

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK LEWIS, a/k/a TONY GRIGGS,

Defendant-Appellant.

UNPUBLISHED

August 31, 2004

No. 244589

Kent Circuit Court

LC No. 01-002471-FC

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to thirty-five to fifty-five years' imprisonment for the murder conviction, three to five years' imprisonment for the concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise out of the shooting death of the victim, a drug dealer. Defendant made a purchase of crack cocaine from the victim. After selling a portion of the cocaine, defendant alleged that he was not given the appropriate quantity. The victim refused to make any accommodations or give a refund in light of defendant's admission that he sold a portion of the cocaine. Eyewitness testimony established that defendant was angry with the victim, returned with a gun and a mask, and killed the victim. Defendant's heroin supplier initially denied any knowledge of defendant's involvement in the murder, but acknowledged that she discarded a "package" consisting of a gun and a white rubbery item after being confronted with an audiotape conversation between herself and defendant. Defendant testified that he did not commit the murder. Although charged with felony-murder, defendant was convicted of second-degree murder.

Defendant first alleges that he was denied his constitutional right to a jury drawn from a venire representative of a fair cross section of the community. However, defendant failed to properly preserve the challenge to the array before the jury was empanelled and sworn. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). Moreover, defendant failed to meet his burden of proof with regard to systematic exclusion when he presented inadmissible hearsay. *Id.* at 161 n 4. Consequently, we review defendant's challenge for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). On this record,

defendant has failed to establish such error. *Id.*¹ Possible flaws in the jury selection system do not translate into a flawed jury selection process in the instant case.

Defendant next alleges that he was denied the effective assistance of counsel at trial. We disagree. When presented with the question of effective assistance of counsel, the trial court must first find the facts and then decide whether those facts constitute a violation of the constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). On appeal, this issue presents a mixed question of law and fact, with the factual findings reviewed for clear error. *Id.*

Following a *Ginther*² hearing, the trial court ruled that defendant received “excellent” representation and rejected the alleged deficiencies that occurred in the representation at trial. We cannot conclude that the trial court’s factual findings were clearly erroneous. *LeBlanc*, *supra*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Id.*

Defendant contends that defense counsel was ineffective because she did not adequately prepare for trial by communicating with him before and during trial. Moreover, he was prevented from communicating with counsel at trial when counsel’s law clerk was seated between the two. When claiming ineffective assistance due to counsel’s unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Prejudice is established when there is a reasonable probability that, but for counsel’s error, the outcome of the proceedings would have been different. *Knapp*, *supra*.

At the *Ginther* hearing, trial counsel explained the extent of her communications with defendant, her offer to withdraw from the case in light of her maternity leave, and her separation from defendant at trial to avoid his constant interruptions. Moreover, security personnel apparently deemed the separation appropriate in light of heated discussions that were occurring. The trial court rejected defendant’s contention that counsel did not adequately meet with him prior to trial and was unprepared for trial. We cannot conclude that the trial court’s factual

¹ Defendant contends that the “cause and prejudice” standard set forth in *Amadeo v Zant*, 486 US 214, 221; 108 S Ct 1771; 100 L Ed 2d 249 (1988), should apply to this case. However, the “cause and prejudice” requirement was adopted “for all petitioners seeking federal habeas relief on constitutional claims defaulted in state court.” *Id.* Moreover, the *Amadeo* decision was premised on the conclusion that the trial court’s factual findings regarding intentional interference with underrepresentation were not clearly erroneous. *Id.* at 223.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

conclusion was clearly erroneous. *LeBlanc, supra*. Moreover, defendant did not allege specific prejudice resulting from trial counsel's action. *Caballero, supra*.

Defendant next alleges that he was denied the effective assistance of counsel because his defense attorney did not interview certain witnesses before trial. We disagree. The failure to interview witnesses does not alone establish inadequate preparation. *Caballero, supra* at 642. It must be established that the failure to interview witnesses resulted in counsel's ignorance of valuable evidence, which would have substantially benefited the accused. *Id.* Thus, ineffective assistance of counsel results from the failure to call witnesses only if the deficiency deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996). "A defense is substantial if it might have made a difference in the outcome of the trial." *Id.* Additionally, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rocky*, 238 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 76-77.

Defendant's contention, that he was deprived of a substantial defense by defense counsel's failure to interview certain witnesses, constitutes pure speculation, fails to establish prejudice, and does not overcome the presumption that counsel's decisions were a matter of sound trial strategy. Defendant does not demonstrate how these witnesses were invaluable to his defense or how their testimony would have impacted the outcome of the trial. Defendant's representations regarding what the witnesses would have testified to, without any affidavit or other admissible evidence, constituted pure speculation.³ Lastly, because defendant failed to present factual evidence regarding the jury array, we cannot conclude that trial counsel was ineffective for failing to object to the array.

Defendant also contends that the trial court erred in admitting the audiotape and allowing the jurors to review a purported transcription of the audiotape between defendant and his heroin dealer. However, defendant's heroin dealer testified on the stand regarding the substance of the conversation and her disposal of the "package." The defense was able to cross examine this witness regarding the conversation. Admission of mere cumulative evidence is not prejudicial. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

³ For example, defendant cited to trial counsel's failure to call other witnesses present in the same jail to rebut the testimony of one of his cellmates. However, trial counsel was able to attack that testimony by establishing his motive to lie and his access to information regarding defendant's case.