STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2009
v	No. 278960 Wayne Circuit Court
MARK ANTONIO OWENS, Defendant-Appellant.	LC No. 06-005250-01

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, assault with intent to do great bodily harm less than murder, MCL 750.84, possession of firearm by a person convicted of a felony, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to life in prison without parole for the first-degree murder conviction, 12 to 30 years in prison for the assault with intent to do great bodily harm less than murder conviction, 2 to 20 years in prison for the felon in possession conviction, and five years in prison for the felony-firearm conviction. We affirm.

Defendant first argues on appeal that because a self-confessed drug abuser provided the only eyewitness testimony to the homicide, the trial court should have, sua sponte, given an instruction on "addict testimony." Defendant concedes that counsel did not ask for the "addict" instruction, but nevertheless argues that because no such instruction was given, defendant did not receive a fair trial. We disagree.

"A defendant may not waive objection to an issue before the trial court and then raise it as an error on appeal." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). "Waiver is the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which . . . [is] the failure to make the timely assertion of a right. One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. Mere forfeiture, on the other hand, does not extinguish an 'error.'" *Id.* at 215 (internal citations omitted). Affirmatively approving a jury instruction extinguishes any error. *Id.* at 216, citing *US v Griffin*, 84 F3d 912, 923-924 (CA 7, 1996).

In this case, the court inquired whether there were any objections to the jury instructions. Defense counsel objected only to the instruction regarding flight from the scene of a crime, but

the trial court overruled the objection. After closing arguments, the trial court again asked if "[b]oth sides are satisfied with the jury instructions and verdict form as presented?" and defense counsel answered, "yes." Moreover, as noted, defendant concedes that there was no request for a so-called addict instruction. Thus, under *Carter, supra,* defense counsel affirmatively approved the jury instructions read by the trial court, which extinguishes any error and precludes review.

Defendant next argues that defendant received ineffective assistance. of counsel. Defendant contends that counsel gave him bad advice regarding whether defendant should testify and defendant further claims that counsel failed to call two alibi witnesses. We reject defendant's claims of ineffective assistance of counsel.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law . . . . This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law." *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). "[B]ecause the trial court did not hold an evidentiary hearing, . . . review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350; 619 NW2d 413 (2000).

"An accused's right to counsel encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const Am VI, Const 1963, art 1, § 20, and *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, to establish ineffective assistance of counsel, a defendant must show: that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland, supra* at 694. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), citing *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant first argues that trial counsel's assistance was ineffective because trial counsel erroneously told him that if he testified, all of defendant's prior convictions could be brought up, when in reality, under MRE 609, the prosecution could have asked him about only the armed robbery conviction. Defendant asserts that because he had several other convictions, this erroneous advice had "a chilling effect" on the exercise of his right to testify, and his waiver of the right was thus not knowing or voluntary. This argument has no merit.

The facts on the record do not support defendant's position. Defense counsel stated, in open court, that defendant did not want to testify, and when asked if this statement was correct, defendant answered, "Yes, sir." When a defendant "decides not to testify or acquiesces in his attorney's decision that he not testify, the right will be deemed waived." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). In addition, "A defendant's decision whether to testify on his own behalf is an integral element of trial strategy. For a variety of reasons, many defendants, under the advice of counsel, do not take the stand, presumably concluding that the advantages of doing so would be outweighed by the disadvantages." *People v Toma*, 462 Mich

281, 304; 613 NW2d 694 (2000). It seems a reasonable trial strategy to avoid reference on cross examination to defendant's armed robbery conviction, when in the case at bar, defendant was accused of demanding money, shooting two people, one of whom died, and after the fact, $56,000 was unaccounted for. Defendant fails to overcome the presumption that his counsel's advice not to testify was a reasonable trial strategy.

Defendant's argument that trial counsel was ineffective for failing to call two alleged alibi witnesses is similarly flawed. "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." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

In this case, defendant has not provided affidavits from his alleged alibi witnesses and there is no evidence on the record to support his assertion that such witnesses exist or that they could have provided evidence that would have affected the outcome of the trial in his favor. On the other hand, the record *does* contain eyewitness testimony from Thomas, supported by other witnesses and physical evidence, identifying defendant as the shooter. "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Therefore, defendant has not shown that trial counsel's advice regarding whether defendant should testify and his failure to call alibi witnesses fell below an objective standard of reasonableness or affected the outcome of the trial.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray