

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 27, 2012

v

DERRICK D. SMITH,
Defendant-Appellant.

No. 304451
Wayne Circuit Court
LC No. 10-005516-FC

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree murder, MCL 750.316(1)(a), and two counts of torture, MCL 750.85. He was sentenced, as a fourth habitual offender, MCL 769.12, to concurrent sentences of life imprisonment without the possibility of parole for the first-degree murder convictions and 60 to 90 years' imprisonment for the torture convictions. He appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. We disagree.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011) (internal quotation marks and citation omitted). We review a trial court’s factual findings for clear error and constitutional determinations de novo. *Id.* “This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record.” *Id.*

Defendant and codefendant, Devi Smith, were convicted after they shot and killed Monica Botello and Percil Carson in Carson’s home. Botello’s children, aged six and eight, were in the house during the shooting. On appeal, defendant argues that his trial counsel was ineffective for several reasons: (1) counsel had two months to obtain an investigator but never did, (2) counsel failed to request discovery or adequately address discovery issues with the court until the day of trial, (3) counsel did not obtain the Kids Talk transcript until only days before trial, (4) counsel never requested that an expert be appointed to analyze whether the child witness’s testimony was coerced until after jury selection, and (5) counsel never arranged for defendant to view surveillance videos admitted by the prosecution at trial.

To establish ineffective assistance of counsel, a defendant must meet two requirements. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). “First, the defendant must show that counsel’s performance fell below an objective standard of reasonableness.” *Id.* at 290. “In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy.” *Id.* “Second, the defendant must show that, but for counsel’s deficient performance, a different result would have been reasonably probable.” *Id.* “[T]he cumulative effect of several minor errors of defense counsel may warrant reversal where the individual errors would not.” *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008) (citation omitted).

Defense counsel’s failure to obtain an investigator did not render his performance ineffective. Defendant was appointed an investigator on October 22, 2010, at his arraignment on the information. The appointed investigator was later removed because the investigator had a conflict of interest with the case. At the final conference on January 20, 2011, the court ruled that another investigator could be obtained. Counsel had two months before trial to obtain an investigator, but never did. In the lower court record, there is nothing that establishes why counsel did not obtain an investigator. Review of this issue is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Therefore, defendant cannot demonstrate that his attorney’s performance fell below an objective standard of reasonableness. However, even assuming counsel’s performance did fall below an objective standard of reasonableness because he failed to obtain an investigator, defendant cannot show that there was a reasonable probability that, but for the failure to obtain an investigator, the outcome of trial would have been different. Defendant does not explain what facts needed investigation, how an investigator would have assisted him in preparing for trial, or how trial would have been different had an investigator been appointed. Therefore, defendant has not established that counsel was ineffective for failing to obtain an investigator.

Similarly, counsel was not ineffective for failure to request discovery or adequately address discovery issues with the court. Defendant specifically argues that his attorney failed to request or obtain police reports, phone records, and DNA evidence reports. Defendant’s argument lacks merit because counsel did address discovery issues with the court before trial, and, according to the record, received all available discovery materials. On December 20, 2010, counsel joined in a discovery motion filed by the codefendant. On December 23, 2010, counsel met with the prosecutor and obtained all discovery materials that the prosecutor had in her possession. On January 20, 2011, at the final conference, counsel acknowledged that the prosecutor turned over all discovery materials, and specifically acknowledged receipt of the phone records. At that time, the prosecutor stated that DNA evidence reports were not yet completed, but that the reports would be turned over when they were complete. At trial, defense counsel stated that he had received the DNA evidence reports shortly before trial. Therefore, defendant is incorrect in his assertion that counsel failed to address discovery with the court, and that he failed to obtain the phone records and DNA evidence reports.

Defendant also argues that there were missing police reports from Los Angeles, where defendant was arrested, that were never provided to defendant. The alleged police reports were never mentioned before trial, and there is no evidence on the record that they exist, except for defendant’s conjecture. Therefore, based on the lower court record, counsel’s performance did not fall below an objective standard of reasonableness.

Even assuming defendant could show that counsel's performance fell below an objective standard of reasonableness, there was no reasonable probability that, but for the deficient performance, the outcome of trial would have been different. Counsel had all available discovery materials before trial, including both the phone records and DNA evidence reports. Furthermore, he utilized this evidence at trial. Counsel offered, and the court admitted, the phone records as evidence. Counsel cross-examined the DNA expert regarding the DNA results. In regard to the police reports from Los Angeles, defendant does not explain what information in the alleged police reports would have affected the outcome of trial. Because he has failed to demonstrate that the alleged deficiency in counsel's representation impacted the outcome of the proceedings, defendant is not entitled to relief.

Defendant further asserts that counsel was ineffective because he did not obtain the Kids Talk transcript until only days before trial. One of the prosecution's key witnesses in this case was the victim's young daughter. On March 2, 2010, the witness was interviewed at Kids Talk. The prosecutor had a recording of the Kids Talk interview, and two transcripts of the interview. On December 20, 2010, the prosecutor submitted the Kids Talk recording and the Kids Talk transcript to the trial court judge for review. At the final conference on January 20, 2011, the judge stated that he had not completed his review of the Kids Talk transcript, but that he would have it completed before trial. At that time, the prosecutor and defense counsel stated that defense counsel had viewed the Kids Talk recording. However, even though his attorney had seen the recording, defendant had not. Defendant could not watch videos in the facility where he was incarcerated. Defendant was given the Kids Talk transcript the Friday before trial began. Based on the record, defense counsel addressed the Kids Talk transcript and recording with the court at almost every appearance, and made diligent efforts to obtain the transcript and recording. Defendant seems to infer that because he personally did not have access to the Kids Talk recording or transcript until a few days before trial, counsel was ineffective. However, defendant cites no authority that requires trial counsel to show all relevant evidence to a defendant. Defendant's attorney had the information, and used it to prepare for trial and during trial. The fact that counsel was not able to show defendant all the evidence before trial does not justify a finding that his performance fell below an objective standard of reasonableness. Furthermore, defendant cannot show that there was a reasonable probability that, but for counsel's performance, the outcome of trial would have been different. Counsel had access to the recording and viewed its contents, and was able to use it to prepare for trial. He utilized the Kids Talk transcript during cross-examination. Therefore, the delayed receipt of the transcript did not negatively affect defendant.

Additionally, counsel was not ineffective where he never requested that an expert be appointed to analyze whether the child witness's testimony was coerced until after jury selection. In the record, there is nothing to suggest that the witness's testimony was coerced. Defendant's only argument at trial to support his contention was that the witness had been interviewed many times. This alone does not show that her testimony was coerced, and, furthermore, the consistency between all of her statements suggests that she was not coerced. Defendant offers no evidence to support his assertion that an expert should have been appointed, or that an expert would have been able to show that the witness was coerced. Counsel's performance did not fall below an objective standard of reasonableness, nor did his performance in this regard impact the outcome of the trial.

Finally, counsel was not ineffective because he did not arrange for defendant to view surveillance videos admitted by the prosecution at trial. Defendant could not view videos at the facility where he was incarcerated. Counsel addressed this problem with the court at every pre-trial court appearance, and made diligent efforts to have defendant watch any and all videos. In fact, defendant was transported to the court on Fridays leading up to trial so that he could view video evidence, but, because of the amount of video recordings, there was not time to view everything. Even though defendant did not view the videos before trial, counsel had viewed the videos, and was able to use the videos in preparing for trial. Additionally, defendant was in fact able to watch the videos during trial before the videos were shown to the jury because of counsel's request. Counsel's performance did not fall below an objective standard of reasonableness. Defendant also fails to demonstrate that there was a reasonable probability that, but for counsel's performance, the outcome of trial would have been different. Therefore, defendant is not entitled to relief in regard to this issue.

Defendant also asserts that, even if the cited errors do not constitute ineffective assistance of counsel when viewed separately, the cumulative effect of the errors constitutes ineffective assistance. Defendant is correct that the cumulative effect of several minor errors may justify a finding of ineffective assistance of counsel. *Unger*, 278 Mich App at 258. However, because none of defendant's claims were meritorious, the purported errors, even when viewed together, do not justify a finding of ineffective assistance of counsel.

Defendant next argues that the trial court abused its discretion when it limited the cross-examination of one of the prosecution's witnesses, Jeffrey Haugabook, at trial in regard to Haugabook's involvement in other robberies. Defendant further argues that the trial court erred when it refused to strike Haugabook's testimony after he asserted his Fifth Amendment right against self-incrimination. We disagree.

We review a trial court's limitation of cross-examination for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 259. To the extent that this issue involves a determination of whether defendant was deprived of his right to cross-examination, the issue presents a question of law subject to de novo review. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).

At trial, defendant's friend, Haugabook, testified for the prosecution. Haugabook was granted immunity in exchange for his testimony, which extended to Haugabook's role in helping defendant leave Detroit after the murders. On direct examination at trial, Haugabook testified that defendant told him that he was "punching in," which meant "he was going to rob the guy [the victim] or cash in prescriptions." Haugabook further stated that defendant asked if Haugabook wanted to participate in the robbery. On cross-examination, defendant's trial counsel asked Haugabook the following questions:

Q. Sir, are you saying you were surprised when my client, Mr. Smith, asked you to pull a robbery?

A. Yes.

Q. You hadn't been involved in a number of robberies yourself?

A. I plead the fifth.

Counsel then asked that Haugabook's testimony be stricken from the record because Haugabook asserted his Fifth Amendment right against self-incrimination. The judge excused the jury. The prosecution argued that the question was improper, and that the question and answer should be stricken from the record, but not Haugabook's testimony. Counsel argued that the question was proper because it was related to Haugabook's credibility regarding his understanding of defendant's statement that defendant was "punching in." Counsel argued that he was not asking about other robberies to show Haugabook's criminal history, but rather, "I'm going to the part about him interpreting what my client allegedly said. And that goes beyond whether or not he's been convicted of anything, but it brings up the whole idea of how he knows that Mr. Smith was contemplating a robbery." Defense counsel asserted that Haugabook's "familiarity with the nomenclature," came from his participation in other robberies. The court held that the proper question to ask was how Haugabook knew what defendant meant when he said he was "punching in." According to the trial court, whether Haugabook was involved in other robberies was not relevant. The judge called the jury back, and asked the jury to disregard the question and answer. Defense counsel then asked Haugabook:

Q. Now, you told us – you told the jury that when Mr. Smith told you that he was going to punch in – you remember that – then you speculated that he was going to commit a robbery?

A. Yes

Q. How do you know what that means, in your mind, when you said that?

A. Just basic talk. That's basic conversations that me and Derrick had.

Defendant now argues on appeal that the trial court abused its discretion when it limited defendant's ability to cross-examine Haugabook regarding his involvement in other robberies.

Criminal defendants have a constitutional right to cross-examine the witnesses testifying against them. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). "A limitation on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). However, the right to cross-examination is not unlimited. *Adamski*, 198 Mich App at 138. For instance, there is no right to cross-examine on irrelevant issues and the right to cross-examine may have to accommodate other legitimate interests of the trial process or society. *Id.* The trial courts are given wide latitude to impose reasonable limits, but defendants must be provided a reasonable opportunity to test the truth of a witness's testimony. *Id.*

The trial court did not abuse its discretion in limiting defendant's ability to cross-examine Haugabook regarding his involvement in other robberies. The trial court ruled that the question was not relevant to defendant's purported purpose— to demonstrate how Haugabook was able to understand defendant's statement that he was "punching in." Defendant does not have a right to

cross-examine Haugabook regarding irrelevant matters. *Adamski*, 198 Mich App at 138. We agree that defendant's inquiry into whether Haugabook was involved in other robberies was not relevant to how defendant was able to understand what defendant meant when he said he was "punching in." The proper, relevant question would have been to directly ask Haugabook how he knew what defendant meant when he said he was "punching in." After the court ruled, defendant asked Haugabook, and the witness responded that he understood defendant's meaning because of conversations the two men had in the past. The direct questioning regarding Haugabook's understanding of defendant's statement was relevant to Haugabook's testimony, whereas defendant's general question regarding Haugabook's involvement in other robberies was vague, broad, and irrelevant to the crux of the issue. Additionally, the direct question sufficiently provided defendant with a reasonable opportunity to test the truth of Haugabook's understanding of defendant's statement. *Adamski*, 198 Mich App at 138. Therefore, the court did not abuse its discretion when it limited defendant's questioning on cross-examination.

Furthermore, the court did not err when it refused to strike Haugabook's testimony after he asserted his Fifth Amendment right against self-incrimination. Defendant and the prosecution relied on *People v Fuzi*, 116 Mich App 246; 323 NW2d 354 (1982), to analyze this issue. In *Fuzi*, the defendant was charged with murder. *Id.* at 249. The prosecution's key witness was granted immunity in exchange for her testimony. *Id.* Before trial, the witness had given the prosecution a list of 13 homicides that had allegedly occurred in Michigan. *Id.* at 250. The witness admitted to being involved in at least some of the alleged homicides. *Id.* The witness told the court that she would assert her Fifth Amendment right against self-incrimination if questioned about the other homicides. *Id.* The trial court ruled that the witness could not be questioned about the other homicides. *Id.* Defendant appealed to this Court and argued that the ruling denied him his constitutional right to confront the witness. *Id.* at 250-251. This Court relied on *United States v Cardillo*, 316 F 2d 606 (CA 2, 1963), in making its decision. *Fuzi*, 116 Mich App at 251. This Court stated, "If a witness's assertion of the privilege merely precludes inquiry into collateral matters bearing only on the witness's general credibility, the witness's testimony may be used against the defendant. If assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination, the witness's testimony should be stricken in whole or in part." *Id.* The Court further stated:

The relevant inquiry, therefore, is whether the intended cross-examination, to which the witness pleads the Fifth Amendment, relates only to general credibility. If the accused's legitimate purpose is to go beyond an attack on the witness's general credibility, the witness's assertion of the Fifth Amendment and the consequent restriction on the scope of cross-examination may constitute reversible error. [*Id.* at 251-252.]

Pursuant to *Fuzi*, the court did not err when it refused to strike Haugabook's testimony. The proposed question was, at most, relevant only to Haugabook's general credibility, and was not probative of Haugabook's testimony on direct examination. Defendant argues that the question regarding Haugabook's involvement in other robberies goes to the credibility of his testimony on direct examination that he understood defendant's statement that defendant was "punching in," to mean that defendant was planning a robbery. However, as discussed above, this question was not relevant to that inquiry. Rather, the more direct question that defendant

was instructed to ask by the trial court was more appropriate and relevant. Therefore, under *Fuzi*, the court did not err when it refused to strike Haugabook's testimony.

Defendant next argues that the trial court abused its discretion when it denied his motion to adjourn trial. We disagree.

We review a trial court's ruling on a defendant's request for an adjournment or a continuance for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 259.

MCR 2.503(B)(1) states that "a request for an adjournment must be . . . based on good cause." In determining whether a party has demonstrated good cause, factors a trial court is to consider include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *Coy*, 258 Mich App at 18 (citation omitted). The decision of a trial court to deny a request for adjournment does not constitute "grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Id.* at 18-19.

During trial, defendant requested a three-month adjournment. Defendant cited several issues as good cause for his request: (1) defendant was not able to go over lost or withheld discovery materials, such as police reports from the Los Angeles Police Department, (2) there was reason to believe that the child witness's testimony was coerced, and an expert should be appointed to investigate that claim, (3) an investigator had not yet been appointed even though defendant was granted an investigator by the court, and (4) defendant had only received the transcript from the Kids Talk interview a few days before trial, and had not been able to view the Kids Talk recording.

The court denied defendant's request for adjournment. The court held:

On the motion to adjourn the trial, the [c]ourt is not persuaded that an adjournment would be appropriate at this time. The allegations, many of them are speculative about things that were allegedly not turned over or lost. If something is lost, if it's lost, it's not going to be able to be produced.

Allegations that some things may have been destroyed, there's no factual basis to support those allegations. It's unspecific as to what allegedly was destroyed. We don't know.

For the appointment of an expert, there's no basis shown that would cause the [c]ourt to believe it's necessary to investigate an issue that the minor witnesses were coerced. I've seen no evidence of that. And to appoint a psychologist to try to analyze their testimony, I don't think that's appropriate under the circumstances. No requisite showing has been made to justify that or any other investigators. I find no reasonable basis to adjourn this trial date.

We hold that the trial court did not abuse its discretion when it denied defendant's request for adjournment. Defendant cannot establish good cause or prejudice. Defendant's arguments in support of an adjournment were mostly speculative and had no factual basis.

Defendant first argument for an adjournment in the trial court was that he was missing critical discovery materials. At trial, defendant stated that there were reports that were “lost or destroyed or stolen.” Specifically, he cited police reports from the Los Angeles Police Department. However, defendant’s allegation was not supported by the record. On December 20, 2010, defendant joined in codefendant Devi’s motion for discovery. On December 23, 2010, defense counsel met with the prosecutor and obtained all discovery materials that the prosecutor had in her possession. At trial, the prosecutor stated that she provided any documents she had in her possession, and that she was, and always had been, willing to assist defendant in obtaining any records that she did not have in her possession. Based on the record, discovery was completed, and there was no missing or withheld information. Defendant did not establish that any missing discovery documents actually existed and did not provide any basis to believe the documents were destroyed. Therefore, there was not good cause to adjourn to discover these alleged reports. Furthermore, defendant did not explain how he was prejudiced. Defendant asserted that there were missing reports, but did not explain how those reports could have affected trial.

Defendant’s next argument for an adjournment in the trial court was that he needed an expert appointed to analyze the child witness’s testimony for coercion. Defendant argued that an expert was necessary because the child witness, aged nine at the time of trial, was interviewed many times. This, by itself, does not establish coercion. There was not good cause to adjourn trial on this basis. Furthermore, defendant has not shown that he was prejudiced. A review of the record shows that the witness’s testimony was substantially consistent in all of her statements and interviews, and there was no basis to believe an expert witness would have changed the outcome of trial.

Defendant next argued that trial should have been adjourned so that he could have obtained an investigator. Defendant was appointed an investigator on October 22, 2010, at his arraignment on the information. The appointed investigator was later removed because the investigator had a conflict of interest with the case. At the final conference on January 20, 2011, the court ruled that another investigator could be obtained. Defendant had two months before trial to hire an investigator, but never did. Therefore, there was not good cause to adjourn on this issue. Furthermore, defendant has not shown prejudice. Defendant fails to explain what facts needed investigating, or what additional evidence an investigator could have obtained.

Finally, defendant argues that trial should have been adjourned because he did not obtain the Kids Talk transcript until only a few days before trial, and had not been able to view the Kids Talk recording. Defendant did not establish good cause in regard to his issue. Defendant was provided with the Kids Talk transcript the Friday before trial, and, therefore, was able to review it before trial. Defendant cites no legal authority to show that the court was also required to allow him to watch the Kids Talk recording. In addition, defendant's trial counsel viewed the Kids Talk recording months before trial. Therefore, the information was available to defendant and his attorney when preparing for defendant's trial, and there was not good cause to adjourn on this basis. Furthermore, there was no prejudice because defendant had the Kids Talk transcript available before trial, and it was utilized during cross-examination. Therefore, defendant is not entitled to relief.

Affirmed.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan