STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2009
v	No. 289287 Wayne Circuit Court
BILLY SULLIVAN, Defendant-Appellant.	LC No. 08-010074

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and four counts of assault with intent to murder, MCL 750.83. He was sentenced to 30 to 60 years' imprisonment for the second-degree murder conviction and to 15 to 40 years' imprisonment for each assault with intent to murder conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

After midnight on July 6, 2008, defendant and Felton Howell-Mackie were involved in a shooting at the apartment residence of the Bryant family. Defendant and Howell-Mackie had been in a fistfight with some men from the Bryant family on July 5, 2008. It is undisputed that Howell-Mackie fired a gun at the door of the Bryant family apartment and that he fired the gun a second time when Dwight Bryant, Sr. walked out the door. Dwight Sr. died of a gunshot wound to the chest. Defendant was convicted on an aiding and abetting theory.

Defendant argues on appeal that he was denied the effective assistance of counsel when trial counsel failed to call Jeff Strickland as a defense witness. According to defendant, Strickland would have testified that defendant told him that defendant could not believe that Howell-Mackie shot Dwight Sr. Because no *Ginther*[1] hearing was held, our review of defendant's claim is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005).

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

> 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. 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.* (quotation and citations omitted).]

The decision whether to call or question a witness is presumed to be a matter of trial strategy, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), and trial counsel is given wide discretion in matters of trial strategy, *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). "The defendant . . . must overcome the presumption that the challenged action was trial strategy." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Failure to call a witness can only rise to ineffective assistance if the defendant was deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant states that "he can not think of a logical reason or strategy" for trial counsel's decision not to call Strickland as a witness. This assertion alone cannot fulfill defendant's burden to establish that counsel's decision not to call Strickland was trial strategy. In addition, defendant has not established that his statement to Strickland would have been admissible as an excited utterance under MRE 803(2). Moreover, trial counsel's decision not to call Strickland as a witness did not deprive defendant of a substantial defense. Defendant testified that he did not intend to kill any person and that he could not believe that Howell-Mackie shot Dwight Sr. Accordingly, defendant was not denied the effective assistance of counsel.

Defendant also argues that he is entitled to be resentenced because the trial court improperly considered the uncharged offense of felony-firearm in imposing sentence. We disagree.

Defendant's minimum sentences fell within the recommended minimum sentence ranges under the legislative guidelines. Because defendant does not allege an error in the scoring of the guidelines or that the trial court relied on inaccurate information, we must affirm defendant's sentences. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). We also note that, although the prosecutor requested the trial court to take into consideration the fact that defendant was not charged with felony-firearm, there is no indication on the record that the trial court made such a consideration in imposing sentence.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck