

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN LEE MOORE,

Defendant-Appellant.

UNPUBLISHED

September 25, 1998

No. 193876

Kent Circuit

LC No. 95-2320-FC

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for the June 9, 1995 shooting of a clerk at Alberda's Taxidermy and Bait Shop in Grand Rapids. The trial court sentenced defendant to life without parole for the murder charge and a consecutive two-year sentence for the felony-firearm conviction. The trial court set aside defendant's armed robbery conviction. Defendant appeals as of right. We affirm.

Defendant first argues the trial court erred in denying his request for the appointment of new counsel during the trial. We disagree. We review the trial court's decision regarding substitution of counsel for an abuse of that discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

The trial court did not abuse its discretion in denying defendant's request because defendant did not show good cause for the appointment of substitute counsel. *Id.* The trial court correctly found that defendant's vague assertions did not constitute a complaint about a legitimate difference of opinion with regard to a fundamental trial tactic. *Id.* Defendant merely asserts he requested his attorney to visit him and provide certain documents, to which she responded that she was in the process of assembling the requested information and would contact him. Accordingly, defendant was not denied his right to counsel by the court's denial of his motion for a new attorney during trial.

Second, defendant argues he was denied the effective assistance of counsel because his attorney elicited certain prejudicial testimony from witnesses, failed to object to certain testimony and failed to properly impeach adverse witnesses. Defendant's failure to move for a new trial or an evidentiary hearing on this basis below forecloses appellate review unless the record contains sufficient detail to support his claims, and, if so, our review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In order to prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Defendant first challenges defense counsel's failure to object to Detective Brown's testimony concerning Toby Davis' gang membership. Defendant argues this testimony was hearsay. However, because there was no objection to the testimony and no question inquiring whether Brown's testimony was based on his personal investigation of gang activity, there is no evidence that it was hearsay. If counsel had objected, there was a risk Brown would have revealed his testimony was based on personal knowledge, which would have strengthened the testimony. Accordingly, counsel's decision was a matter of trial strategy, which this Court will not second guess. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

Defendant also claims that defense counsel should have impeached Jones' testimony with the omission in his report regarding defendant's membership in the 6-4 or 4KP gang. Defendant has failed to show prejudice because this impeachment, if conducted, would not have "dispelled the claim of defendant's gang membership," as defendant claims. Moreover, the police report to which defendant refers was not a part of the lower court record and may not be considered by this Court. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1997), lv pending.

Defendant also argues counsel was deficient because she elicited testimony that defendant's nickname was "John Gotti." Defense counsel was attempting to elicit information regarding defendant's nickname of "Demonte Moore" when she asked the witness whether defendant had any nicknames. The information about the nickname "Demonte" was important to the defense's strategy and theory of the case. We will not second guess counsel on this matter of trial strategy. *Sawyer*, *supra* at 3.

Defendant further contends counsel was ineffective because she did not impeach Roger Alberda with inconsistent statements he made about how often he cleaned the counters at the store. Defendant's offer of proof comes from an interview in which Alberda said he cleaned the top of the glass quite often, but was unsure when he last cleaned the front of the cabinet. The interview is not part of the record; thus, we may not consider it on appeal. *Warren*, *supra* at 356. Moreover, the statement to which defendant refers is not inconsistent with Alberda's testimony. Accordingly, defense counsel was not deficient in failing to impeach the witness with these statements.

Defendant next argues the trial court erred in allowing Detective Jones to testify that defendant refused to give a taped statement to police. Defendant asserts this testimony was an

improper comment on his constitutional right to remain silent, relying on *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973), and its progeny. Defendant's argument is without merit because he gave a statement to the police and only refused to make a taped statement. *People v VanAuker*, 111 Mich App 478, 485; 314 NW2d 657 (1981), rev'd on other grounds 419 Mich 918 (1984). Accordingly, the trial court did not abuse its discretion in admitting the testimony. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Finally, defendant claims the cumulative effect of these alleged errors mandates reversal. Defendant's argument is without merit because we have not found any actual errors in his trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Affirmed.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Henry William Saad