STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2007
v	No. 271838 Jackson Circuit Court
JAMES WHETSTONE, Defendant-Appellant.	LC No. 06-000157-FC

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit first-degree murder, MCL 750.157a, and sentenced to life imprisonment. Defendant appeals as of right. We affirm defendant's conviction, but we remand for correction of the judgment of sentence.

This case arises out of a shooting in Jackson. The shooting, in turn, apparently arose out of a fight between the victim and a member of a gang. Defendant was also a member of the gang; the victim was not. The other gang member made threats against the victim shortly after the fight, and approximately a month later he came to an apartment where the victim was located, along with defendant and another individual. There were numerous witnesses in the vicinity, but no direct eyewitnesses who testified to actually seeing defendant shoot the victim. Nevertheless, all three individuals were apparently armed, and the testimony was clear that the victim got shot exiting the apartment. There was also testimony that defendant told others that he had shot the victim.[1] Additionally, there was testimony that, two weeks later, defendant was involved in an armed robbery during which he stated that he would "do" a drug dealer just like he "did" the victim.

Defendant first argues that the trial court erred in admitting evidence of the context of the statement that he would "do" a drug dealer just like he "did" the victim. Defendant argues that the evidence of the armed robbery was offered solely to establish defendant's propensity to commit violent crimes. Because defendant objected to the prosecutor's notice to admit bad-acts evidence on different grounds, specifically relevance, the issue is unpreserved. See *People v*

[1] Defendant was charged with first-degree murder, but the jury acquitted him of this charge.

Stimage, 202 Mich App 28, 30; 507 NW2d 778 (1993). We review defendant's unpreserved claim of error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We find the evidence properly admitted.

MRE 404(b) prohibits a court from admitting bad-acts evidence when the evidence is offered for the purpose of establishing the defendant's propensity to commit crimes. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Engelman*, 434 Mich 204, 212-213; 453 NW2d 656 (1990). "Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *VanderVliet, supra* at 65. The testimony about a subsequent armed robbery was not offered for the purpose of establishing defendant's propensity to commit violent crime. Rather, it was offered to provide the jury with the context for understanding defendant's statement, which constituted an admission to shooting the victim in this case. With the evidence of the context surrounding the statement, the jury was better able to determine what defendant meant when he said he "did" the victim. In addition, because the jury received an "intelligible presentation" of the context in which defendant made his statement, the jury was better able to perform its sworn function. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Because the bad-acts evidence was offered for a proper purpose other than establishing defendant's propensity, the trial court did not plainly err in admitting the evidence. *Carines*, *supra*.

Defendant also argues that he was denied the effective assistance of counsel. Because defendant did not move for a *Ginther*[2] hearing or for a new trial, our review of defendant's claims is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim for ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, he was denied his Sixth Amendment right to counsel. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *Id.*; *People v Sabin* (*On Second Remand*), 242 Mich App 656, 659; 620 NW2d 19 (2000). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that 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, 600; 623 NW2d 884 (2001). We find no merit in any of defendant's allegations of ineffective assistance.

Defendant first asserts that trial counsel should have requested the assistance of an expert witness. However, defendant does not articulate how an expert witness would have helped his case, and nothing in the record suggests that any facts required an expert explanation. Thus, defendant has failed to establish that a motion by counsel for the appointment of an expert would not have been futile. Counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next argues that counsel was ineffective for failing to call any defense witnesses. However, trial counsel *did* call a defense witness, and the record contains no

[2] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

summary of what defendant's proposed other witnesses might have testified to. Our review is limited to the record, *Rodriguez, supra*, which does not indicate that defendant was deprived of a substantial defense by counsel's failure to call additional witnesses.[3] *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990); *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Similarly, we reject defendant's claim that counsel was ineffective for failing to raise certain credibility issues. Defendant has failed to overcome the presumption that counsel's decisions regarding what evidence to present and which witnesses to call were not sound trial strategy. *Sabin, supra*. Defendant's assertion that counsel was ineffective for failing to request LIEN information regarding prosecution witnesses is contrary to the record, which shows that, pursuant to MCR 6.201, counsel requested the criminal histories of the prosecution's witnesses and that counsel received this information.

Defendant next argues that, because of extensive pretrial publicity, counsel was ineffective for failing to move for a change of venue. Of the 42 potential jurors who were questioned during voir dire, only five indicated that they had seen or heard stories in the media about defendant's case. Two of these five potential jurors were excused, one for cause because she admitted that, after reading the case involved gang activity, she could not be a fair and impartial juror. Based on this record, a motion for a change of venue would have been futile. Cf. *People v Cline*, ___ Mich App ___; ___ NW2d ___ (2007); *People v DeLisle*, 202 Mich App 658, 667-669; 509 NW2d 885 (1993). Counsel is not ineffective for failing to make a futile motion. *Fike, supra*. Defendant finally argues that counsel was ineffective for failing to raise the issue whether he was competent at the sentencing hearing. However, defendant does not assert on appeal that he *was* incompetent at his sentencing hearing, nor does anything in the record even suggest it. Counsel's performance did not fall below an objective standard of reasonableness. *Mack, supra*.

Defendant also asserts that the trial court erred when it ordered that his sentence of life imprisonment be served consecutively to his two-year sentence, imposed in a separate case, for possessing a firearm during the commission of a felony. We agree. The mandatory two-year sentence for a felony-firearm conviction, MCL 750.227b(1), may only be served consecutively to the sentence of the underlying felony. *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). Defendant's conviction for conspiracy to commit first-degree murder was not the underlying felony for his felony-firearm conviction. The convictions were rendered in separate cases, and defendant was acquitted of felony-firearm in the present case. We, therefore, remand for the limited purpose of correcting the judgment of sentence. Defendant's sentence of life imprisonment shall be served concurrently to his two-year sentence for felony-firearm.

[3] We decline defendant's request to remand for an evidentiary hearing because the request is not properly before us. See MCR 7.211(C)(1)(a).

Affirmed, but remanded for correction of the judgment of sentence. We do retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto