

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON TARELL SLATER,

Defendant-Appellant.

UNPUBLISHED
October 20, 1998

No. 203161
Kent Circuit Court
LC No. 95-001754 FC

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. The trial court sentenced defendant to concurrent terms of imprisonment of fifteen to forty years for his assault conviction and two to five years for carrying a concealed weapon. The sentences are consecutive to defendant's mandatory two year sentence for his felony-firearm conviction. We affirm.

This case arises from the shooting of Michael Bobo. According to the victim, defendant signaled for the car in which the victim rode to stop by flashing the lights of his car. After the cars stopped, defendant demanded that the victim return money that defendant had entrusted to him. Defendant displayed a handgun and forced the victim into the back seat of defendant's car. Defendant then drove away. Soon thereafter, defendant turned toward the back seat and shot the victim in the face. The victim eventually exited the car and was transported to the hospital by a friend, who had followed defendant after he abducted the victim.

Defendant told a different story. He claimed that on the night of the shooting he rode in a car driven by his uncle. According to defendant, the victim ran to the car and entered the back seat. Defendant testified that, on realizing that the victim had sustained a head injury, he and his uncle forced the victim from the car. They then drove away.

I. Effective Assistance

Defendant first argues that he was denied the effective assistance of counsel by defense counsel's failure to present an expert witness and prepare and adequately examine other witnesses.¹ We disagree. To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In doing so, however, defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Further, in this case, review is foreclosed unless the alleged deficiency is apparent on the record because defendant did not raise this issue below. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

We conclude that defendant was not denied the effective assistance of counsel in this case. Contrary to defendant's assertion, the record reflects that counsel interviewed the witnesses before trial. We do not infer a lack of adequate trial preparation from the witnesses' contradictory and, at times, confusing testimony. The record reveals that counsel attempted to clarify the witnesses' testimony through questioning. Next, defense counsel's decision not to present an expert witness to testify regarding the absence of powder burns in the car and blood residue on the door handle was a matter of trial strategy. *Daniel*, *supra* at 58. We will not second guess counsel's decision because he elicited this evidence from the prosecution's witness. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Finally, defendant has failed to overcome the presumption that counsel's cross-examination of the victim was sound trial strategy. *Daniel*, *supra* at 58.

II. Standard 11 Issues

In his Standard 11 brief, defendant first argues that the trial court abused its discretion in denying his request for a continuance to allow him to obtain substitute counsel. We disagree. Although defense counsel moved to withdraw in July 1995, we consider the motion abandoned because the record does not reflect that the trial court ruled on it. *People v Kowalski*, 230 Mich App 464, 488; ___ NW2d ___ (1998) (Corrigan, C.J. concurring). Further, because the record does not reflect that defendant moved for a continuance or for substitute counsel, this issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In any event, defendant has not demonstrated that he was prejudiced by the trial court's alleged refusal to allow him to obtain substitute counsel. *People v Pena*, 224 Mich App 650, 660-661; 569 NW2d 871 (1997), modified 457 Mich 883 (1998).

We next reject, as wholly without merit, defendant's argument that the trial court committed plain error by admitting irrelevant bloodstain evidence. The evidence technician testified that he discovered a stain resembling blood in the car in which defendant allegedly shot the victim. The evidence was clearly relevant. Defendant's argument that the prosecution never established that the stain was blood is a matter of weight for assessment by the jury, not admissibility. See *People v Wolfe*, 440 Mich 508, 514-15; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant further argues that he was denied a fair trial because the prosecution violated MCR 6.201 and a discovery order by failing to provide defendant with a copy of Officer Kooistra's notes memorializing a statement allegedly made by defendant. Again, we disagree. This Court reviews the trial court's remedy for a violation of the court rule or a discovery order for an abuse of discretion. MCR 6.201(J); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

In this case, the prosecutor attempted to elicit testimony from Officer Kooistra that defendant had informed him that he needed money because he had been threatened. Officer Kooistra did not recall the statement. The prosecutor then referred Officer Kooistra to his interview notes. Defense counsel objected on the ground that the prosecutor had not provided him a copy of the notes. After a discussion off the record, the prosecutor withdrew the question. The trial court instructed the jury to disregard any reference to defendant's statements. Moments later, Officer Kooistra reiterated that defendant had denied shooting the victim.

We conclude that the trial court properly exercised its discretion to exclude the evidence and strike the question. The prosecutor's reference to defendant's statement in his question did not deny defendant a fair trial because the cautionary instruction cured any resulting prejudice. See *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Further, the record does not demonstrate that the statement was favorable to defendant. Therefore, the prosecution's failure to disclose it did not infringe on defendant's due process rights. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997).

III. Sentencing

Defendant next argues that the trial court abused its discretion in sentencing him because it improperly relied on information in the presentence investigation report, failed to articulate adequate reasons to support its decision, and sentenced him to a term of imprisonment that violates the principle of proportionality. We disagree. We decline to consider defendant's contention that the trial court relied on an inaccurate presentence investigation report because he did not preserve this issue by objecting below. MCR 6.429(C); *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992). Next, we conclude that the trial court articulated sufficient reasons for imposing the sentence by stating that it would impose a sentence within the guidelines' range. *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987). Finally, the trial court did not abuse its discretion in imposing a sentence that reasonably reflects the seriousness of the offense and the offender. *People v Castillo*, 230 Mich App 442, 447; ___ NW2d ___ (1998). Defendant's fifteen to forty year term of imprisonment for his assault conviction is presumptively proportionate because the minimum term fell within the sentencing guidelines' range of 96 to 180 months. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Defendant has failed to present any unusual circumstances that would overcome that presumption. *Id.*

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

¹In his Standard 11 brief, defendant additionally argues that counsel failed to investigate the facts and circumstances of the offense, improvised a defense at trial, and failed to inform him of offered plea bargains. Defendant, however, has failed to support his allegations with citation to record evidence. MCR 7.212(C)(7). Because defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, we decline to review these additional arguments. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).