STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 8, 2013
v	No. 305794 Genesee Circuit Court
JARVON CRAIG BROWN, Defendant-Appellant.	LC No. 08-023564-FC

Before: M.J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the murder conviction and concurrent prison terms of 2 to 10 years each for the CCW and felon-in-possession convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the December 2004 shooting death of Karibe Anderson, Jr., who was shot and killed during a drive-by shooting on Baltimore Street in Flint. Anderson was staying with his father at the home of the Steeles. The prosecution presented evidence that defendant had wanted to carry out a drive-by shooting at the house next door to the Steeles's home because of a dispute defendant had with rival gang members who were known to congregate there and that, after the shooting, defendant told others that he had shot up the wrong house by mistake. Defendant denied any involvement in the shooting and presented an alibi defense. Defendant's girlfriend testified at trial that defendant was at home with her when the shooting occurred.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he is entitled to a new trial due to ineffective assistance of trial counsel. Defendant raised this issue in a post-conviction motion in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). But because the trial court did not conduct an evidentiary hearing, this Court's review is limited to errors apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, defendant must "show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also show that "the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Under the first prong of this test, "a reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission." *People v Gioglio (On Remand)*, 296 Mich App 12, 22-23; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864 (2012).

A. SPEEDY TRIAL

Defendant first argues that trial counsel was ineffective for failing to pursue a motion to dismiss for violation of his right to a speedy trial. The decision whether to file pretrial motions is a matter of trial strategy. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). However, counsel may be ineffective for failing to raise a meritorious motion. See *People v Carrick*, 220 Mich App 17, 21-22; 558 NW2d 242 (1996). The record shows that defense counsel raised this issue by joining in another defendant's motion. However, defendant's motion was adjourned pending the submission of supplemental information. The record does not disclose what became of the motion; it was not raised again before trial.

A criminal defendant has a right to a speedy trial. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). The right to a speedy trial requires that the trial commence within a reasonable time under the circumstances. *People v Spalding*, 17 Mich App 73, 75; 169 NW2d 163 (1969). Whether a defendant has been denied his right to a speedy trial involves consideration of four factors: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay. *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

The delay period commences when a defendant is arrested. *Id.* at 261. A delay of six months is necessary to trigger an investigation into a claim that a defendant has been denied a speedy trial. *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), vac'd in part on other grounds 480 Mich 1059 (2008). The defendant must prove prejudice when the delay is less than 18 months. *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009). But a delay of more than 18 months is presumptively prejudicial to the defendant and shifts the burden of proving lack of prejudice to the prosecution. *Williams*, 475 Mich at 262.

Defendant was arrested in March 2008, and the trial began in June 2011, resulting in a delay of a little more than three years. Thus, such a delay is presumptively prejudicial and requires consideration of the remaining factors. *Id.*

In assessing the reasons for the delay, each period of delay is examined and attributed to the prosecution or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517

(1985). Defendant has not shown that this factor weighs in his favor. First, defendant relies in part on prearrest delay, which is a wholly separate issue. The right to a speedy trial considers only the delay between the defendant's arrest and the commencement of the trial. *Williams*, 475 Mich at 261. Second, defendant notes the need to apportion responsibility for the delay between the prosecution and the defense, but he does not do so. He simply asserts that "[n]one of the delay was [his] fault." "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Further, defendant's assertion is not supported by the record. Delays caused by the adjudication of defense motions are attributable to the defendant. *People v Gilmore*, 222 Mich App 442, 461; 564 NW2d 158 (1997). The record discloses that defendant filed or joined in numerous defense motions, beginning while the case was still in the district court and continuing after he joined in the speedy trial motion.

Regarding the third factor, defendant waited almost two years into the process before asserting his right to a speedy trial. A defendant's failure to assert his right to a speedy trial does not constitute a waiver of that right, *People v Missouri*, 100 Mich App 310, 322; 299 NW2d 346 (1980), but the failure to assert this right in a timely manner weighs against a finding that the defendant was denied a speedy trial, *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993). After defendant asserted his right in January 2010, there were subsequent defense motions that needed to be resolved. In addition, the pretrial proceedings were unusually complex because they involved at least 10 charges against defendant, whose case was being handled jointly with the cases of several other gang members. The greater complexity inherent in such a process makes delay more tolerable for speedy trial purposes. *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987).

The right to a speedy trial protects "three interests of the defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; (3) limitation of the possibility that the defense will be impaired." *People v White*, 54 Mich App 342, 351; 220 NW2d 789 (1974). "In considering the prejudice to the defendant, the most serious inquiry is whether the delay has impaired the defendant's defense." *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994).

In this case, prejudice is presumed due to the length of the delay, but the record indicates that the presumption of prejudice was rebutted. Defendant was subjected to lengthy pretrial incarceration. However, the prejudice element may properly weigh against an incarcerated defendant as long as his defense is not prejudiced by the delay. *Williams*, 475 Mich at 264. Prejudice to the defense is that which meaningfully impairs the defendant's ability to defend against the charges against him to the extent that the outcome of the proceeding will likely be affected. *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). The only prejudice to the defense was the loss of a potential alibi witness. Defendant's mother, Diane Atkins, who had been named as an alibi witness in 2008, died shortly before trial. However, defendant all but conceded at the hearing on his motion in limine that the most Atkins would be able to offer was that defendant was in her house when she went to bed and when she woke up. Defendant did not claim that Atkins could account for his whereabouts during the interim, which included the time of the shooting, because she slept in a separate bedroom. Because Atkins would not have been able to definitively state where defendant was at the time of the shooting, her testimony was unlikely to have affected the outcome of the trial. In addition, the absence of

Atkins' testimony did not prevent defendant from actually presenting an alibi defense, however, because the person allegedly in the same bedroom with him, his girlfriend, did testify at trial that defendant was with her at the time of the shooting.

Given the record presented and defendant's failure to adequately address one of the necessary elements of a speedy trial claim, defendant has failed to show a reasonable probability that a motion would have been likely to succeed. Because "defense counsel is not ineffective for failing to pursue a futile motion," *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008), defendant's claim must fail.

B. FAILURE TO OBJECT TO EVIDENCE

Defendant next argues that trial counsel was ineffective for failing to object to evidence at trial. The decision whether to object to evidence is a matter of trial strategy. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989), overruled in part on other grounds by *People v Grissom*, 492 Mich 296, 320 n 40; 821 NW2d 50 (2012). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). However, counsel may be found ineffective with regard to a strategic decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988).

Defendant first argues that defense counsel was ineffective for failing to object to certain testimony offered by Sgt. Shawn Ellis on direct examination. Defendant contends that the testimony at issue "was obviously hearsay" that should have been excluded. This is a conclusion devoid of any analysis and unsupported by citation to relevant authority. As previously indicated, defendant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Kelly*, 231 Mich App at 640-641. In any event, we have reviewed the portions of the record cited by defendant and conclude that they do not support defendant's argument that Ellis's testimony was inadmissible hearsay.

Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Thus, an out-of court statement is not hearsay if it is offered for a purpose other than the truth of its contents. *People v Mesick (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). Viewed in context, much of the challenged testimony was not offered for its truth, but rather to explain the police investigation. Thus, it was not hearsay. In addition, although Ellis frequently alluded to other sources of information, for the most part he did not actually state what was said by the other sources. Moreover, to the extent it could be considered hearsay, it was not objectively unreasonable for defense counsel to refrain from objecting to Ellis's testimony that he (1) learned from police reports and witness interviews that defendant was shot at Club 210, (2) learned from witness interviews that a set of twins hung out on Baltimore Street, and (3) learned from an unnamed source that defendant and Garrard Kincaid were both in jail in 2008.

Even assuming Ellis's testimony on these topics constituted impermissible hearsay, any error was harmless. "[T]he admission of a hearsay statement that is cumulative to in-court

testimony by the declarant can be harmless error, particularly when corroborated by other evidence." *People v Gursky*, 486 Mich 596, 620; 786 NW2d 579 (2010). At trial, the Steeles had already testified that a set of twins operated a drug house next to their home. Defendant also testified that he was shot at Club 210 and reported the incident to the police, and both defendant and Cedric Earley testified that defendant was in jail with Kincaid. Moreover, because defendant did not contest those facts and relied on them as part of the defense, counsel had no reason to object. Lastly, we reject defendant's assertion that Ellis's testimony, that nobody ever told him that defendant was not the shooter, was hearsay. Ellis's testimony refers to something that was *not said*, rather than something that was said. Something that was not said cannot be an out-of-court statement; accordingly, the concept of hearsay was not implicated. Consequently, defendant has not demonstrated that defense counsel was ineffective for failing to object to Ellis's testimony.

Defendant next argues that defense counsel was ineffective for failing to object to the rebuttal testimony offered by Sgt. Michael Angus, who was called to impeach testimony offered by defense witness Earley. Defendant contends that Angus's testimony was improper because specific instances of conduct of a witness offered to attack his credibility cannot be proven by extrinsic evidence. MRE 608(b). However, extrinsic evidence of a witness's prior inconsistent statement is admissible under certain circumstances, MRE 613(b), for impeachment purposes only, not as substantive evidence. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002); *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Defendant does not discuss the interplay of these two rules and has not shown that MRE 613(b) is inapplicable in this case. Thus, he has not shown that defense counsel's failure to object to Angus's testimony was objectively unreasonable. Moreover, even assuming defense counsel unreasonably failed to object to Angus's testimony, defendant has not shown that he was prejudiced by the testimony. Angus's impeachment testimony did not result in the introduction of otherwise inadmissible evidence that implicated defendant in the offense, as was the situation in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), the case relied on by defendant. Therefore, the record does not support defendant's claim.

C. JURY INSTRUCTIONS

Defendant argues that defense counsel was ineffective for failing to request a cautionary instruction advising the jury that the out-of-court statement, that defendant "had something to do with" the victim's death, could not be considered as substantive evidence. Counsel's decision whether to request a cautionary or limiting instruction is a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003); *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Witness Kincaid testified that a man named "Frost" told him that defendant "had something to do with" the victim's death. Defendant contends that to the extent this testimony was admissible, counsel should have requested a limiting instruction regarding its use to prevent the jury from considering it as substantive evidence. Assuming that a limiting instruction would have been warranted, it is unlikely that its omission prejudiced defendant because Frost's statement was not the only evidence implicating defendant in the crime. The prosecution presented evidence that defendant wanted to do a drive-by shooting because he believed that a rival gang member had shot him, but he was unable to carry it out at that time. Evidence was

also presented that defendant was known to carry a nine-millimeter handgun, the same type of gun used in the shooting, and that defendant told two different people that he had made a mistake and shot up the wrong house. Given such evidence, it is not reasonably probable that the result of the trial would have been different if counsel had requested a cautionary or limiting instruction.

II. EXCLUSION OF EVIDENCE

Defendant next argues that the trial court erred by excluding Atkins's out-of-court statement to defendant's cousin, Janeen Henderson, that defendant was at home with Atkins at the time of the shooting. Defendant further contends that the exclusion of this evidence violated his constitutional right to present a defense. The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Whether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question that is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

"A criminal defendant has a state and federal constitutional right to present a defense." *Id.* at 326. This includes the right to call witnesses to establish that defense. *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984). "However, an accused's right to present evidence in his defense is not absolute." *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). "It is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Thus, the rules of evidence "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Unger*, 278 Mich App at 250, quoting *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998). A rule is arbitrary if it excludes important defense evidence but does not serve any legitimate interests. *Holmes v South Carolina*, 547 US 319, 325; 126 S Ct 1727; 164 L Ed 2d 503 (2006).

The trial court excluded the statement as inadmissible hearsay. The hearsay rules are designed to ensure that evidence is trustworthy. Each categorical exception "reflects instances in which courts have historically recognized that the required trustworthiness is present." *People v Katt*, 468 Mich 272, 289; 662 NW2d 12 (2003). Thus, the rules preserve the integrity of criminal trials by excluding hearsay evidence which is not trustworthy. There is no basis for concluding that the general rule excluding hearsay is arbitrary or disproportionate to its intended purpose. Therefore, the exclusion of Atkins's statement as inadmissible hearsay did not violate defendant's constitutional right to present a defense. Further, the trial court's exclusion of Atkins's statement did not infringe on defendant's right to present a defense because defendant offered his girlfriend's testimony in support of his alibi defense.

Defendant alternatively contends that Atkin's statement should have been admitted under MRE 803(24), the catch-all exception to the hearsay rule where the declarant is unavailable. "To be admitted under MRE 803(24), a hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a

material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission." *Id.* at 290. Defendant has omitted any discussion of the first element and thus has not shown that the evidence was trustworthy. Further, he has failed to show that the third and fourth elements were met. Atkins's hearsay statement was not more probative of defendant's whereabouts at the time of the shooting than any other evidence defendant could procure because defendant's girlfriend was available and testified that defendant was at home with her at the time. "[N]onhearsay evidence on a material fact will nearly always have more probative value than hearsay statements, because nonhearsay derives from firsthand knowledge. Thus, the residual exception normally will not be available if there is nonhearsay evidence on point." *Id.* at 293. Further, the interests of justice would not be served by admitting the evidence because, as noted previously, Atkins could not actually account for defendant's whereabouts at the time of the shooting. Under the circumstances, the trial court did not abuse its discretion in excluding the evidence.

III. SUFFICIENCY OF THE EVIDENCE

Defendant's final claim on appeal is that the evidence was insufficient to sustain his conviction of first-degree murder. A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "The intent to kill may be proved by inference from any facts in evidence," *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011), including the defendant's use of a lethal weapon, *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent to kill is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

"Premeditation and deliberation characterize a thought process undisturbed by hot blood." *People v Conklin*, 118 Mich App 90, 93; 324 NW2d 537 (1982), overruled in part on other grounds by *People v John Williams*, 422 Mich 381; 373 NW2d 567 (1985). That is, the defendant must have "had sufficient time to think about his actions before the commission of the crime and evaluate the consequences and alternatives," *People v Wells*, 87 Mich App 402, 409; 274 NW2d 797 (1978), overruled in part on other grounds by *John Williams*, 422 Mich 381, or in other words, the defendant must have had sufficient time to "take a second look," *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). "Premeditation can be established from reasonable inferences drawn entirely from circumstantial evidence." *Wells*, 87 Mich App at 409. It may be inferred from such factors as (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself, including the weapon used and the nature of the wounds inflicted, and (4) the defendant's conduct after the killing. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

The evidence was sufficient to prove that defendant harbored a premeditated and deliberate intent to kill someone, if not the victim.[1] There was evidence of feuding between defendant's gang and a rival gang. Darryl Morgan testified that defendant wanted to shoot up a house on Baltimore Street where members of the rival gang were known to congregate in retaliation for an earlier incident in which defendant was shot. When they first went to Baltimore Street, they did not carry out the shooting because a police car drove by. Approximately two weeks later, the Steeles' home, which was next door to the home frequented by the rival gang, was shot up in a drive-by shooting. Anderson, who was asleep in the house, was shot and killed. Ballistics evidence indicated that the shots were fired by a single nine-millimeter gun, which matched the type of gun defendant was known to carry. Both Morgan and Kincaid testified that defendant later implicated himself in the crime. The witnesses, who did not know one another, both testified that defendant said that he mistakenly shot up the wrong house. Evidence that defendant fired several shots into a house at a time when people were likely to be present and fired the shots "below the windows," i.e., at a height calculated to strike an occupant, was evidence of an intent to kill. Evidence that defendant wanted to retaliate against a rival gang, that his initial attempt was frustrated by the police, that he returned at a later date, and that he took a gun with him was evidence that defendant acted with premeditation and deliberation. Therefore, the evidence was sufficient to prove the elements of first-degree murder.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood

[1] Under the doctrine of transferred intent, it is sufficient for the prosecutor to show that defendant had the requisite state of mind to kill; it is not necessary to show that defendant's state of mind was directed at a specific person or the actual victim. *Abraham*, 256 Mich App at 270.