

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BARNETT LEE,

Defendant-Appellant.

UNPUBLISHED

March 17, 2009

No. 281048

Saginaw Circuit Court

LC No. 06-028176-FC

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two years for the felony-firearm conviction to be served consecutively to 10 to 20 years imprisonment for assault with intent to commit murder. Defendant now appeals by right.

Defendant first argues the jury verdict is against the great weight of the evidence. We disagree. We review for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the basis that the verdict is against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

A trial court "may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "The hurdle that a judge must clear in order to overrule a jury and grant a new trial 'is unquestionably among the highest in our law.'" *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008) (citation omitted).

The essence of defendant's argument is simply that the jury's credibility determinations were wrong. But "absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Lemmon, supra* at 642 (citation omitted). Accordingly, defendant's assertions of innocence at trial do not cast doubt on the verdict. While he testified that on the night and at the time of the shooting he was drinking with others at an apartment, defendant's alibi witnesses were effectively challenged on cross-examination. In sum, because

the credibility of witnesses is a matter for the jury and because there is overwhelming evidence to support the jury verdict, including a confession defendant made to acquaintance Raychan Williams, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Next, defendant asserts he was denied the effective assistance of counsel because his counsel failed to call certain witnesses and was unprepared to examine alibi witnesses at trial. We disagree. "The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

This Court reviews de novo a trial court's constitutional determination while reviewing the court's factual findings for clear error. *Id.* Effective assistance of counsel is presumed; consequently, the defendant bears a heavy burden of proving trial counsel was ineffective. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To overcome the presumption of effective 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). Counsel is accorded wide discretion concerning matters of trial strategy. *LeBlanc, supra* at 578. This Court will not substitute its judgment for that of counsel regarding such matters, "nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Id.* at 76.

Defendant references four instances where he believes his trial counsel was ineffective. First, defendant argues counsel should have called Wondolyn Martin to contradict the victim's testimony that he was coming from her house just before the time of the shooting. Martin is the victim's former girlfriend and the mother of his child. The victim testified that he was traveling home from Martin's home when he encountered defendant and stopped to help him jumpstart his car. Defendant provides no support for his belief that Martin would have testified that Clark was not traveling home from her house just before the shooting. As the trial court noted, "In any motion for a new trial, facts not appearing on the record must be supported by an affidavit filed or served with the motion. MCR 2.611(D)(1); MCR 6.001(D)." Because decisions "regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," defendant's argument is without merit. *Rockey, supra* at 76-77.

Second, defendant argues counsel was ineffective for failing to obtain records of his cell phone calls because they would have shown that defendant only made one call to Williams, and the call was too short to relay the information Williams testified to at trial. We agree with the trial court that counsel was not ineffective in this regard because there was no proof at trial that defendant placed the telephone call to Williams on his cell phone. Defendant does not provide any argument as to how the cell phone records would have impacted his trial. Williams testified that he spoke briefly with defendant when telephoned at 4 a.m. Williams further testified that he was sleeping when defendant called, so he and defendant agreed to talk the next day. According to Williams' testimony, defendant called back the next day, confessed to shooting the victim, and stated that he wanted to "finish him off." Accordingly, defendant has failed to establish outcome

determinative error or any basis to question counsel's trial strategy. *LeBlanc, supra* at 578; *Rockey, supra* at 76-77.

Third, defendant challenges defense counsel's cross-examination of Williams. He states that counsel failed to ask Williams about certain contradictory statements Williams purportedly made to the police, but defendant fails to identify those statements. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007) (citations omitted). Defendant's argument that counsel "failed to cross-examine regarding the deal [Williams] received for his testimony" is contrary to the record. The first question defense counsel asked Williams on cross-examination was in response to Williams's testimony that the prosecutor promised to write a letter to the parole board for Williams if he testified truthfully at trial. Counsel's decision not to pursue the matter any further is one of trial strategy, and defendant offers no argument on why this strategy was not objectively reasonable.

Last, defendant argues defense counsel was ineffective because he did not properly present the alibi witnesses. He asserts that counsel did not speak to alibi witnesses before trial, but provides no argument or proof of this claim. See MCR 2.611(D)(1); *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001) (a defendant asserting ineffective assistance of counsel has the burden of establishing the necessary factual predicate for his claim). Defendant also argues that counsel was unprepared for direct examination. But the record establishes counsel questioned the witnesses, particularly Arthur Woods, at length in an attempt to establish a timeline of defendant's whereabouts on the night of the shooting. Defendant asserts that the witnesses were unprepared for cross-examination, but any contradictions plaintiff elicited in their testimony is not defense counsel's fault. Accordingly, this argument is without merit.

Finally, defendant argues that this Court should remand to the trial court for further development of the record. We will not remand because defendant has not timely moved to remand, nor has he provided affidavits reiterating what would be established at a remand hearing. MCR 7.211(C)(1)(a). Accordingly, we deny defendant's request.

Next, defendant argues that the prosecutor's misconduct denied him a fair trial. Specifically, defendant asserts that the prosecutor withheld a jail visitation record and then ambushed defendant with the record during cross-examination. Defendant also asserts the prosecutor's actions violated discovery rules. We disagree.

When there is no objection at trial, we review an assertion that the prosecutor's conduct denied a defendant a fair trial for plain error affecting defendant's substantial rights. *Schumacher, supra* at 177. In general, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). But "[d]ue process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *Schumacher, supra* at 176, citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To establish a due process violation based on the failure to disclose evidence, a defendant must show "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been

disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *Schumacher, supra* at 177, quoting *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

The jail records at issue identified Lorenzo Farrow as a visitor and gave his address. This evidence was not exculpatory as it was not favorable to defendant. Indeed, the evidence was inculpatory because it tended to show that defendant knew someone on Annesley Street well enough to possibly be in that area and at the scene of the crime. The prosecutor asked defendant if he knew anyone who lived on Annesley Street whom he would visit or who would have visited him in jail. Defendant stated that he did not. Farrow owned a home directly in front of where the shooting occurred, and defendant had placed his name on the visitation sheet at the jail. Not surprisingly, the prosecutor then used the jail visitation list to show that defendant was lying when he testified that he did not know anyone on Annesley Street well enough that the person would visit him in jail. Further, defendant was aware of the evidence—he was the person who requested and wrote Farrow’s name on the visitation list to allow him to visit him in jail. Accordingly, the jail visitation sign-in sheet was a record about which defendant obviously knew. The prosecutor did not commit misconduct or deny defendant due process.

Finally, defendant argues that the trial court abused its discretion by scoring offense variable (OV) 3 as 25 points. Defendant argues the victim’s injuries were not permanent or incapacitating as the victim can walk and his injuries will continue to improve. Accordingly, defendant argues that the victim’s injuries should not be considered permanently incapacitating, that they are merely bodily injuries requiring medical treatment and only justify an OV 3 score of 10 points. We disagree.

We review de novo issues concerning the proper interpretation and application of sentencing guidelines. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). But we review the trial court’s sentencing decision to determine whether the trial court abused its discretion and whether the record adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). We will uphold the trial court’s guidelines scoring decisions that are supported by any evidence. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We conclude evidence exists in the record to support the trial court’s scoring; therefore, the trial court did not abuse its discretion by scoring OV 3 at 25 points.

MCL 777.33(1)(c) provides that OV 3 is to be scored at 25 points if a “[l]ife threatening or permanent incapacitating injury occurred to a victim.” Applying this phrase in a common sense, generally understood way in the context of OV 3’s focus on physical injury to a victim, we conclude the phrase “permanent incapacitating injury” means a perpetual, everlasting deprivation of ability or strength resulting from bodily harm or damage the victim sustained because of the defendant’s actions.

In this case, a shotgun blast seriously injured the victim’s left femur, a major supporting bone. The victim impact statement in the PSIR indicates that the victim told the investigator that “he wasn’t sure if he would ever be able to walk again on his [left] leg.” The victim testified that he was told that “[f]ive inches of bone got blown off.” The victim also indicated that as of the time of the trial, he had been told his injured leg could bear only about 30 percent of his weight.

Similarly, Dr. Thomas Veverka testified that an x-ray of Clark's left leg showed that the femur was shattered into multiple pieces requiring an orthopedic surgeon to place a permanent rod in the victim's femur that ran the length of the bone. Dr. Veverka further stated that the fracture that the victim sustained "can tend to be pretty complicated in terms of their healing," and that "[s]ome people do very well" while "others don't." We conclude this evidence adequately establishes a "permanent incapacitating injury" sufficient to sustain the scoring of OV 3 at 25 points.

Moreover, although there was no testimony that the victim could have died or was at any point in danger of dying, it is reasonable to conclude that the victim's left leg injury was indeed "life threatening." A shotgun blast that destroys a femur to the extent present here clearly posed a danger to the victim's life. The fact that the victim was able to drag himself to his car and then drive himself to the hospital does not lessen the danger posed. Consequently, we conclude that the trial court did not abuse its discretion in scoring OV 3.

We affirm.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey