STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2013
v DERRICK LAMONT CHATMAN, Defendant-Appellant.	No. 311033 Wayne Circuit Court LC No. 11-011739-FC

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court vacated defendant's second-degree murder conviction and sentenced him to mandatory life imprisonment for the first-degree murder conviction and concurrent prison terms of 10 to 20 years each for the assault and armed robbery convictions, and a consecutive two-year term of imprisonment for the felony-murder conviction. Defendant appeals as of right. We affirm.

Defendant first argues that defense counsel was ineffective for failing to properly investigate the case to learn the identities and locations of three witnesses known as "Chill," "Fat Mike," and "Pooper." Because defendant failed to raise an ineffective assistance of counsel issue in the trial court, our review of this issue is limited to errors apparent from the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Effective counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish a claim of 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).

Defendant's convictions arise from an attempted robbery and shooting at a gas station. There was evidence that three men known as Chill, Fat Mike, and Pooper were present at the

station. The police were never able to identify these men. Defendant contends that he had contact information for these men in his cell phone, which had been confiscated by the police when defendant was arrested, but was subsequently lost at some unspecified time. Defendant argues that trial counsel was ineffective for failing to make a more diligent effort to obtain his cell phone or to obtain his cell phone records in order to identify, locate, and call Chill, Fat Mike, and Pooper to testify at trial.

The failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Counsel may be ineffective for failing to discover and present witnesses who could have directly contradicted the prosecution's case, *People v Johnson*, 451 Mich 115, 118-120, 122; 545 NW2d 637 (1996), or who could have otherwise provided a substantial defense, *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). The failure to interview witnesses does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). "It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id*.

The available record does not support defendant's claim that defense counsel was ineffective with respect to acquiring defendant's cell phone. The record does not indicate when defendant told counsel that his cell phone might provide clues for identifying and locating the witnesses. Further, the record does not indicate when the telephone was lost, only that it could not be found when people began looking for it in March or April 2012. Because it is not known whether the jail still had defendant's cell phone following defendant's arrest in August 2011 until March 2012, it is not apparent that the phone would have been available had defense counsel promptly sought it out. Even if the telephone had been available, the record does not indicate that it would have provided solid information that could have led to the discovery of Chill, Fat Mike, and Pooper. The record does not indicate whether they were listed under their given names or their nicknames or whether their telephone numbers and addresses were actually listed and, if so, whether they were still viable. Finally, the record is silent regarding what testimony the three men might have offered if called as witnesses, and thus the record does not show that their testimony would have benefited defendant in some way. See *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Therefore, defendant has not shown that there is a reasonable probability that, if counsel had identified, located, and called the witnesses, the outcome of the trial would have been different. See *Frazier*, 478 Mich at 243.

To the extent defendant argues that trial counsel should have subpoenaed his cell phone records, this claim must likewise fail. Cell phone records would show the numbers called from defendant's telephone and numbers from which calls were placed to defendant's phone. Assuming that defendant were able to recognize numbers of incoming calls as those of Chill, Fat Mike, or Pooper, the record does not show whether those phone numbers would have provided a means of contacting the witnesses. Further, the record remains silent regarding what testimony the three men might have offered if called, and thus the record does not show that their testimony would have benefited defendant in some way. Again, defendant has not shown a reasonable probability that, if counsel had identified, located, and called the witnesses, the outcome of the trial would have been different. See *id*.

Defendant next challenges the sufficiency of the evidence in support of his armed robbery conviction. Specifically, he argues that the evidence was insufficient to support his conviction because it did not show that he actually stole anything from the victims.

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). We "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 proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

As relevant here, the elements of armed robbery, as prescribed by MCL 750.529 and MCL 750.530, as amended by 2004 PA 128, include that "in the course of committing a larceny," defendant used force or violence against a person and possessed a dangerous weapon. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007). The elements of larceny include the taking and carrying away of property of another person. *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992) (citation omitted). However, the statutory phrase "in the course of committing a larceny" is defined to include "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2). Our Supreme Court recently held that under the statute as amended, "an attempted robbery or attempted armed robbery with an incomplete larceny is now sufficient to sustain a conviction under the robbery or armed robbery statutes, respectively." *People v Williams*, 491 Mich 164, 172; 814 NW2d 270 (2012). The Court thus upheld an armed robbery conviction based on evidence that the defendant threatened a store clerk by indicating that he had a dangerous weapon and stated, "You know what this is, just give me what I want," but the clerk did not comply and the defendant "fled from the store without having stolen anything." *Id*. at 167. The Court stated that "[e]ven though defendant was unsuccessful in obtaining money, his attempt to complete a larceny while representing that he was armed with a dangerous weapon satisfied MCL 750.529." *Id*. at 183.

The evidence in this case is similar to that in *Williams*. Defendant approached a car while openly displaying a handgun, which he pointed at the occupants. Defendant told the men to get out of the car and "give me everything." The men did not comply and tried to escape. Defendant thwarted their escape by shooting at the car and hitting two of the occupants, and then fled without taking anything from the men. This evidence showed that, "in the course of committing a larceny," defendant used force or violence against people, and possessed a dangerous weapon. Accordingly, the evidence is sufficient to support defendant's armed robbery conviction.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens