

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE DUANE BRADSHAW,

Defendant-Appellant.

UNPUBLISHED
February 11, 2010

No. 288638
Berrien Circuit Court
LC No. 2008-411168-FH

Before: Talbot, P.J. and Whitbeck and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82. He was acquitted of resisting a police officer, MCL 750.81d(1). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 152 months to 30 years' imprisonment for assault with intent to do great bodily harm less than murder, and 58 months to 15 years' imprisonment for felonious assault. We affirm.

I. Ineffective Assistance of Counsel

Defendant contends that he was denied his right to the effective assistance of counsel. We disagree.

A. Standard of Review

Whether defendant was denied his right to the effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error and issues of constitutional law de novo. *Id.* Because defendant's motions for a *Ginther*¹ hearing were denied, our review of defendant's ineffective assistance of counsel claims is limited to the facts contained in the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

¹ *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

B. Analysis

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

Defendant first alleges that defense counsel acted deficiently when he failed to object to the prosecutor's cross-examination of defendant concerning a prior incident involving defendant's possession of a knife. Even assuming that the failure to object fell below an objective standard of reasonableness, defendant cannot prevail. After reviewing the record, we conclude that defendant has failed to show that there is a reasonable probability that any error with respect to the other-act evidence affected the result of the lower court proceeding. *Carbin*, 463 Mich at 600.

In this case, the prosecution presented substantial evidence that would allow a rational juror to conclude beyond a reasonable doubt that all of the elements of both offenses were established notwithstanding the introduction of the other-acts evidence. An eyewitness and the victim both testified that defendant instigated a physical altercation with the victim when he pushed him over a table and chair and then slapped him. Defendant admitted during his testimony that he was angry when he confronted the victim about a guitar, and he became angrier when the victim handed him the guitar and told him to leave. Defendant then inflicted life-threatening injuries upon the victim when he introduced a dangerous weapon into the fight. Defendant stabbed the victim in the neck approximately two-inches from critical blood vessels and he continued to slash the weapon through the victim's neck and forearm. The victim testified that he felt a hard punch to his neck and then he saw a shiny blade protruding about 1-½ inches from defendant's clenched right fist; the victim also saw blood running down his arm.

Expert testimony of Dr. Scott Gerald Thomas, a trauma surgeon, supported that defendant stabbed and then slashed the victim on the neck and forearm with a knife, not with a guitar. Dr. Thomas testified that the victim's cuts were very clean without any debris or jagged edges, and he opined that a very sharp, narrow, instrument caused the injuries. Dr. Thomas opined that the wounds were inconsistent with the defendant's theory that they were caused by a guitar. The wound was one-inch deep and it severed the blood vessels in the victim's forearm. When paramedics arrived at the scene, according to testimony, the victim was in a "class 3 or 4" state of shock due to blood loss and his life was in jeopardy. After the incident, defendant threw his guitar away and fled from police; both of these actions were indicative of defendant's consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008) (evidence of flight is admissible to show consciousness of guilt); *People v Cutchall*, 200 Mich App 396, 400-401, 404-405; 504 NW2d 666 (1993) (defendant's attempts to conceal involvement in a crime are probative of his consciousness of guilt and are thus relevant).

Next, defendant contends that defense counsel acted deficiently when he failed to request an accident instruction as opposed to a self-defense instruction. A trial court is “required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner.” *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). While a criminal defendant is entitled to a properly instructed jury, a defendant must request an instruction on a defense theory and a trial court is only required to provide instructions that are supported by the evidence. *Id.* at 80-81.

In this case, an accident instruction was not supported by the evidence introduced at trial. Defendant testified that he intentionally jabbed the victim in the face with his guitar while the two were allegedly struggling over the instrument. Defendant stated that he intentionally jerked the guitar upwards and it hit the victim in the side of the face. Defendant theorized that the guitar must have caused the victim’s life threatening injuries. This testimony does not support that defendant accidentally caused serious injuries to the victim in this case. In addition, none of the other evidence in this case supports that defendant accidentally injured the victim. In addition to Dr. Thomas’ testimony about the nature of the victim’s wounds, the roommate testified that defendant tossed his guitar behind him and then assaulted the victim. The facts and circumstances surrounding the offense do not provide any support for defendant’s theory that he accidentally caused the victim’s injuries with a guitar; to conclude otherwise defies basic logic. See *Mills*, 450 Mich at 82. In sum, because there was no evidence of an accident in this case, defense counsel was not deficient in failing to request an accident instruction. *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009) (“Trial counsel is not ineffective for failing to advocate a meritless position”).

Defendant finally contends that defense counsel acted deficiently when he failed to impeach the victim’s roommate concerning a conflict between the roommate’s trial testimony and the statement he gave to police immediately following the incident. After reviewing the record, we conclude that defense counsel adequately cross-examined the victim’s roommate, and we will not second-guess counsel with respect to counsel’s strategic approach to questioning of a witness. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008) (“The questioning of witnesses is presumed to be a matter of trial strategy”); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (“This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight”).

II. Cross-Examination

Defendant next argues on appeal that the prosecutor’s cross-examination of defendant concerning his prior possession of a knife amounted to plain error affecting his substantial rights. We disagree.

Defendant failed to preserve this issue for review because he did not raise an objection on the same basis in the trial court. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). An unpreserved non-constitutional error is reviewed for plain-error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). For the same reasons discussed *supra* with respect to defendant’s ineffective assistance claim, we conclude that defendant’s has failed to show that the cross-examination amounted to plain-error affecting his substantial rights. *Id.*

III. Right to Present a Defense

Defendant additionally contends that he was denied his constitutional right to present a defense when the trial court refused to allow him to introduce testimony of a witness whom defendant contends was involved in a verbal altercation with the victim moments before the assault. We disagree.

A. Standard of Review

We review a trial court's decision regarding admission of evidence for an abuse of discretion. *Crawford*, 458 Mich at 383. Evidentiary errors are nonconstitutional errors. *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001). A preserved nonconstitutional error is reviewed for harmless error. *Carines*, 460 Mich at 774; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Under a harmless error review, the effect of the error, "is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* We review de novo the question whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

B. Analysis

After reviewing the proffered testimony of the defense witness we conclude that any error with respect to the trial court's finding that the witness' testimony involved a collateral matter amounted to harmless error because any error in this respect did not affect the outcome of the trial. *Lukity*, 460 Mich at 495. The witness' proposed testimony was cumulative of defendant's testimony and other evidence that showed the victim was intoxicated on the night of the incident and could not remember certain details that occurred that night. Moreover, the prosecution presented overwhelming evidence in this case establishing defendant's guilt. Defendant was not denied his constitutional right to present a defense.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens