STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

        Plaintiff-Appellee,

v

JAMES JOHN ROWE,

        Defendant-Appellant.

UNPUBLISHED
February 2, 2010

No. 286711
Mecosta Circuit Court
LC No. 96-003759-FC

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's denial of his motion for relief from judgment. We affirm.

This case arose from the 1995 robbery and shooting of Radio Shack employee John East. Defendant was initially convicted in a joint jury trial with his codefendant, Richard Allen Shaneberger, of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, and kidnapping, MCL 750.349. Defendant was sentenced to life in prison without parole on the charge of felony murder and a concurrent sentence of 20 to 40 years for conspiracy. The court did not sentence defendant on the remaining charges to avoid a double jeopardy issue. In his initial appeal, this Court affirmed defendant's convictions and sentences, but remanded for correction of the judgment of sentence to indicate no conviction for armed robbery, and to reflect the correct statutory citation for conspiracy. *People v Shaneberger*, ___ Mich App ___; ___ NW2d ___ (1998), opinion rescinded and ordered depublished, *People v Shaneberger*, unpublished order of the Court of Appeals, entered November 23, 1998 (Docket Nos. 200499/200500). Years later, defendant brought a motion for relief from judgment, which was ultimately denied, as was his subsequent motion for reconsideration. This appeal then followed.

Defendant's challenges on appeal the competency of the legal assistance provided by counsel who met with him prior to trial, counsel who represented him at trial, and his first appellate counsel. The test for ineffective assistance of counsel is the same for each level of representation being challenged on appeal. See *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). In order to prevail on a claim of ineffective assistance of counsel, defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy, *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), and show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing

professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that he resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). On appellate review, the trial court's factual findings are reviewed for clear error and the matters of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made after a review of the entire record. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

All of defendant's assertions of unreasonable representation stem from his representation by James Narregan, who was brought to the police station after defendant requested an attorney while being questioned by police. After speaking with attorney Narregan for several minutes, defendant was questioned by police and gave an account of his involvement in the armed robbery of East, which resulted in the victim being shot and killed by John Gillette, a coconspirator with defendant and Shaneberger. Gillette committed suicide as he was going to be captured by police. Attorney Narregan died several months after defendant filed his motion for relief from judgment.

Defendant argues that Narregan's assistance was ineffective because he had not done any investigation and did not understand what defendant would be saying before advising defendant to talk to the police. See *People v McGhee,* 268 Mich App 600, 626; 709 NW2d 595 (2005) ("Failure to make a reasonable investigation can constitute ineffective assistance of counsel."). Specifically, defendant is arguing that counsel failed to investigate what defendant would be admitting to and how that would implicate the law of adding and abetting, and as a result, his statement to the police was tantamount to a confession to felony murder.

Based on the record in this case, it is not possible for this Court to fully determine the veracity of defendant's claims regarding Narregan's alleged failure to investigate. However, were we to accept defendant's account, it would certainly follow that Narregan's performance fell below the objective standard of reasonableness. Defendant's decision to talk with the police could have proven to be crucial. It was Narregan's responsibility to ensure that defendant's decision was, at a minimum, well informed. By failing to fully investigate what defendant intended to say to the police, Narregan failed to ensure that defendant understood the possible ramifications of his decision. Consequently, if defendant's account is accurate, Narregan's performance was not objectively reasonable. However, for the reasons stated below, defendant is not entitled to relief.

Defendant is unable to establish that there is a reasonable probability that the outcome of trial would have been different had counsel acted differently. As noted by the trial court, the police had independent information casting suspicion on defendant and his codefendant as being involved in the crimes. Most damaging was the taped conversation that defendant and Shaneberger had while seated in a police car. In this conversation, defendant and Shaneberger spoke of many of the robberies they had been involved in, including some that were the subject of the other acts evidence properly admitted at trial. Defendant recounted that he told the police that during the other robberies, he was "drunk as a skunk" and did not have a gun. In their recorded conversation, defendant and Shaneberger also acknowledged that Gillette acted as the trio's triggerman:

"*Shaneberger*:	Yup. Justin was the main per, he went in first on everything.
Rowe:	Right.
Shaneberger:	Gun ablazin', sayin' he was gonna kill people.
Rowe:	Oh, my God. Big bubba."

Defendant's admissions about participation in the numerous robberies coupled with the admitted knowledge that Gillette had used his firearm and threatened to kill during the course of the robbery spree is sufficient to support the verdict.

Defendant's challenge to trial and appellate counsels' representation rests on their subsequent failure to raise the issue of Narregan's assistance. Because defendant fails to show that Narregan's ineffective assistance probably affected the trial's outcome, he cannot show that subsequent counsels' failure to raise the issue evidences ineffective assistance. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also challenges trial counsel's handling of the admission of Shaneberger's taped police interview. Defendant argues that admission of the unredacted statement violated the rule of *Bruton* and thus warrants a finding of ineffective assistance. We disagree. It is clear to us that admission of the statement in full, and in the absence of a limiting instruction regarding its application to defendant, supported counsel's strategy to create a reasonable doubt in the jury's mind that defendant acted with the requisite malice with respect to the murder. Defendant's counsel focused on the consistency between the two statements and the fact that defendant and Shaneberger did not have the opportunity to collude prior to each man talking to the police. This consistency, it was argued, showed the sincerity of defendant's assertion that he did not have the mens rea necessary to find him guilty of felony murder. The strategy was reasonable and approaching Shaneberger's statement as support for this theory of defense is entirety consistent with that strategy.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly