STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2013
v	No. 306405 Macomb Circuit Court
PAUL JOHN POZNIAK, Defendant-Appellant.	LC No. 2010-004521-FC

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from the February 23, 2010, strangulation of 84-year-old Charles Taylor in his home in Warren, Michigan. The prosecution's theory was that defendant, the estranged son of Taylor's long-time friend, knew that Taylor had money, attacked him in his home, ransacked his home looking for valuables, and stole his wallet. Defendant's DNA was discovered on Taylor's left and right hands, as well as the inside of Taylor's right rear pants pocket, where Taylor kept his wallet. At trial, the defense argued that defendant's DNA was on Taylor's hands because Taylor shook defendant's hand and hugged him during a prior visit, and that a secondary transfer from that contact caused the presence of defendant's DNA inside Taylor's pants pocket. The defense presented an alibi defense, and defendant and his girlfriend both testified that they were together on the day of Taylor's death.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence identifying him as the person who killed Taylor. We disagree. When evaluating whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). Identity is also an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *Nowack*, 462 Mich at 400. The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Id.*

Defendant does not contest that a premeditated murder was committed, but asserts that there was no credible evidence that he was the person who committed the murder. Because there were no eye-witnesses to the actual crime, defendant's identity as the killer was established by circumstantial evidence. But our deferential standard of review "is the same whether the evidence is direct or circumstantial," and it is well established that "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Nowack*, 462 Mich at 400 (citation omitted).

Evidence was presented that Taylor was a long-time friend of defendant's father, but that defendant had not seen Taylor for more than 30 years. Taylor lived alone, had a regular routine, and was known to carry money in his wallet and to keep large sums of money in his meticulously organized home. Taylor's neighbor, Dennis Lohmeier, placed defendant on Taylor's street on the day Taylor was killed. Lohmeier selected defendant's photograph "immediately" from a total of 18 individuals, presented in three different photo arrays. Lohmeier testified at trial that he was 100 percent certain that defendant was the person he observed and conversed with about snow removal on the day Taylor died. After their brief conversation, Lohmeier observed defendant, who was wearing a dark hooded sweatshirt and jeans, walk down the street. Another neighbor, Janice Knoll, observed a man wearing a dark hooded sweatshirt and jeans walk up Taylor's walkway to Taylor's door, and walk directly into Taylor's house after the door was opened. This seemed unusual to Knoll because in her 35 years as Taylor's neighbor, he rarely had company. The police found no evidence of a forced entry, although Taylor's bedrooms had been ransacked, as if someone was searching for something.

Defendant's DNA was found on Taylor's right and left hands and on the inside of Taylor's right rear pants pocket. Testimony indicated that Taylor always kept his wallet in his right rear pants pocket. Expert forensic testimony indicated that, of the three places that defendant's skin cells were found, the inside of his pants pocket contained the largest source of defendant's DNA and garnered the strongest results. With regard to the presence of his DNA, defendant testified that he had taken a 25-mile bus ride from his Pontiac home to visit Taylor on the day before Taylor was killed, and that he shook Taylor's hand and hugged Taylor during the visit. Testimony indicated that there was a heavy snowfall on the day that defendant claims to have taken the lengthy bus ride to visit Taylor. Defendant denied being at Taylor's house or in Taylor's neighborhood on the day Taylor was killed.

Testimony from both defendant and his father, Alphonse Pozniak (hereafter, "father" or "Pozniak"), revealed that defendant had little to no contact with Taylor for several decades

before visiting him in February 2010. Pozniak testified that the 52-year-old-defendant last saw Taylor when defendant was 12 or 13 years old, and Pozniak could think of no reason why defendant would have gone to Taylor's house in February 2010. Although defendant testified that he had recently reconnected with Taylor before Taylor was killed, defendant did not attend Taylor's funeral and, although defendant spoke with his father after supposedly visiting Taylor, defendant did not mention that he had seen or talked to Taylor, who was his father's close friend.

Viewed in a light most favorable to the prosecution, the evidence of Taylor's known tendencies, Lohmeier's identification of defendant as being on Taylor's street on the day Taylor was killed, Knoll's observation of a similarly-dressed man walking directly into Taylor's home, the presence of defendant's DNA in Taylor's back pocket where he kept his wallet, and the evidence that defendant had not been in contact with Taylor for many years and had no reason for being at Taylor's home, considered together, was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant was the person who stole Taylor's wallet and strangled him during the criminal episode. Although defendant argues that there was evidence that his DNA could have been transferred innocently during a prior visit, and that Lohmeier's identification of him was not credible, these challenges are related to the weight of the evidence rather than its sufficiency. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). These same challenges were presented to the jury during cross-examination and closing argument. This Court may not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514. The evidence was sufficient to support defendant's conviction of first-degree premeditated murder.

We note that defendant urges this Court to extend the so-called "fingerprint rule" to DNA evidence. In *People v Ware*, 12 Mich App 512; 163 NW2d 250 (1968), this Court observed that fingerprint evidence may alone support a conviction only if "'the fingerprints corresponding to those of the accused . . . [are] found in the place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed.'" *Id.* at 515 (citation omitted). In this case, however, defendant's identity was not established *solely* by DNA evidence. Therefore, this is not an appropriate case for deciding to what extent, if any, the rule in *Ware* should be applied to DNA evidence. Lohmeier's testimony identifying defendant as the person he saw on Taylor's street on the day Taylor was killed, and Knoll's observation of a similarly-dressed man walking into Taylor's home, is additional evidence supporting defendant's identity as the person who killed Taylor.

Further, defendant's arguments relating to the failure to perform DNA testing on other items in Taylor's bedroom do not affect the sufficiency of the evidence or compel a different result. In the absence of "a showing of suppression of evidence, intentional misconduct, or bad faith," due process does not require that the prosecution seek and find exculpatory evidence or test evidence for a defendant's benefit. *People v Coy (After Remand)*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Defendant does not contend that any evidence was suppressed, and there is no basis in the record for finding any bad faith or intentional misconduct by the police or prosecutor. In fact, a forensic witness testified that pursuant to Michigan State Police testing protocol and guidelines, only the most probative samples are tested and that there is a limit of seven evidence samples for a homicide case. We therefore find no misconduct in the prosecution's failure to perform DNA testing on all possible items in Taylor's bedroom that were believed to have been touched by the perpetrator.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant lastly argues that defense counsel was ineffective for failing to object to testimony that he characterizes as inadmissible hearsay under MRE 801 and an inadmissible lay opinion under MRE 701. Again, we disagree.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

On direct examination by the prosecutor, Taylor's daughter, Cassandra Skladzien, testified about a telephone call that she made to defendant's father, Alphonse Pozniak, on the day defendant was arrested for Taylor's murder. The following exchange occurred:

> *Q.* And what was your purpose of calling him?
>
> *A.* I was hysterical. I wanted him to know I didn't blame him. He was hysterical that his son would do such a thing.
>
> * * *
>
> *Q.* Was he hysterical as well?
>
> *A.* Yes.
>
> *Q.* Was he excited, meaning hysterical, excited emotional?
>
> *A.* Emotional.
>
> *Q.* What, if anything did he say at the time?
>
> *A.* *He couldn't believe his son had killed his best friend.* [Emphasis added.]

During defense counsel's cross-examination of Skladzien, the following exchange occurred:

Q. Now, [the prosecutor] asked you about a statement Mr. Alphonse Pozniak made when he was excited or—excitable, we'll say or emotional. That he couldn't believe that Paul had killed his best friend?

A. Yes.

* * *

Q. Are you—are you aware of any specific foundation or reason why he would make that statement, other than it being on the news?

A. No. Other than it being on the news, no.

Based on both attorneys' references to Pozniak's state of mind as excited and emotional, it is apparent that the prosecutor sought to present Pozniak's statement as an excited utterance under MRE 803(2), and defense counsel evidently believed that the statement qualified as an excited utterance. Regardless of whether the statement actually qualifies as an exited utterance under MRE 803(2), it is not reasonably probable that defendant was prejudiced by the testimony. The record reveals that defense counsel adequately addressed the testimony during his subsequent cross-examination of Skladzien and Pozniak. When questioning Skladzien, defense counsel clarified that she was aware of no reason why Pozniak would make the statement "other than it being on the news." Subsequently, during Pozniak's cross-examination, defense counsel elicited that Pozniak, while "in [an] excited state of mind," made the statement to Skladzien only "because [defendant] was charged with the crime." Counsel's cross-examination established that Pozniak admittedly knew nothing about the facts underlying the charges and that the statement was not based on Pozniak's knowledge of any evidence linking defendant to the crime. Defense counsel established that Pozniak had made the statement only because defendant had been arrested. Consequently, defendant cannot establish that he was prejudiced by defense counsel's handling of Skladzien's testimony. Accordingly, defendant cannot establish a claim of ineffective assistance of counsel in this regard.

Further, defendant's reliance on MRE 701 is misplaced. Contrary to what defendant argues, Pozniak's statement, as relayed through Skladzien, did not express an opinion that defendant was capable of murder. Rather, Pozniak made a statement after hearing that defendant had been arrested for the crime, he clearly had no other information, and his statement was not related to any particular observations or findings. Because there was no basis for an objection based on MRE 701, defendant cannot establish a claim of ineffective assistance of counsel. Counsel is not required to make a futile objection. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra