

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY COBBLE,

Defendant-Appellant.

UNPUBLISHED

May 30, 2000

No. 212113

Wayne Circuit Court

LC No. 97-006422

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, intentional discharge of a firearm at a dwelling, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent terms of eight to fifteen years' imprisonment for the assault conviction and five to eight years' imprisonment for the intentional discharge conviction, consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant argues that the trial court abused its discretion in denying his motion for a new trial on the basis of ineffective assistance of counsel. Defendant contends that his attorney failed to: investigate and present an alibi defense; produce the officer in charge of the investigation to testify to the "lack of evidence;" produce complainant's physician to testify regarding the extent of treatment; introduce complainant's "complete" medical history; effectively cross-examine witnesses; and, consult with defendant to keep him informed of important developments during the trial. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A claim for ineffective assistance of counsel requires the defendant to establish that (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Contrary to defendant's contention, there is no indication that counsel "abandoned" his alibi defense or was ineffective for failing to request an adjournment on the issue. At trial, defense counsel's motion to present two alibi witnesses (defendant's "friend" and "mother") was denied on grounds that defendant failed to give timely notice of the witnesses' existence. MCL 768.20(1); MSA 28.1034(1) and MCL 768.21(1); MSA 28.1044(1); *People v Travis*, 443 Mich 668, 677; 505 NW2d 563 (1993). With respect to the friend, defense counsel claimed that defendant informed her about the witness only six days before trial and that she did not recall receiving a letter defendant allegedly wrote to notify her about the witness. Defendant submitted no proof to oppose these claims at the motion for a new trial. Although defendant submitted an affidavit from his "maternal aunt" (i.e., presumably the "mother") which could be read to support his claim that counsel knew about the witness before trial, defendant failed to request an evidentiary hearing on this issue. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). Without the testimony of defendant's trial counsel, we are unable to conclude that counsel actually knew about the witness in advance of trial or that her failure to call an interested witness was strategic.¹ See *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v Stevenson*, 60 Mich App 614, 618; 231 NW2d 476 (1975); Cf. *People v McVay*, 135 Mich App 617, 619; 354 NW2d 281 (1984). With regard to the remaining claims, defendant has similarly not overcome the presumption that counsel's decisions involved sound trial strategy. *Ayres*, *supra* at 23 (how to cross-examine witnesses and what evidence to present all involve matters of trial strategy).

Regardless, defendant has failed to demonstrate that, absent the alleged errors, there was a reasonable probability that the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The prosecution presented eyewitness testimony placing defendant at the crime scene with a gun, evidence that defendant threatened to kill complainant and his wife both before and after the incident, and evidence of defendant's strong motive to commit the offenses against complainant, who had married the mother of his child. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial based on ineffective assistance of counsel. *People v Gadowski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Defendant's contention that the trial court abused its discretion in refusing to allow oral argument in support of his motion for a new trial is likewise without merit. MCR 2.119(E)(3) specifically authorizes a court, in its discretion, to dispense with or limit oral arguments with regard to motions. *People v Leonard*, 224 Mich App 569, 579; 569 NW2d 663 (1997). We find no abuse of discretion where, as here, the court presided at trial and was fully apprised of defendant's position by way of written motion before rendering a decision. See *Fast Air, Inc v Knight*, 235 Mich App 541; 599 NW2d 489 (1999); compare *Leonard*, *supra* at 576. Further, defendant's claim that the court's decision to dispense with oral argument evidenced bias and prejudice is not supported by the record. *Wayne County Jail Inmates v Wayne County Chief Executive Officer*, 178 Mich App 634, 663-664; 444 NW2d 549 (1989).

Finally, defendant contends that the trial court erred in failing to articulate its reasons for denying his motion for a new trial, as required by MCR 6.431(B). We conclude, however, that the trial court's statement that "I don't believe [defense counsel] was incompetent in representing the defendant"

satisfied MCR 6.431(B) under the circumstances of this case. *Leonard, supra* at 580. As noted, the court presided at trial where it previously explained its reasons for excluding the alibi witnesses and other evidence related to defendant's motion, and indicated that it had read the motion before ruling on it.

Affirmed.

/s/ Gary R. McDonald

/s/ Hilda R. Gage

/s/ Michael J. Talbot

¹ We decline defendant's request for an evidentiary hearing to determine whether counsel was ineffective in failing to investigate or present an alibi defense. There is no indication that defendant filed a motion to remand with this Court within the time provided for filing his appellate brief as required by MCR 7.211(C)(1) or that defendant filed a motion for an evidentiary hearing below. In any event, in light of our analysis below that the alleged errors, if any, were not prejudicial, an evidentiary hearing would serve no purpose. See MCR 7.211(C)(1)(ii).