STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2011
V	No. 295776 Macomb Circuit Court
ROBERT LEROY REICH, Defendant-Appellant.	LC No. 2009-003066-FC

Before: SAAD, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, and the trial court sentenced him to 25 to 40 years in prison. For the reasons set forth below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecutor presented insufficient evidence to establish that he killed the victim, Richard Lehr. "A claim of insufficient evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). "The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009). The identity of the perpetrator is an element in every criminal offense, but circumstantial evidence and reasonable inferences may be used to prove the elements of the crime. *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010).

We hold that sufficient evidence supported defendant's second-degree murder conviction. On January 24, 2009, defendant and Richard Lehr spent the evening at Tudge's Pub in St. Clair Shores. At the time, defendant was living with Lehr at Lehr's apartment in the nearby Chapoton Apartment complex. A bartender testified that she heard Lehr tell defendant that "[h]e was tired of [defendant] mooching off him and asked him why can't he find somewhere to go or get a job. . ." The record also reflects that defendant had a confrontation with another bar patron that night and, when defendant became angry and started yelling, the bar owner broke up the argument. Defendant and Lehr left the bar together when it closed around 2:00 a.m. on January 25, 2009. Defendant later told police officers that he and Lehr continued to argue about defendant moving

out of Lehr's apartment as they walked back to the apartment complex. Defendant also told officers that, after they entered Lehr's apartment, defendant told Lehr that he would leave if Lehr gave him $20. According to defendant, Lehr gave him the money and defendant left the apartment.

Lehr's dead body was discovered inside his apartment by a police officer on January 28, 2009. The medical examiner testified that Lehr died of ligature and manual strangulation. A broken shoelace was found near Lehr's body and his body showed signs of a struggle. However, there was no sign of forced entry into the apartment. No one saw Lehr after he left Tudge's Pub with defendant during the early morning hours of January 25, 2009.

A waitress at the Travis Coffee Shop in St. Clair Shores testified that defendant came into the restaurant between 4:00 and 5:00 a.m. on January 25, 2009. The waitress testified that defendant ordered a large breakfast, but ate only a couple of bites. She also recalled that defendant appeared "nervous" and "fidgety." At defendant's request, the waitress called defendant a cab so that defendant could go to a bus station in Southfield. According to the waitress, defendant told her that he wanted to leave town. The cab driver testified that he took defendant to the bus station. The driver recalled that defendant said he had an argument with his girlfriend, he did not want any trouble with the police, and he wanted to leave town. Because the bus station was closed, the cab driver ultimately dropped defendant off at around 6:30 a.m. at a Dunkin' Donuts near Telegraph and 10 Mile in Southfield.

The record reflects that defendant used Lehr's ATM card to withdraw $100 from Lehr's bank account at around 7:25 a.m. on January 25, 2009, at a gas station at 10 Mile and Telegraph. Later that day, defendant used Lehr's ATM to withdraw $200 from an ATM machine at a drug store on Five Mile Road in Redford. On the evening of January 25, 2009, defendant spent time at a crack house on Forrer Street in Detroit. After spending a couple of hundred dollars on crack, defendant requested credit to buy more drugs by using Lehr's ATM card. A man named Kaleci Hill approved defendant's request after defendant gave him Lehr's ATM card and pin number. Kaleci testified that he withdrew $300 from the account. The record reflects that Kaleci received the cash from a Comerica ATM machine in Detroit at 4:25 a.m. on January 26, 2009.

On January 30, 2009, defendant turned himself in at the Clarkston courthouse on an unrelated warrant. He was transferred to the Oakland County Jail, where he was interviewed by St. Clair Shores Detective Sergeant David Centala and Detective Steven Krauss. As noted, defendant admitted that, in the early morning hours of January 25, 2009, he and Lehr went to Lehr's apartment after leaving Tudge's Pub and he admitted that he was arguing with Lehr about Lehr's desire that he move out. Defendant maintained that he left the apartment after Lehr gave him $20. Defendant recalled that Lehr and he bumped into a black man named Ernie on their way to Lehr's apartment and that, when he left, Ernie was still in Lehr's apartment. Investigating officers later learned that the man to which defendant was referring, Ernie Farrell, was not in St. Clair Shores in the early morning hours of January 25, 2009.

Defendant told the officers that, when he left Lehr's apartment, he went to a restaurant called Linda's Place and then, at around 6:30 or 7:00 a.m., he took a bus to Waterford, then to Royal Oak. However, an investigation later revealed that defendant did not go to Linda's Place that morning and that the first bus did not begin its route in that area until 8:20 a.m.

For impeachment purposes, and to rebut the defense's theory that defendant was elsewhere when Lehr died, the prosecutor introduced a statement that defendant made to a police officer, Gordon Carrier, who transported defendant from the district court to the Oakland County Jail. The officer asked defendant if he was surprised about the murder charge and defendant said he was not and that he had spoken to detectives while he was in jail. Officer Carrier testified that defendant then said, "It's not like how they said. We did get into it, but it was an accident."

We hold that the prosecutor presented sufficient evidence to establish that defendant committed the crime. Defendant was the last person to see Lehr alive, he admitted that he and Lehr were fighting that night, he had a motive to harm Lehr because Lehr was pressing him to move out of his apartment, defendant repeatedly lied to police about his whereabouts during the early morning hours of January 25, 2009, and, even so, had the time and opportunity to kill Lehr while inside the apartment. Defendant also undermined his claim that he was not at the apartment when Lehr died when he told Officer Carrier that Lehr died accidentally. Defendant lied to police when he tried to implicate Ernie Farrell in the murder when evidence showed that Farrell was not in St. Clair Shores during the relevant period of time. On the morning of January 25th, defendant appeared nervous and told people he wanted to leave town. Thereafter, he never returned to Lehr's apartment even though he had been living there with Lehr. And, though defendant claims not to have been involved in Lehr's death, he was in possession of Lehr's ATM card and he used it to withdraw cash and to buy drugs just after Lehr was apparently killed. This evidence was clearly sufficient for a reasonable jury to conclude that defendant murdered Lehr.

II. ASSISTANCE OF COUNSEL

Defendant contends his counsel was ineffective because he opened the door for the prosecutor to introduce defendant's statement to Officer Carrier that "It's not like how they said. We did get into it, but it was an accident." "To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted." *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010). "Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

Before trial, the prosecutor sought to introduce defendant's statement to Officer Carrier that Lehr's death was an accident. The trial court denied admission of the statement because it was made after defendant's arraignment, at which he requested a lawyer to represent him in defending against the charge. Further, the trial court found that Officer Carrier initiated the conversation with defendant and asked a question about whether he was surprised about the murder charge, which would tend to elicit a response regarding defendant's involvement in the crime after defendant had requested a lawyer. During the direct and cross-examinations of Detective Sergeant Centala and Detective Krauss, the prosecutor and defense counsel elicited various hearsay statements about what defendant told the police officers regarding his whereabouts on January 25, 2009. Among other things, their testimony established that defendant maintained that he left Lehr's apartment after Lehr gave him $20 and that he left while

Lehr was alive. Thereafter, the trial court admitted defendant's statement to Officer Carrier as impeachment evidence under MRE 806, which provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

We hold that defense counsel's questioning of Detective Sergeant Centala and Detective Krauss did not constitute ineffective assistance of counsel. At that time, the trial court had denied the prosecutor's motion to introduce defendant's statement to Officer Carrier as substantive evidence. Defense counsel followed up with the officers on issues raised by the prosecutor with regard to defendant's claimed whereabouts on the morning of January 25th. This was merely an attempt to highlight exculpatory evidence to show that defendant did not commit the crime, without requiring defendant to take the stand in his own defense. Without defendant's own statements to the officers regarding his conduct on the night in question, many of which were introduced by the prosecutor, defense counsel would not have been able to establish the defense that someone else must have committed the crime. It is well-settled that a trial lawyer's decision about how to cross-examine a witness is a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). Further, the prosecutor's decision to move for the admission of defendant's statement through MRE 806 was not foreshadowed earlier in the proceedings, and the trial court's decision to grant the prosecutor's motion was a close legal question, the outcome of which defense counsel could not have predicted when confronting the two witnesses at issue. Accordingly, defendant has failed to show that his counsel's conduct was objectively unreasonable. *McCauley*, 287 Mich App at 162.

III. DNA TESTING

Defendant maintains that the trial court denied him a fair trial by failing to conduct DNA testing on a cigarette butt found in Lehr's bathroom. Where a "[d]efendant's exculpatory theory about the evidence is highly speculative" and where other significant identification evidence is presented against the defendant, we will not reverse a trial court's denial of a motion for DNA testing. *People v Sawyer*, 215 Mich App 183, 192; 545 NW2d 6 (1996); *People v Vaughn*, 200 Mich App 611, 619; 505 NW2d 41 (1993), rev'd on other grds 447 Mich 217; 524 NW2d 217 (1994). Here, as the trial court found, the prosecutor did not take the position that no one other than defendant and the victim had entered or had access to Lehr's apartment and nothing in the record showed when the cigarette butt was left in the apartment or that it was involved in the crime or near where it occurred. Therefore, a finding that the cigarette butt belonged to someone other than Lehr or defendant would not tend to establish defendant's innocence. Moreover, the evidence described above established defendant's identity as the perpetrator and testing of this

unrelated item lacks probative value. Accordingly, defendant is not entitled to relief on this basis.

IV. BURDEN OF PROOF

Defendant argues that the prosecutor unfairly shifted the burden of proof when he argued that defendant failed to present any evidence that someone other than defendant could have committed Lehr's murder. A prosecutor is not permitted to attempt to shift the burden of proof to a defendant. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). However, viewed in context, the prosecutor was merely attacking defendant's theory that he was not present when Lehr died and that someone else committed the crime. Our courts have held that, when a defendant presents an alternate theory or alibi, a prosecutor's comment about the lack of corroboration does not amount to a shifting of the burden of proof. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995).

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio