

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ERIC JAMES FISHER,

Defendant-Appellant.

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UNPUBLISHED

October 23, 2001

No. 225569

Calhoun Circuit Court

LC No. 99-002375-FC

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals from his jury trial conviction for two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. This Court granted defendant's motion to remand this case to the trial court for a *Ginther*<sup>1</sup> hearing regarding his claim of ineffective assistance of counsel. The trial court held the hearing and denied defendant's motion for a new trial. Defendant now appeals as of right, challenging various aspects of his trial and the court's subsequent denial of his motion for a new trial. We affirm.

In order to establish that his claim of ineffective assistance of counsel is sufficient to justify reversal of an otherwise valid conviction, defendant must show: (1) that counsel's representation fell below an objective standard of reasonableness, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Defendant first asserts that his trial counsel's failure to present an alibi defense requires a remand for a new trial. We disagree.

This Court has stated:

[w]here there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

difference in the outcome of the trial. [*In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).]

Applying this standard to defendant's proposed alibi defense, the defense was not substantial. Defense counsel testified during the *Ginther* hearing that she believed the alibi defense was contrived because the report of the investigating officer, and the statements of various witnesses contained in it, flew in the face of statements she had received from most of the same witnesses and from the letter she received from defendant. Defense counsel further stated that she believed the alibi strategy was poor because the witnesses' statements were inconsistent. Indeed, defendant testified that there were inconsistencies in the witnesses' testimony. Given the inconsistencies acknowledged by both defendant and defense counsel, and given the two eyewitnesses who testified that defendant was the shooter, we cannot say that defendant was deprived of a substantial defense by his counsel's decision not to present an alibi defense. Thus, defendant was not denied the effective assistance of counsel and he is not entitled to a new trial.

Defendant also claims that defense counsel refused to allow him to testify and that this deprivation constitutes ineffective assistance. The failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court will not substitute its judgment for that of counsel in a matter of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). We conclude that defendant was not denied effective counsel. At the hearing, defense counsel stated that defendant wished to get on the stand in part to explain his relationship with the other defendant in this case and to indicate that he spent a lot of time in the victims' neighborhood. This testimony, however, would only have strengthened the connection between defendant and the victims. Furthermore, had defendant testified it would also have provided the prosecution an opportunity to disclose defendant's prior conviction for robbery. Thus, not putting defendant on the stand to testify was sound trial strategy. Defendant was not denied the effective assistance of counsel.

Defendant next contends that the evidence adduced at trial was insufficient to support his conviction. We disagree.

In order to support a conviction for assault with intent to murder, the prosecution must prove the following elements: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). In this case, Fred Hampton, the father of one of the victims, testified that defendant arrived at his house in a car, searching for the victims before the shooting. He further testified that once defendant saw the two victims, he put a gun out of the window of the car and began shooting at them. Charles Thompson, one of the victims, testified that he saw defendant shoot the gun, and heard more than one shot. Michael Hampton was shot in the head. Given defendant's use of a gun, the multiple shots fired at the victims, the injuries suffered by Hampton, and the purpose with which defendant was looking for Thompson and Hampton, a jury could reasonably conclude that defendant intended to kill both the victims.

Defendant next asserts that detective Mullen, the investigating officer, prejudiced the jury when he indicated that the police had had prior contact with defendant. Because defendant failed to object to this statement, the issue is not preserved for appeal. An appellate court properly may review unpreserved claims of evidentiary error when the forfeited claim involves a plain error affecting the defendant's substantial rights. *People v Coy*, 243 Mich App 283, 287; 620 NW2d

888 (2000). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third prong of the plain error rule “generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* Here, even assuming that plain error occurred, in view of the eyewitness testimony placing defendant at the scene, the error did not affect the outcome of the trial. Therefore, defendant is not entitled to relief. For the same reason, defense counsel was not ineffective for failing to object to the testimony. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Finally, defendant claims that his sentence is disproportionate and that he is entitled to resentencing. We again disagree.

The Supreme Court’s sentencing guidelines were superseded by guidelines developed by the Sentencing Commission pursuant to MCL 769.31 *et seq.* MCL 769.34(1). The Supreme Court’s sentencing guidelines apply to offenses committed before January 1, 1999, MCL 769.34(1), *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000), while the statutory guidelines apply to offenses committed on or after January 1, 1999, MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). Because defendant’s crimes were committed on May 15, 1999, the statutory guidelines apply.

In this case, the trial court sentenced defendant to serve 20 to 40 years in prison for the assault convictions. The guidelines range for his offense was 225 to 375 months (18 years, 9 months, to 31 years, 3 months). His minimum sentence of 20 years was therefore within the guidelines range. MCL 769.34(10) provides, in pertinent part, that

[I]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.

Defendant presents neither a scoring error nor a claim of inaccurate information. Instead, he asserts that the trial court should have relied upon additional factors when sentencing defendant. Therefore, pursuant to MCL 769.34(10), defendant has failed to present a claim of error for this Court to review. As this Court stated in *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000), “[t]he clear language of this subsection compels the conclusion that the Legislature intended to preclude any appellate scrutiny of sentences falling within the appropriate guidelines range absent scoring errors or reliance on inaccurate information.” Thus, in the absence of either of these alleged errors, this Court must affirm defendant’s sentence. Defendant is not entitled to relief on this basis.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald