STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 267951 Wayne Circuit Court
CHESTER WILLIAMS, Defendant-Appellant.	LC No. 05-008891-01

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 25 to 40 years' imprisonment for the second-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but vacate the portion of the judgment of sentence requiring him to pay attorney fees, and remand for further proceedings.

Defendant fatally shot Charles Franklin on July 19, 2005, in the home of his fiancé Lynette Sanderson. On the night of the shooting, defendant used cocaine with Sanderson, Sanderson's friend Nadine Cook, and Franklin in Sanderson's living room. Defendant subsequently left the living room and entered Sanderson's bedroom. Franklin followed. Shortly thereafter, Sanderson and Cook heard a gunshot and saw Franklin stagger away from the bedroom. Defendant left the scene immediately after the shooting. Police arrested defendant almost one month later.

I

Defendant first argues that the trial court erred in denying his motion for directed verdict on the first-degree murder charge against him because there was insufficient evidence of premeditation and deliberation. Additionally, defendant argues that the evidence presented by the prosecution was insufficient to support his second-degree murder conviction and to overcome his claim of self-defense. We disagree. We review a trial court's decision on a motion for directed verdict and claims on the sufficiency of the evidence de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the charged crime were proved beyond a reasonable doubt.

People v Tombs, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To establish first-degree murder under MCL 750.316, the prosecutor must show that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). Premeditation and deliberation require sufficient time to allow a reasonable person to take a second look, *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), and they can be inferred from the circumstances surrounding the victim's death, *Saunders*, *supra* at 496. In *People v Bowman*, 254 Mich App 142, 151-152; 656 NW2d 835 (2002), this Court ruled that evidence of the victim's manner of death may be used to establish premeditation. Premeditation may also be established through evidence of: 1) the parties' prior relationship; 2) the defendant's prior actions; 3) the circumstances of the killing; and 4) the defendant's actions after the killing. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

We find that the prosecution presented sufficient evidence to persuade the jury that defendant killed Franklin with premeditation and deliberation. First, a reasonable juror could have inferred that defendant had a motive to kill Franklin. Although not an essential element of a crime, proof of motive in a prosecution for murder is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). According to Sanderson and Cook, defendant was jealous of Sanderson's friendship with Franklin and defendant believed that they were having an affair. Further, it is undisputed that on the night of the shooting, defendant conversed with Franklin about Franklin's relationship with Sanderson. Based on this evidence, a reasonable juror could have inferred that defendant killed Franklin because he believed Franklin had an affair with his fiancé. Cf. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995) (holding that marital discord may be motive for murder, or may serve as circumstantial evidence of premeditation and deliberation).

Defendant's statements and conduct after the shooting also support a finding of premeditation and deliberation. When Sanderson and Cook asked defendant why he shot Franklin, defendant said, "I ain't no joke," or "I'm not a joke," and "I am not to be played with." The meaning of defendant's statements presented a question of fact to be resolved by the jury, *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997), and a juror could reasonably find defendant's statements incriminating. Further, the testimony at trial established that defendant fled the scene immediately after the shooting and that the police were unable to locate him for almost a month. Although flight alone is insufficient to warrant conviction, it is admissible to show consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). "It is true that 'flight from the scene of a tragedy may be as consistent with innocence as with guilt;' but it is always for the jury to say whether it is under such circumstances as to evidence guilt." *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993), quoting *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927). Defendant's evasive conduct following the shooting supports an inference of premeditation and deliberation. See *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

On the record before us, viewing all of the evidence in the light most favorable to the prosecution, the trial court did not err in denying defendant's motion for directed verdict.

Furthermore, contrary to defendant's contention on appeal, the evidence presented at trial was clearly sufficient to support his conviction for second-degree murder. To prove second-degree murder, under MCL 750.317, the prosecution must show that there was: (1) a death, (2) caused by an act of defendant, (3) with malice, and (4) without justification or excuse. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Bulls*, 262 Mich App 618, 626; 687 NW2d 159 (2004).

Defendant does not dispute that he caused Franklin's death. Rather, defendant argues that there was insufficient evidence to establish that he shot Franklin with malice. We disagree. The prosecution presented ample evidence that defendant intended to kill Franklin. As previously indicated, a reasonable juror could have inferred from the testimony at trial that defendant intentionally shot Franklin because he believed that Franklin had an affair with his fiancé. See *Fisher*, *supra* at 453. Defendant's statements after the shooting, that he was not a joke and that he was not to be "played with," also implied that the killing was intentional. More importantly, however, defendant admitted that after Franklin approached the bedroom, he grabbed a shotgun, deliberately pointed the shotgun at Franklin, and then shot Franklin in the chest. We believe that this evidence was more than sufficient to find that defendant intentionally set in motion a force likely to cause death. See *Bulls*, *supra* at 627 (stating that malice may be inferred from the use of a deadly weapon).

Defendant alternatively argues that the prosecution presented insufficient evidence to overcome his theory of self-defense. We disagree. "Once evidence of self-defense is presented, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005) (citations omitted). The killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes that he is in imminent danger of death or serious bodily harm. *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). In deciding whether the defendant feared for his safety, the jury must consider the circumstances as they appeared to the defendant at the time, *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976), but the defendant's belief that he is in danger must be a reasonable belief, *Riddle*, *supra* at 127; *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995).

Defendant testified that Franklin had a reputation for violence and aggression and that he saw a metal object in Franklin's pocket on the night of the shooting. At the time, defendant believed that the object might be a gun. When Franklin approached defendant in Sanderson's bedroom, he asked defendant for cocaine. When defendant said that he had no cocaine, Franklin called him a "bitch" and hit him in the face. Defendant then grabbed the shotgun, pointed it at Franklin's chest, and told him to leave. Defendant claimed that Franklin lunged toward him, attempted to grab the shotgun with one hand, and reached into his pocket with the other hand. Defendant then shot Franklin in the chest. Defendant now claims that he fired the shotgun because he believed that his life was in danger. Franklin's autopsy, however, revealed that defendant shot Franklin from a distance of at least four to six feet. This evidence contradicts defendant's testimony that Franklin lunged forward to grab the shotgun. Furthermore, neither

Sanderson nor Cook heard any fighting before the shooting took place and they both testified that Franklin did not have a gun that night. After the shooting, police found a screwdriver in Franklin's pocket. Based on this evidence, a reasonable juror could conclude that defendant's belief that his life was in danger was dishonest or unreasonable. *Riddle*, *supra* at 127; *George*, *supra* at 634-635. Questions of credibility are properly resolved by the trier of fact. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). Accordingly, we find that there was sufficient evidence presented at trial to overcome defendant's theory of self-defense.

II

Defendant further argues that the trial court erred in denying his request for a jury instruction on voluntary manslaughter. We disagree. Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Because voluntary manslaughter is a necessarily included lesser offense of murder, defendant was entitled to such an instruction if supported by a rational view of the evidence. *Mendoza*, *supra* at 542. "To show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id*. at 535. The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes a defendant to act out of passion rather than reason. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The provocation must be that which would cause a reasonable person to lose control. *Id*.

Here, a rational view of the evidence does not support a voluntary manslaughter instruction. As discussed *infra*, defendant's testimony about the shooting, that Franklin picked a fight with defendant, lunged toward the shotgun, and reached into his pocket to retrieve his own gun, was not supported by credible evidence. Furthermore, even if the jury believed defendant's version of the events, defendant testified that he grabbed the shotgun, deliberately pointed it at Franklin's chest, and asked Franklin to leave before Franklin lunged toward him or reached into his pocket. This evidence indicates that the shooting was deliberate, rather than the result of uncontrollable passion. Defendant's explanation for the shooting, that he was not a joke and that he was not to be "played with," further negates any inference that he lost control and acted out of the heat of passion rather than reason. Thus, the trial court did not abuse its discretion in finding that the evidence failed to support a voluntary manslaughter instruction.

III

Defendant next argues that the trial court improperly suppressed evidence of Franklin's previous acts of violence and aggression. We agree. The decision whether to admit or exclude evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Even if a trial court abuses its discretion in excluding evidence, reversal is warranted only if it affirmatively appears, after review of the entire record, that it is more probable than not that the

court's error was outcome determinative. *Id*. at 495-496; *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

During cross-examination, Sanderson testified about Franklin's reputation in the community. Sanderson claimed that Franklin was known as an "aggressive type person" who "would take people's money," and that she told defendant about specific instances when Franklin exhibited aggressive or violent behavior. The prosecution objected, however, when defense counsel attempted to question Sanderson about the specific acts of aggression and violence committed by Franklin that she related to defendant. The trial court excluded the evidence. The court found that defense counsel could question defendant, but no other witnesses, about Franklin's specific acts of violence and aggression that defendant was personally aware of and that directly related to the shooting in this case.

When a defendant charged with murder claims self-defense, evidence of the victim's character trait for aggression is admissible. MRE 404(a)(2). MRE 405 provides that "testimony as to reputation" may be used to prove a person's character in all cases in which evidence of the person's character is admissible. MRE 405(a). But, "specific instances of that person's conduct" may only be used to prove character when the person's character "is an essential element of a charge, claim, or defense." MRE 405(b). In applying MRE 405 to the facts in *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998), our Supreme Court held that when a defendant claims self-defense, specific instances of violent or aggressive conduct on the part of the victim may not be used to show that the victim was the aggressor, "since the aggressive character of the victim is not an essential element of the defense of self-defense." The *Harris* Court further found, however, that specific instances of violence or aggression on the part of the victim may be admitted to establish that the defendant had a reasonable apprehension of harm, since the defendant's state of mind is material to a claim of self-defense. *Id*. at 316, 319, citing *People v Cooper*, 73 Mich App 660, 664; 252 NW2d 564 (1977). The victim's acts of violence and aggression must be known to the defendant in order for the defendant to show that he had a reasonable apprehension of harm. *Id*. at 316-317.

The trial court abused its discretion in excluding Sanderson's testimony about Franklin's specific acts of violence and aggression. Because defendant raised a claim of self-defense, evidence of Franklin's character trait for aggression was admissible. MRE 404(a)(2). Sanderson testified that she was aware of specific instances when Franklin demonstrated aggressive or violent behavior and that defendant was aware of the same instances. Therefore, according to our Supreme Court's decision in *Harris*, *supra*, Sanderson's testimony was admissible to show that defendant had a reasonable apprehension of harm.

We are convinced, however, that the trial court's error was harmless. The trial court allowed defendant to testify about Franklin's specific acts of violence and aggression. During direct examination, defendant described at least three instances when Franklin "jumped," fought, or slapped people prior to the shooting. Considering that more than one person testified at trial that Franklin had a reputation for violence and aggression and that defendant testified about Franklin's specific acts of violence and aggression, there is no basis on which we can conclude that the trial court's exclusion of additional specific-acts testimony affected the outcome of the case. See *Lukity*, *supra* at 495-496; *McLaughlin*, *supra* at 650 (holding that reversal is required only if it is more probable than not that the trial court's error was outcome-determinative).

IV

Defendant additionally argues that the prosecutor committed misconduct. We review defendant's unpreserved claim of prosecutorial misconduct for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Where a curative instruction could have alleviated any prejudicial effect, reversal is not warranted. *Id*. at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

First, defendant argues that the prosecutor committed misconduct by making statements during her closing argument that were unsupported by the evidence. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id*. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *Ackerman*, *supra* at 450, but she is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Ackerman*, *supra* at 450.

Defendant asserts that the prosecutor committed misconduct by stating that, "Nadine [Cook] told you it was a matter of seconds from when the victim walked back to that bedroom to when that boom we heard [sic]. Lynette [Sanderson] told you it was five to ten minutes and then we heard from Officer [Lance] Newman that during the interview [Sanderson] had with himself and myself, in fact, she said a few seconds from the time the victim walked back there." Contrary to defendant's position, we find that the prosecutor's statements were supported by the evidence. At trial, Cook testified that she heard a loud boom or a gunshot a few seconds after Franklin walked to the bedroom and Sanderson testified that she heard the gunshot five to ten minutes after he walked to the bedroom. But, according to Officer Newman's testimony, Sanderson reported to him that she heard the gunshot within seconds after Franklin went to the bedroom. Therefore, based on the record before us, we cannot conclude that the prosecutor committed misconduct.

Defendant asserts that the prosecutor committed further misconduct by stating that, "In [defendant's] testimony on direct, he first said it was [Franklin's] left hand that went into his pocket. Then he switched it on cross and said it was his right hand." We agree that in making this statement, the prosecutor mischaracterized defendant's testimony. Defendant first testified that, "when [Franklin] tried to grab the shotgun with his left hand, he was going into his pocket." Later, on cross-examination, defendant indicated that Franklin attempted to grab the shotgun with his left hand and that he reached for his pocket with his right hand. Clearly, there was no discrepancy in defendant's testimony. Defendant has failed to establish, however, that the prosecutor's misconduct was outcome determinative. *Carines*, *supra* at 763. A prosecutor's isolated statement, even when improper, is subject to harmless error analysis. See *People v Armentero*, 148 Mich App 120, 134; 384 NW2d 98 (1986). As discussed *infra*, the evidence presented at trial was more than sufficient to support a conviction of second-degree murder. Furthermore, the trial court instructed the jury that, "the lawyers' statements and arguments are not evidence," and that it must "only accept things the lawyers say that are supported by the evidence." In providing these limiting instructions, the trial court alleviated any prejudice to defendant. *Ackerman*, *supra* at 449; *Watson*, *supra* at 586.

Additionally, defendant argues that the prosecutor committed misconduct by suppressing or negligently losing potentially exculpatory evidence. We disagree. There is no general constitutional right to discovery in a criminal case. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Due process does, however, require a prosecutor to disclose evidence that is both favorable to the defendant and material to the determination of guilt or punishment. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Fink*, 456 Mich 449, 453-454; 574 NW2d 28 (1998). Accordingly, a defendant has a due process right to exculpatory evidence in the prosecution's possession. *Brady*, *supra* at 87. But the loss of evidence of unknown probative value, "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," does not violate due process unless the police lost the evidence in bad faith. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Cress*, 250 Mich App 110, 155; 645 NW2d 669 (2002), vacated in part on other grounds 468 Mich 678 (2003). The defendant bears the burden of showing that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Defendant asserts that Franklin's tee shirt was destroyed before testing could be done to determine if Franklin was shot at close range and that the test results may have been exculpatory. While it is undisputed that Franklin's tee shirt was destroyed before any testing occurred, defendant has failed to meet his burden of showing bad faith. *Youngblood*, *supra* at 57-58; *Johnson*, *supra* at 365. According to Officer Newman, the police normally receive a victim's clothing from the morgue. In this case, however, the morgue released Franklin's clothes to the funeral home immediately after his autopsy and the clothes were destroyed at that time. The police were never in possession of Franklin's tee shirt. Thus, there is no basis on which to conclude that the police acted in bad faith.

Furthermore, defendant cannot establish that the prosecution's failure to preserve the evidence affected the outcome of the case. See *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998) (stating that evidence is only material and exculpatory if it is favorable to the defendant and there is a reasonable probability that the outcome of the proceedings would have been different if the evidence had been admitted). The forensic examiner who conducted Franklin's autopsy, Dr. Melissa Pasquale-Styles, testified that she examined Franklin's tee shirt and determined that it did not exhibit evidence of close-range firing. She opined, based on the shape of Franklin's fatal wound, that he was most likely shot from a distance of four to six feet. Dr. Pasquale-Styles further testified that, although clothing can absorb some of the soot and unburned gunpowder particles, "in this case it's really the pattern of the entrance wound that is much more telling than the absence of close range evidence." Therefore, because defendant failed to show that the police acted in bad faith and that the loss of Franklin's tee shirt affected the outcome of the case, his claim of prosecutorial misconduct must fail.

V

Defendant next argues that his trial counsel rendered ineffective assistance of counsel. We disagree. Because the trial court was not presented with and did not rule on defendant's claim of ineffective assistance of counsel, we are left to our own review of the record in evaluating his assertions. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Defendant first argues that his trial counsel was ineffective for failing to have a sound strategy for admitting evidence of Franklin's previous acts of violence and aggression. Contrary to defendant's argument on appeal, defense counsel implemented a sound strategy to admit the evidence. As discussed *infra*, the trial court abused its discretion in excluding Sanderson's testimony about the specific acts of violence and aggression committed by Franklin. We cannot find that defense counsel's strategy for admitting the evidence was unsound simply because it was unsuccessful at trial. See *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001) (stating that this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if the strategy backfired). Furthermore, considering that more than one person testified that Franklin had a reputation for violence and aggression, and that defendant testified about Franklin's specific acts of violence and aggression, defendant cannot establish that a lack of additional character evidence affected the outcome of the case. *Henry*, *supra* at 146.

Defendant next argues that his trial counsel was ineffective for failing to object when the prosecutor made statements unsupported by the evidence to the jury. Considering that the prosecutor's statements about the timing of the shooting were supported by the evidence, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Furthermore, while the prosecutor mischaracterized defendant's testimony about which hand Franklin used to reach into his pocket, defendant cannot establish that defense counsel's failure to object affected the outcome of the case. *Henry*, *supra* at 146. As discussed *infra*, the evidence presented at trial was more than sufficient to support a conviction of second-degree murder and the trial court's cautionary instructions to the jury alleviated any prejudice to defendant.

Next, defendant argues that his trial counsel rendered ineffective assistance of counsel in regard to the prosecution's failure to produce Franklin's tee shirt. According to defendant, defense counsel should have filed a motion to compel, moved to dismiss the charges against him, and requested an adverse inference instruction. We disagree. In light of the fact that Franklin's tee shirt was destroyed almost immediately after his autopsy, a motion to compel would have been futile. Further, considering that defendant cannot establish that the loss of the tee shirt affected the outcome of the case, a motion to dismiss the charges against defendant would also have been futile. Defense counsel cannot be deemed ineffective for failing to make futile motions. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Additionally, because defendant failed to show that the police acted in bad faith, an adverse jury instruction was not warranted. See *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993) (holding that an adverse inference instruction need not be given where the defendant has not shown that the prosecutor acted in bad faith in failing to produce the evidence). Consequently,

counsel was not ineffective for failing to request such an instruction. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (stating that trial counsel is not required to advocate a meritless position).

Additionally, defendant argues that his trial counsel was ineffective for failing to call a firearms expert to testify at trial because "it might well be that the prosecutor's medical expert grossly mischaracterized and overstated the evidence regarding the distance of the gun from the victim." We disagree. Defense counsel's failure to investigate and call a witness does not amount to ineffective assistance of counsel unless the defendant shows prejudice as a result. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990). In other words, defense counsel's failure to call an expert witness in this case can only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Hyland*, *supra* at 710. Moreover, the decision whether to call a witness is presumed to be a matter of trial strategy, *Dixon*, *supra* at 398, and we will not substitute our judgment for that of counsel regarding matters of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant asserts that his trial counsel should have called a firearms expert to rebut Dr. Pasquale-Styles' testimony that the perpetrator shot Franklin from a distance of four to six feet, but defendant has failed to establish the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant did not identify a firearms expert who would testify on his behalf and the record does not disclose to what extent, if any, counsel considered calling an expert to testify, or his reasons for deciding not to do so. Therefore, defendant has failed to overcome the presumption that counsel's failure to call an expert was anything but sound trial strategy. *Henry*, *supra* at 146. Moreover, there is no basis on which we can conclude that defense counsel's failure to call an expert was outcome determinative. *Id.*; *Hyland*, *supra* at 710. Because the record does not indicate that there was any expert witness who would have refuted the prosecution's theory regarding the distance of the gun from the victim, this case is distinguishable from cases where trial counsel failed to present witnesses who could actually have directly contradicted the prosecution's case. See, e.g., *People v Johnson*, 451 Mich 115, 118; 545 NW2d 637 (1996).

Defendant also argues that his trial counsel was ineffective for failing to call additional defense witnesses. Defendant has not identified the witnesses who would testify on his behalf or demonstrated that his trial counsel was even aware of any potential witnesses. "[C]ounsel cannot be found ineffective for failing to pursue information that his client neglected to tell him." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Furthermore, because defendant provided no information regarding the alleged witnesses, there is no basis on which to find that defense counsel's failure to call them denied defendant a substantial defense. *Dixon*, *supra* at 398; *Hyland*, *supra* at 710. Defendant has failed to overcome the presumption of effective assistance of counsel.

On appeal, defendant asks for a remand for further fact finding on his claim of ineffective assistance of counsel, but he did not comply with MCR 7.211, which provides a means for requesting a hearing in the trial court to develop evidence. Even on appeal, defendant has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing

would support his claim. See MCR 7.211(C)(1)(a)(ii). Thus, we decline to order a remand on that basis.

VI

Finally, Defendant argues that the trial court erred in ordering him to contribute to the cost of his court-appointed attorney without first assessing his ability to pay. Defendant failed to properly present this issue by including it in the statement of the questions presented as required by MCR 7.212(c)(5). Despite the error in presentation, we will consider the merits of the issue because we have all of the pertinent facts and law before us, and it is a significant issue. *Health Care Ass'n Workers Comp Fund v Dir of Bureau of Worker's Comp*, 265 Mich App 236, 694; NW2d 761 (2005); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Because defendant did not object to the imposition of attorney fees at sentencing or raise this issue in a motion for resentencing, we review for plain error affecting his substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004), citing *Carines*, *supra* at 763.

A defendant may be required to reimburse the county for the cost of his court-appointed attorney. *Dunbar*, *supra* at 251. Unless the defendant specifically objects to the reimbursement amount at the time it is ordered, the trial court is not required to make specific findings on the record regarding the defendant's ability to pay. *Id*. at 254. The court does, however, "need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id*. at 254-255. The reimbursement amount should also correspond to the defendant's *foreseeable* ability to pay. *Id*. at 255. Here, the trial court plainly erred by ordering defendant to pay $1,820 in court-appointed attorney fees without providing any indication that it considered defendant's ability to pay. Accordingly, we vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for the trial court to reconsider its reimbursement order in light of defendant's present and future ability to pay.

Affirmed in part, vacated in part, and remanded for reasons consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering