STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTTWAN L. RICHEY,

Defendant-Appellant.

UNPUBLISHED
November 16, 2001

No. 221306
Wayne Circuit Court
Criminal Division
LC No. 99-000028

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to mandatory life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right, and we affirm.

This case arises out of the shooting death of Darryl Turner. The prosecutor's theory of the case was that, as defendant and Jimavis Hatchett were driving in the area of the Hayes Troester Market, defendant saw Turner using a pay telephone, told Hatchett to stop the car, got out of the car, and shot Turner as revenge for a prior incident between defendant and Turner. Defendant's defense was that none of the eyewitnesses could identify him as the shooter and the descriptions of the shooter given by the eyewitnesses varied greatly.

Defendant first claims that the trial court committed reversible error when it allowed the prosecutor to question Hatchett about a statement she gave to the police prior to trial, and allowed the prosecutor to read excerpts of the statement into the record as substantive evidence. We disagree.

The prosecutor first used the statement in his examination of Hatchett. During the examination, Hatchett repeatedly stated that she did not recall that certain things happened. When referred to her statement, she testified that reading her statement did not refresh her recollection, but that she had told the police the truth when she gave her statement. When questioned regarding various specific portions of her statement, Hatchett sometimes admitted

that she had made the specific statement to the police, and sometimes did not recall what she told the police. She did, however, admit signing the statement. [1]

After examination, the prosecutor moved to admit the statement under MRE 803(5) (past recollection recorded), which provides:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

To the extent Hatchett admitted making the specific statements, the requirements of MRE 803(5) were met. The statement at issue pertained to an incident about which Hatchett once had knowledge, but at the time of trial had insufficient recollection. As to the specific statements she admitted making, the testimony establishes that the statement reflects her knowledge correctly. Hatchett also testified that her statement was true when it was given to the police.[2] Defendant does not challenge the "freshness" requirement. Thus, to the extent Hatchet admitted that the statement was her earlier truthful statement to police, the court properly permitted the statement to be read and treated as substantive evidence under MRE 803(5). The fact that Hatchett's trial testimony may have been inconsistent with certain portions of her statement to the police does not affect this conclusion. Any inconsistencies go to the evidentiary weight the statement should be accorded, not its admissibility. *People v Daniels*, 192 Mich App 658, 669; 482 NW2d 176 (1991).

However, to the extent that Hatchett did not admit, or could not recall, making certain statements to the police, defendant correctly argues that the statement was not properly read to the jury as substantive evidence under MRE 803(5). The prosecutor should have brought in the police officer to testify that the statement as written represented Hatchett's verbatim account to him.

We conclude, nevertheless, that reversal is not required. The prosecutor only read into evidence the portion of the statement regarding which he had already examined Hatchett. And, as to the most damaging portions of the statement, in which Hatchett said that defendant said he had "got" the victim and killed the victim, Hatchett admitted making the specific statements and that the specific statements were true when made.

[1] While Hatchett admitted signing the statement, she did not testify that she signed the statement because she read it at the time and determined that it was an accurate and truthful representation of what she said and what happened.

[2] On cross-examination, defense counsel asked Hatchett if her fear of the police affected her veracity, and whether the police tricked her into giving the statement. Hatchett answered both inquiries in the affirmative. However, in light of the fact that Hatchett testified repeatedly on direct examination that her statement was true when it was given, we cannot conclude that the trial court abused its discretion in concluding that the statement was admissible under MRE 803(5).

Next, defendant claims that the trial court should have sua sponte instructed the jury, consistent with CJI2d 5.6, that it should examine Hatchett's testimony with caution because she was an accomplice to the crime. We disagree.

A trial court's obligation to give the accomplice instruction where it is not requested arises where the trial is essentially a credibility contest between the defendant and the accomplice. Here, it is questionable whether Hatchett was an accomplice at all. There was no evidence that Hatchett knew that defendant intended to shoot Turner when she stopped the car and let defendant out. At most, based on statements made to Hatchett by defendant, Hatchett was an accessory after the fact. However, an accessory after the fact, by definition, does not participate in the principal offense and does nothing in furtherance of the offense before it occurs. See *People v Perry*, 218 Mich App 520, 529; 554 NW2d 362 (1996), aff'd 460 Mich 55; 594 NW2d 477 (1999). The court had no obligation to give the instruction sua sponte where Hatchett's status as an accomplice is not apparent and defendant did not argue to the court that she was one.

Next, defendant claims that he was denied the effective assistance of counsel. We disagree. 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 Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defense counsel's failure to request that the trial court instruct, immediately after Hatchett's statement was read, that the statement could only be considered for impeachment purposes does not amount to ineffective assistance in light of the fact that the statement could have been considered as substantive evidence under MRE 803(5). Also, we do not deem defense counsel's examination of Hatchett to have been deficient, and will not second-guess counsel's strategy in this regard. See *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). In addition, because Hatchett was not shown to be an accomplice, defense counsel's failure to request the accomplice testimony cautionary instruction was not improper.

Defendant also claims that counsel was ineffective because she failed to locate any alibi witnesses and failed to file any pretrial motions. However, defendant's argument in this regard is unpersuasive. Defendant offers no reason to believe that an investigation into the existence of any alibi witnesses would have been fruitful and could reasonably have affected the outcome of the proceedings. Similarly, defendant fails to indicate either which pretrial motions should have been filed, or how they could have affected the outcome of the proceedings. In short, defendant has failed to overcome the presumption that he was afforded the effective assistance of counsel, or establish that there is a reasonable probability that, but for the alleged errors, he would have been acquitted.

Last, defendant claims that the trial court utilized an improper variation of the "struck jury method" to select the jury. We disagree.

In *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981), our Supreme Court held that the "struck jury method" or "any system patterned thereafter is disapproved and may not be

used in the future." The Court went on to hold that the failure to follow the jury selection method prescribed in the Michigan Court Rules requires reversal. *Id*.

In the case at bar, the jury selection method used by the trial court was not the "struck jury method" prohibited in *Miller*. Rather, on two occasions the defense exercised a peremptory challenge and immediately after the juror was excused, and before the juror was replaced, the court asked defense counsel if she had any other peremptory challenges. On both occasions, counsel exercised a second challenge. After the second challenge, two new jurors were selected. While the method used did not comply with the procedure set forth in MCR 2.511(F), in that two jurors were excused before the first was replaced, it appears that the challenges were exercised together simply as an expedient, to move the selection process along. There is no indication that counsel was unwilling to exercise two challenges at once. Further, it is clear that counsel was not required to exercise all her challenges at once. Nor did the court regard an earlier failure to challenge a particular juror as a waiver of the right to challenge that juror at a future time. Moreover, defendant failed to exhaust his allowable peremptory challenges. In short, defendant can show no prejudice from the minor departure from MCR 2.511(F). As a result, we are not persuaded that defendant is entitled to any relief in this regard.

Affirmed.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White