

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KEVIN GIBBONS,

Defendant-Appellant.

UNPUBLISHED

October 5, 2004

No. 247136

Wayne Circuit Court

LC No. 02-010814

Before: Donofrio, P.J. and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. We affirm.

On appeal, defendant claims that he was denied a fair trial where the prosecutor coerced complainant into testifying. A prosecutor may not intimidate witnesses in or out of court. *People v Clark*, 172 Mich App 407, 409; 432 NW2d 726 (1988). However, a prosecutor may inform a witness that false testimony could result in a perjury charge. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999).

Here, complainant expressed his reluctance to testify, and the trial court questioned him from the bench. Complainant sought to exercise a right to remain silent, which was inapplicable as there was no claim of self-incrimination. There is no indication that complainant was inclined to testify falsely, or that the prosecutor urged him to change his testimony. Where complainant's reluctance to testify was brought out on the record, the trial court did not err in declining to hold an evidentiary hearing. *People v Lucas*, 188 Mich App 554, 572; 470 NW2d 460 (1991).

Defendant also asserts that he was denied a fair trial where the prosecutor introduced evidence of his prior convictions. Prior to trial, the court granted defendant's request to exclude evidence of his prior convictions for armed robbery and felony-firearm. However, during cross-examination, defendant denied ever carrying a weapon, opening the door for the prosecutor to impeach him with his prior weapons convictions. MRE 609 is not intended to apply to shield a defendant where evidence of prior convictions is offered to rebut specific statements of the defendant who testifies at trial. *People v Oscar Moore*, 164 Mich App 378, 383; 417 NW2d 508 (1987). The prosecutor properly used defendant's prior convictions to rebut his claim that he never carried a weapon.

Defendant also raises additional issues in a late-filed Standard 11 brief. We have considered defendant's arguments and find them without merit.

First, defendant argues that the evidence does not support his convictions. We review the sufficiency of evidence in a criminal case in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). We must give deference to the jury's findings by determining all reasonable inferences and credibility choices in favor of the jury's verdict. *Nowack, supra*, at 400.

At trial, the victim, Anthony Bridges, testified that on November 14, 2001, he was shot after two men approached him. Bridges told police that "K.G.," identified as defendant, shot him. The shots hit him in the lower kidney area. After the shooting, defendant kept jabbing the gun at Bridges, and he tried to push it away. Defendant then shot Bridges six more times. Prior to the incident, Bridges did not know defendant's real name, but knew him from the neighborhood for about two years as "K.G." At trial, defendant denied shooting Bridges and maintained that he never carried a gun.

Reviewing the evidence introduced at trial in a light most favorable to the prosecution, we conclude that the evidence supports the jury's verdict because a reasonable juror could find that all essential elements were proven beyond a reasonable doubt. Therefore, the prosecution introduced sufficient evidence to support defendant's convictions of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b.

Next, defendant raises several issues asserting ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant

must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' *Id.* at 167. [*People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).]

Defendant claims that his counsel erred when he failed to investigate and call exculpatory witnesses including both expert witnesses and res gestae witnesses. Counsel's failure to call a witness is considered ineffective assistance only if the failure deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has failed to overcome this presumption. Defendant argues that trial

counsel was ineffective because he did not call a ballistics expert and medical examiner at trial to establish that defendant could not have committed the crime. However, there is no indication in the record, nor has defendant demonstrated by offer of proof, that an expert witness, had one been called, could have provided any favorable testimony. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Because defendant has not established the factual predicate for his ineffective assistance of counsel claim concerning expert witnesses, he “has not established a reasonable probability that but for counsel’s alleged error the result of the proceedings would have been different.” *Id.* at 455-456.

Regarding *res gestae* witnesses, defendant argues that his trial counsel was ineffective for not calling Mark Avant and Bobby Weise. 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 in his Standard 11 brief regarding what the witnesses would have testified to, without any affidavit or other admissible evidence, constitutes pure speculation. Because the record itself is silent regarding the testimony Avant and Weise would have offered if called, defendant has not shown that a reasonable probability exists that, if counsel had presented the testimony of either witness, the outcome of the trial would have been different. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Finally, defendant argues that his conviction should be reversed because trial counsel failed to properly impeach the testimony of the victim, Bridges. Again, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra*, 238 Mich App 76. 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. A review of the record reveals that defense counsel thoroughly questioned Bridges on cross-examination regarding the events surrounding the shooting. The questions counsel chose to ask Bridges are squarely a matter of trial strategy, and we refuse to assess counsel’s competence with the benefit of hindsight. *Id.*

Affirmed.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot