STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTLY JOHNSON,

Defendant-Appellant.

UNPUBLISHED
March 26, 2002

No. 228547
Wayne Circuit Court
Criminal Division
LC No. 99-005393

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree felony murder, MCL 750.316(b), assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and twenty to thirty years' imprisonment for the assault with intent to rob while armed conviction, consecutive to the mandatory two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court failed to obtain a valid waiver of his right to a jury trial. We disagree. The validity of a defendant's waiver is reviewed for clear error. *People v Taylor*, 245 Mich App 293, 305, n 2; 628 NW2d 55 (2001). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996), quoting *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

In addition to obtaining a written waiver, the trial court questioned defendant in open court concerning his request for a bench trial. A review of the record indicates that the trial court specifically asked defendant about his educational level, whether any threats or promises had been made in exchange for his waiver, and whether he was freely and voluntarily waiving his right to a jury trial. We conclude that the trial court properly ascertained that defendant understood and voluntarily waived his right to a jury trial. MCR 6.402(B). Furthermore, the record shows that defendant had an opportunity to consult with his attorney. MCR 6.402(A). Contrary to defendant's assertion, the trial court was not required to ascertain whether defendant could explain the "significance" of his waiver or the difference between a jury trial and a bench trial. *People v Leonard*, 224 Mich App 569, 595-596; 569 NW2d 663 (1997); see also *People v*

James (After Remand), 192 Mich App 568, 570-571; 481 NW2d 715 (1992). Based on the evidence presented, we find that defendant executed a valid waiver of his right to a jury trial.

Defendant next argues that there was insufficient evidence for the trial court to find him guilty beyond a reasonable doubt. We disagree. In reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). Moreover, intent may be inferred from the surrounding facts and circumstances. *People v Whitehead*, 238 Mich App 1, 14; 604 NW2d 737 (1999).

Assault with intent to rob while armed requires "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991) (citations omitted); see also MCL 750.89. In the instant case, witness Raymond Jackson testified that the day after the incident defendant came over to his house and informed him that defendant had "hit a lick"[1] and "messed up and had to shoot." Moreover, witness Antonio Burnette testified that prior to the offenses, defendant expressed an intention to "hit a lick" and that he saw defendant put a weapon into the trunk of his girlfriend's car. Considering this testimony in addition to the other circumstantial evidence, we conclude that there was sufficient evidence for the trial court to find defendant guilty beyond a reasonable doubt.

Defendant disputes the credibility of both Jackson and Burnette. However, credibility is an issue for the trial court as the trier of fact to resolve. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). We further note that the prosecution was not required to negate every reasonable theory of innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); see also *People v Saunders*, 189 Mich App 494, 495-496; 473 NW2d 755 (1991). Rather, it is sufficient that the prosecution prove its own theory beyond a reasonable doubt "in the face of whatever contradictory evidence the defendant may provide." *Nowack, supra*, quoting *People v Konrad*, 449 Mich 263, 273, n 6; 536 NW2d 517 (1995).

Defendant further opines that he was denied effective assistance of counsel because his trial attorney failed to file a notice of alibi or offer alibi witnesses at trial. We disagree. Because defendant did not raise this issue before the trial court, this Court's review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error only warrants reversal when it was a plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish

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[1] There was testimony during trial that "hitting a lick" meant to rob somebody.

ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

It is insufficient for defendant to merely state that his defense counsel failed to file a notice of alibi. Rather, defendant must show that an alibi witness' testimony would have affected the outcome of the proceeding. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). Here, defendant's alleged alibi is that he was with Burnette at the time the victim was shot. However, Burnette consistently testified that his father picked him up at 10:30 p.m. and dropped him off at 2:30 a.m. It was during this period of time that the victim was shot. Burnette testified that he was with defendant that evening. However, that was before Burnette left with his father and after his father dropped him back off early the next morning. Thus, Burnette's testimony does not support defendant's alleged alibi defense.[2]

Moreover, the record does not reveal any additional witnesses that could have supported an alibi defense. We note that defendant names three individuals as potential alibi witnesses. However, defendant has failed to submit any affidavits or offers of proof from these individuals in support of his claim that he was with Burnette at the time of the incident.[3] The decision to call a witness is often deemed a matter of trial strategy and, absent evidence to the contrary, this Court will not substitute its judgment in such matters. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). More importantly, defendant has failed to demonstrate a reasonable probability that, but for his counsel's failure to file a notice of alibi or present "alibi" witnesses, the result of the proceeding would have been different. *Carbin, supra* at 600; *Pickens, supra* at 327.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper

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[2] In the second issue of his appellate brief, defendant comments that Jackson could have provided a potential alibi for defendant's location at the time of the shooting. However, defendant also contends that Jackson is not credible and thereby discounts any testimony that Jackson could have provided regarding an alibi. Furthermore, the record evidence fails to support a claim that Jackson could have provided an alibi defense because he did not see defendant until later in the morning on May 9, 1999.

[3] We decline to consider defendant's claim that he passed a polygraph examination. *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977); *People v Mechigian*, 168 Mich App 609, 613; 425 NW2d 199 (1988).