any consideration for his testimony. He testified that at Milan he overheard a conversation between defendant and Foster in which defendant "was talking how he was a killer, how he was a gangster. And that he killed a cop's son." He testified that defendant indicated that "he had sent his girlfriend to buy some drugs from the dude that's killed, and the dude took the girl money [sic] from her." He testified that defendant stated that he went to Dre's house and shot Dre in the leg and shot Dre's girlfriend. Harvey testified that defendant stated that Dre later shot defendant shortly after Dre had been released from jail. He testified that defendant recuperated and learned that Dre resided on Helen Street. He testified that defendant, his girlfriend, and his brother drove near Helen Street and parked. Harvey testified that

defendant indicated that his brother walked to the side of Dre's house and that he "knocked on the door. And he shot twice through the door when Dre came to the door."

Roda Barnes testified that in 1996 she lived on Sheridan Street. She also testified she was familiar with the house at 666 Helen Street as the home of Andre Quarles' grandparents. She testified that in 1996 she lived with Andre and that he was the father of her children. She testified that Andre's nickname was "Dre." She also testified that she knew defendant as one of Andre's customers. She testified that one day in 1996 she and Andre were on the porch of their house and defendant approached carrying a large revolver. Barnes testified that as she fled defendant shot her in her left arm. She testified that she hid from defendant but later returned to find that Andre had been shot in the leg. She testified that she left Michigan before Andre had been killed and that Andre's father had been a police officer for the city of Detroit.

Danny Quarles testified that Andre and Andre's brother, Anthony, were his first cousins. He testified that 666 Helen was the address of their grandparent's house. He testified that he knew defendant from the neighborhood. He testified that in 1981 or 1982 he witnessed defendant steal a car parked in the lot next to his grandparents' house. Danny testified that defendant almost hit his grandmother while driving away. He testified that his grandmother called his uncle (Andre's father who is a police officer) who began a search for defendant.

Danny testified that in September of 2001 he lived at 666 Helen. He testified that his grandparents no longer lived there and he and Andre sold drugs from the house. He testified that, at that time, he used a lot of crack cocaine. He testified that one day in September 2001, he and a friend met and went to a local pub. He testified that they left and went to 666 Helen to get crack cocaine from Andre. Danny knocked on the door but no one answered. Danny testified that he pushed the door open, which was braced with wood, enough to see a white tee shirt. He testified that he broke a window, entered the house, and saw Andre lying on the floor. He testified that he opened the door and let his friend and others that had shown up at the house inside. Danny testified that he and his friend then went upstairs, took a stack of money, drugs, and cassette tapes, and that he changed clothes because it had started to rain. He testified that his friend called the police but he left because he was on parole. Danny testified that police later arrested him entering Andre's vehicle.

Anthony Quarles, Sr., testified that he was a retired city of Detroit police officer and that he had two sons, Anthony and Andre. He testified that 666 Helen was once his parents' home. He testified that in 1980 or 1981 he received a call and was told that defendant had stolen a car parked in the lot next door to 666 Helen. He testified that he arrested "one of the Gavin brothers" for the stolen car. He confirmed that his son Anthony was nicknamed "Tone," and had been murdered.

Police officers' testimony in regard to the investigation generally supported the theory that Andre had been shot twice and that the bullets had first traveled through the front door at 666 Helen. David Pouch, a City of Detroit police officer assigned to the Crime Lab, Firearms, and Tool Mark Identification units, testified that he examined the bullets recovered from the 666 Helen crime scene and determined that either a 9 millimeter or a .38 that had been fired from the same weapon. William Steiner, a forensic chemist at the city of Detroit crime lab, testified that the clothes Danny was wearing when arrested tested negative for gunshot residue.

Defendant testified that he did not kill Andre. He testified that Anthony Sr. had never arrested him. Defendant admitted that, in 1996, he went to the Sheridan house with a gun to confront Andre in regard to money that defendant believed Andre owed his friend. Defendant testified that Andre brandished a gun, and that defendant then began shooting at Andre. Defendant testified that he did know he had shot Barnes. He admitted that on a subsequent occasion Andre had shot him twice. Defendant testified that he did not see Andre after being released from the hospital for treatment of those gunshot wounds. Defendant testified that his cellmate in Milan was a friend of Andre and knew of the acrimony between defendant and Andre. He testified that his cellmate related the information to Foster.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied the effective assistance of counsel. He specifically argues that defense counsel failed to move for a mistrial after Danny mentioned that he offered to take a polygraph examination and later that he took the examination.

Here, there was not a hearing in the trial court, and this Court's review is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973)*; People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue involves counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza*, 246 Mich App at 255.

At trial, Danny was initially called as a prosecution witness. During cross examination by defense counsel, Danny mentioned that he offered to take a polygraph examination during the following testimony.

Defense Counsel: Okay. And you were never arrested in this matter?

Danny: When they arrested me, the police, I said, "Man, what's going on? "They said, "We have cause, statement, you killed your cousin."

Defense Counsel: Okay. And then after that there was an investigation; correct?

Danny: I said, "I'll take a lie detector test."

Defense Counsel: Oh, okay. All right. Put [sic] let's skip over that; okay?

Danny: Well . . .

Defense Counsel: Yeah, let's skip over that. And subsequently you were released?

Danny shortly afterwards mentioned that he had taken a polygraph examination:

Defense Counsel: Okay. Did you ever mention, when you were questioned by the police, that Mr. Gavin did it, or might have done something to your cousin?

Danny: Yeah, I said, "It could have been."

Defense Counsel: You put that in your statement?

Danny: I don't know if it's in my state—I said—the police asked me, when I took the lie detector test, after all this, they say—I said, "Man, it could have been Larry Gavin."

Defense Counsel: Okay. And did you see a police officer write that down anywhere.

Normally, reference to a polygraph test is not admissible before a jury. *People v Pureifoy*, 128 Mich App 531, 535; 340 NW2d 320 (1983). Indeed, it is a bright-line rule that reference to taking or passing a polygraph test is error. *People v Kosters*, 175 Mich App 748, 754; 438 NW2d 651 (1989). Thus, defense counsel could have moved for a mistrial based on Danny's mention of a polygraph examination.

However, the mere mention of a polygraph examination does not require routine reversal. *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). For example, "[a] reference may be a matter of defense strategy, the result of a nonresponse [sic] answer, or otherwise brief, inadvertent and isolated." *Id*. This Court has also considered a number of factors to determine whether reversal is required.

"(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's

> credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." [*People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982), quoting *Rocha*, 110 Mich App at 9.]

Here, Danny testified that he offered to take a polygraph examination and later testified that he actually took the polygraph examination. Danny further testified that after taking the polygraph examination, he informed police that defendant may have committed the instant crimes. Defendant argues that this testimony was particularly prejudicial because defendant maintained at trial that Danny committed the instant crimes. Defendant's claim is not that defense counsel was ineffective for failing to object to these references. Rather, defendant claims counsel was ineffective for failing to move for a mistrial because of these references.

Our review of the relevant case law indicates that a mistrial was not required in this case, and thus, defense counsel was not ineffective in failing to make that request. In *People v Green*, 74 Mich App 351, 358; 253 NW2d 763 (1977), the defendant's chief alibi witness mentioned that he had submitted to a polygraph examination. This Court noted that "defense counsel did not object nor request a cautionary instruction. The reference to the polygraph examination was made by a defense witness and we do not find that the prosecutor purposely interjected the same. Additionally, the testimony in question was isolated and was not pursued nor emphasized." This Court held that reversal was not required.

Likewise, in *People v Whitfield*, 58 Mich App 585; 228 NW2d 475 (1975), this Court recognized that testimony mentioning a polygraph examination to bolster the witness's credibility is an important factor. In *Whitfield*, the victim, whose credibility was crucial, testified that she had taken a lie detector test. Nonetheless, this court held that reversal was not required because the reference to the polygraph examination was brief, inadvertent and not emphasized. This instant case is analogous to the above case because even assuming Danny's testimony was crucial there was no objection, the reference was inadvertent, and the reference was not emphasized. Accordingly, defense counsel was not ineffective for failing to move for a mistrial.

Defendant counsel also argues that defense counsel was ineffective in calling Danny in the defense's case to testify in regard to the polygraph examination. Clearly, such testimony was not admissible, but defense counsel nonetheless engaged the trial court as follows.

> *Defense Counsel*: You indicated that you took a lie detector; right, sir?
>
> *Trial Court*: No, no, you cannot ask about that in court; that is verboten.
>
> *Defense Counsel*: Your Honor
>
> *Trial Court*: No.
>
> *Defense Counsel*: May we approach?
>
> *Trial Court*: You can't. This is not [sic] my ruling. You cannot go into that period, it doesn't exist. You can't mention it, so don't ask it.
>
> *Defense Counsel*: He opened the door, Judge.

Trial Court: I know, but he's not a lawyer. He's not a lawyer. You are the lawyer. You know better; he didn't. He volunteered that; no one asked him did he do that. So, please, don't argue with me about this.

Defense Counsel: No, I'm not arguing.

Trial court: Don't bring it up again. Because you cannot do it in this State.

Defense Counsel: Well, Judge, I'd like to make a separate record, outside the hearing of the jury, then.

A. You may do that. You may do that. But any question about it, whether it was offered or taken, is verboten. You can't do it. Okay. And I'll stand on that. You can't do that.

Defense Counsel: And I respect that, Judge.

Trial Court: Thank you. So if you want to ask him some questions other than that, go right ahead. But you can't ask him about that.

Defense Counsel: Okay, Judge.

Trial Court: Okay.

Defense Counsel: Well, we'll make our separate record outside the hearing of the jury, then.

Trial Court: Yes, you can. Now, if—

Defense Counsel: I don't have any—

Trial Court: —you want to ask him something that didn't come up yesterday—

Defense Counsel: It did come up yesterday, your Honor.

Trial Court: No, no. I know he mentioned that. Do you have any other questions that you wish to ask him—

Defense Counsel: Outside the hearing of the jury, Judge.

Trial Court: Do you have any further questions?

Defense Counsel: No, Judge. I have no other questions for this particular man.

After defendant testified, defense counsel, outside the presence of the jury, argued that she should have been able to examine Danny on the polygraph examination because he had

previously mentioned it. The trial court held that Danny's non-responsive answer could not "open the door" to cross-examination on inadmissible evidence.

Defendant assigns blame to defense counsel because instead of moving for a mistrial, defense counsel recalled Danny to the stand and asked him whether he had taken a polygraph examination. We conclude that defendant has failed to show that recalling Danny to the stand prejudiced defendant. Before Danny could testify about the polygraph examination, the trial court prohibited defense counsel from any inquiry in regard to the matter. Accordingly, no prejudice can be attributed to Danny's testimony. Defendant also argues that defense counsel was ineffective in unwisely reminding the jury of Danny's previous nonresponsive statement by asking Danny, "You indicated that you took a lie detector; right, sir." We agree with defendant that defense counsel's question was improper. However, defense counsel's question clearly indicated to the jury that defendant was willing to allow Danny to testify about any polygraph examination, thus implying that his testimony on the matter would not be unfavorable to defendant. In addition, given the overwhelming evidence that defendant committed the instant offenses, and the negligible evidence that Danny committed the instant offense, we cannot conclude that the result of the proceedings would have been different had defense counsel not recalled Danny to testify. Accordingly, we cannot conclude that defendant established that he was denied the effective assistance of counsel.

III. SUFFICIENCY OF THE EVIDENCE

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor 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 Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Ericksen*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288496, issued April 15, 2010), slip op pp 1-2.

"[T]o convict a defendant of first-degree premeditated murder, the prosecution must first prove that the defendant intentionally killed the victim." *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008), citing *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense. *Marsack*, 231 Mich App at 371.

Defendant first argues that Foster and Harvey were not credible witnesses because they recieved a sentence reduction. There was testimony however that Foster did not know whether he received any benefit for his cooperation in this case and Harvey denied any benefit for his testimony. Defendant also notes that "[w]hether they received any further sentencing consideration or reduction is not the point. Rather it is the fact of their motivation to do so that should have rendered their testimony completely incredible . . . ." However, there is no evidence that Foster and Harvey expected a sentencing benefit from giving testimony in this case. Rather, the testimony only indicated that the "Standard Cooperation Agreements" they had previously entered into to reduce their sentences requires a "continuing obligation to provide

information." Moreover, questions concerning witness credibility are to be resolved by the trier of fact. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). Thus, defendant's contention in this regard must be rejected.

There is no question that someone intentionally twice shot Andre through a closed door. The only real question in this case is the identity of the murderer. See *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008) (stating that identity is an element of every offense). Here, there was substantial evidence presented from which a jury could conclude that defendant committed the instant offenses. There is evidence that defendant spoke to Foster, and was overheard by Harvey, about having killed someone named Dre and ruing not having likewise killed Dre's brother, Tone. Foster also testified that defendant testified that Dre's last name was Quarles. Further, Dre is Andre's nickname and Andre's brother is Anthony whose nickname is "Tone." There is little question that the person defendant confessed to killing was Andre. Defendant mentioned that Andre's father was police officer with whom he had previous contact. There was evidence that defendant stole a car from a lot next next-door to Andre's grandparents' home, and that Andre's father responded to the call and arrested defendant or defendant's brother for theft. There was also testimony that defendant mentioned to Foster that he had previously shot Andre and Andre's girlfriend and the defendant had been shot by Andre. This testimony was confirmed by Harvey, who overheard some the conversations, and by Andre's then girlfriend who witnessed some of the events. There was also evidence that defendant preferred to use the weapon potentially used to shoot Andre.

In addition, there was no dispute that defendant and Andre had animosity toward one other. Although motive is not an essential element of the crime, evidence of motive in a prosecution for murder is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). In cases in which the proofs are circumstantial, evidence of motive is particularly relevant. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Here, defendant and Andre had previously shot one another. There is sufficient evidence for a reasonable jury to conclude that defendant murdered Andre and committed the charged offenses in this case.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood