

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MASHAWNTAY MONTGOMERY,

Defendant-Appellant.

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UNPUBLISHED

December 16, 2008

No. 281857

Wayne Circuit Court

LC No. 05-005361-FC

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of assault with intent to murder, MCL 750.83, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Complainant Roosevelt Halsell testified that he was visiting the home of Allen McAfee when defendant and another man arrived. Defendant displayed a handgun, put it to Halsell's head, and told him that he was going to kill him. Defendant told his acquaintance to "hit" Halsell's pockets. Defendant's acquaintance appeared as shocked as were Halsell and McAfee. Halsell "hit the gun down" and told defendant to "quit playing." Defendant again pointed the gun at Halsell's temple, and pulled the trigger. The gun misfired, and Halsell ran out the door. Defendant followed, and shot at Halsell again. One bullet hit Halsell in the back, and another struck a mint case in Halsell's pocket. Defendant and his friend then drove away.

Defendant argues on appeal that trial counsel provided ineffective assistance by failing to call his acquaintance as a witness and by preventing defendant from testifying on his own behalf. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing<sup>1</sup> before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, our review is "limited to mistakes apparent on the record." *Id.* "If the record does not contain sufficient detail to support

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing on this ground before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* (citations omitted). "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* (citations omitted).

Defendant argues that counsel provided ineffective assistance by failing to call his acquaintance, Eddie, as a witness. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis, supra* at 368. Defendant has not overcome this presumption here. A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant maintains that Eddie would have testified that defendant "never shot at anybody." However, defendant does not provide an affidavit from Eddie stating that he would have so testified had he been given the opportunity. This claim of ineffective assistance of counsel is without merit.

Defendant also argues that his trial counsel was ineffective for "not allowing" him to testify at trial. A defendant's decision to testify or to remain silent is considered a strategic decision, which is best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). Defendant presents no evidence that he ever expressed to his counsel, or to the court, a desire to testify during trial. Moreover, the record does not support defendant's contention that he was discouraged or prevented from testifying. Trial counsel told the court that he and defendant had discussed defendant's right to testify and that defendant "wishes to remain silent, and not have it used against him." Defendant could have challenged this assertion had he wished to do so. If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, then the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). This claim of ineffective assistance is also without merit.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Patrick M. Meter