

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN AARON DISHON,

Defendant-Appellant.

UNPUBLISHED

November 12, 1999

No. 206338

Recorder's Court

LC No. 94-002651

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twelve to twenty-five years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant contends he was denied the effective assistance of counsel at trial for three reasons. First, in her opening statement, counsel failed to set forth a plausible defense. Second, counsel failed to impeach an eyewitness with her prior testimony from the preliminary examination. Finally, counsel failed to object to inadmissible hearsay evidence. We disagree. Because a *Ginther*¹ hearing was conducted with regard to defendant's first two claims of error, the issue is preserved for appeal. *People v Ginther*, 390 Mich App 436, 443; 212 NW2d 922 (1973). With regard to defendant's third claim of error, this Court is limited to the facts contained in the record because the issue was not explored at the evidentiary hearing. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must have prejudiced the defendant. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *Daniel*, *supra* at 58. In addition, the defendant must overcome the

presumption that the challenged conduct was sound trial strategy. *Id.* A defendant must demonstrate that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

A

Defendant takes issue with the length and content of counsel's opening statement. However, defendant fails to cite authority for his position that counsel was under an obligation to do more in her opening statement. A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Rather, insufficiently briefed issues are deemed abandoned on appeal. *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997). Defendant was not required to make an opening statement; therefore, the content of such a statement is a matter of trial strategy. Moreover, it is clear from trial counsel's *Ginther* hearing testimony that her reasoning for the brevity and content of her opening statement was a matter of sound trial strategy.

B

Defendant also argues that counsel was deficient in failing to impeach an eyewitness with her previous testimony. However, after reviewing the trial transcripts, it is difficult to discern what was deficient about counsel's performance with regard to her cross-examination of the witness. Counsel was able to fully and effectively cross-examine the witness without using the specific testimony at issue. She elicited the witness's admission that she could not be certain it was the driver who was the shooter. Defendant has failed to show that counsel erred or that, but for counsel's error, there is a reasonable probability that the result of the trial would have been different. *Poole, supra* at 718.

C

Defendant contends that counsel was ineffective for failing to object to hearsay testimony. However, after reviewing the record, it is clear that the challenged statements were not introduced to prove the truth of the matter asserted; rather, they were introduced to "show the effect of the statement on the hearer" and were not hearsay. *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986). The statements were used merely to show why law enforcement reacted the way it did. See *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994). Because the evidence was admissible, counsel was not ineffective for failing to object. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

II

Defendant next argues that the trial court abused its discretion by admitting irrelevant bad acts evidence regarding defendant's possible gang affiliation. We disagree. Defendant has not preserved this issue for appeal because he failed to object in the lower court. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). A defendant forfeits appellate review of bad acts evidence when he fails to object in a timely manner, absent a showing of plain error affecting substantial

rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992).

III

Finally, defendant argues that the prosecutor improperly injected evidence into the record when reading a stipulation. Specifically, the prosecutor stated that one of the projectiles from the shooting was found under a baby's crib. Defendant claims that the prosecution hoped to inflame the jury with this fact and that it improperly vouched for a witness. We disagree. The test for prosecutorial misconduct is whether the defendant received a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Evidence that a projectile was found under a baby's crib was introduced twice before the reading of the stipulation. In neither of the two instances did defense counsel object to the testimony. Considering the remark in the context in which it was made, it cannot be said that the prosecutor was guilty of misconduct. See *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The prosecutor made a statement of fact which was supported by evidence at trial. See *Stanaway*, *supra* at 686.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Henry William Saad

¹ *People v Ginther*, 390 Mich App 436, 443; 212 NW2d 922 (1973).