STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 288874 Lenawee Circuit Court
ANTHONY TROY VANZANT, Defendant-Appellant.	LC No. 07-013287-FC

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to commit murder, MCL 750.83, assault with intent to rob while armed, MCL 750.89, possession of a firearm during the commission of a felony, MCL 750.227b, carrying a weapon with an unlawful intent, MCL 750.226, and felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent terms of life imprisonment for the assault with intent to commit murder conviction, 675 to 1,350 months' imprisonment for the assault with intent to rob conviction, 40 to 60 months' imprisonment each for the carrying a weapon and felon in possession convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm.

I. FACTUAL HISTORY

On May 16, 2007, defendant, Ashley Secord, and Michelle Moore were together in Secord's apartment and planned to "set up" the victim to rob him. According to Secord and Moore, the plan was for them to distract the victim with sex, and for Moore to steal the victim's wallet and throw it through a window to defendant. At some point, the victim was called to Secord's apartment, and the victim and the two women then went to Moore's apartment where the three eventually engaged in sexual activities. The victim testified that he briefly left the women to hide his money because he did not trust them. The victim indicated that defendant subsequently entered the bedroom with a gun and demanded his money. The victim replied that he did not have any money. Defendant again demanded money, and the victim emptied his pockets and showed defendant his empty wallet. The victim indicated that defendant discharged a "warning shot" into the wall, and asked him if he "was willing to die for [his] money?" The victim again denied having any money. From close range, defendant then shot the victim in the forehead and in the temple. As the victim fled the house, defendant fired more shots toward him.

The victim, Secord, and Moore identified defendant as the shooter. Both Moore and Secord testified that they never discussed using a gun to carry out the robbery.

At trial, the defense argued that the three eyewitnesses were inconsistent and not credible. Defendant testified in his own defense and denied shooting the victim. He claimed that Secord and Moore planned to "hit a lick" against the victim, and that he was not in Moore's house when the victim was shot. Instead, he saw the victim at a nearby car wash after he had already been shot.

II. CONSECUTIVE SENTENCE

Defendant argues that the trial court erred in ordering that his sentence for assault with intent to commit murder be served consecutively to his sentence for felony-firearm, because the information listed armed robbery as the underlying felony and that charge was dismissed before trial. We disagree. We review de novo the question whether a consecutive sentence is statutorily mandated. *People v Clark*, 463 Mich 459, 464 n 9; 619 NW2d 538 (2000).

Defendant correctly argues that the mandatory two-year sentence for a felony-firearm conviction, MCL 750.227b, may be served consecutively only to the sentence for a specific underlying felony. *Clark*, 463 Mich at 463-464. Defendant ignores, however, that the information here was amended to specify assault with intent to commit murder as an underlying felony for the felony-firearm charge. In the original information, the felony-firearm charge was predicated only on the charge of armed robbery. But that charge was dismissed at the preliminary examination, at which time the prosecutor moved to bind defendant over on all other charges, including felony-firearm. The trial court made findings of fact that implicitly amended the list of underlying felonies for the felony-firearm charge.

At trial, during opening statement, the prosecutor stated that the evidence would show that defendant possessed a firearm during the commission of the crimes of assault with intent to commit murder and assault with intent to rob while armed. In its findings of fact relative to the felony-firearm charge, the trial court found "beyond a reasonable doubt that . . . at the time of the assault that he was armed with a dangerous weapon that being a 22 caliber pistol." The prosecutor subsequently filed a motion to amend the information to reflect that assault with intent to commit murder was the underlying felony for the felony-firearm offense. At defendant's resentencing, the trial court granted the prosecutor's motion to amend, observing "[t]hat notice was given to the defendant at the time of trial so I don't think it prejudices the defendant."

Defendant does not challenge the propriety of the trial court's decision to grant the amendment, but we nonetheless note that the court did not abuse its discretion in doing so. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). An information may be amended before, during, or after trial to cure a defect, imperfection, or omission as long as the defendant is not prejudiced. MCR 6.112(H). Unacceptable prejudice includes "unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Here, the amendment did not involve a new or different act, defendant had notice of the felony-firearm charge after the dismissal of the original armed robbery charge, and defendant did not assert below, nor does he argue on appeal, that he was unfairly prejudiced by the amendment. Consequently, the trial court did not abuse its discretion in granting the

amendment with respect to the felony-firearm charge, and defendant is not entitled to resentencing.

III. RESTITUTION AMOUNT

Defendant argues that the trial court erred in ordering him to pay $75,185.54 in restitution with "no authentication" of the medical bills and "no testimony." This Court "typically reviews the amount of a restitution order for an abuse of discretion." *People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003). But because defendant failed to challenge the restitution award below, we review this unpreserved claim for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

Restitution is mandatory under the Crime Victim's Rights Act, MCL 780.766(2), which requires a defendant to "make full restitution to any victim of the defendant's course of conduct . . . ." The restitution statute, MCL 780.767(1), provides that "[i]n determining the amount of restitution . . . the court shall consider the amount of the loss sustained by any victim as a result of the offense." *People v Gubachy*, 272 Mich App 706, 711; 728 NW2d 891 (2006). The prosecution has the burden of proving the amount of loss by a preponderance of the evidence. MCL 780.767(4); *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997).

Here, the amount of loss sustained by the victim was specified in the presentence investigation report ("PSIR"), and copies of the victim's medical bills were attached. This evidence supports the trial court's restitution award. Further, because defendant did not object to the accuracy of the restitution amount specified in the PSIR, at either his original sentencing or resentencing, the trial court was entitled to rely on that amount. Therefore, defendant has waived his opportunity for an evidentiary hearing. *Gahan*, 456 Mich at 276 n 17.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel at trial. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.*; see also, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant argues that defense counsel was ineffective for failing to object when the trial court ordered his sentence for assault with intent to commit murder to run consecutively to his sentence for felony-firearm. Although trial counsel did not object at sentencing, the matter was subsequently raised in a motion for resentencing and addressed by the trial court. Moreover, as discussed previously, given the amendment of the information, there was no error in ordering the

sentences to be served consecutively. Because defendant was not prejudiced by trial counsel's failure to object, he cannot establish a claim of ineffective assistance of counsel. *Id.*

We also reject defendant's claim that defense counsel was ineffective for failing to request an evidentiary hearing regarding the amount of restitution. Defendant has failed to demonstrate that, had an evidentiary hearing been requested, there is a reasonable probability that the amount of restitution would have been different. Again, the restitution amount was detailed in the PSIR and supporting documentation was provided. On appeal, defendant has not provided any information that a lower figure would likely have emerged from further investigation or testimony. Because the restitution amount was supported by sufficient evidence, defense counsel was not ineffective for failing to request an evidentiary hearing. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

V. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant raises three additional issues of ineffective assistance of counsel in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit. Again, because defendant failed to raise these issues in the trial court, our review is limited to mistakes apparent on the record. *Ginther*, 390 Mich at 443; *Sabin (On Second Remand)*, 242 Mich App at 658-659.

A. ALIBI WITNESS

Defendant argues that defense counsel was ineffective for failing to call Amanda Blanks as an alibi witness. "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). "A defense is substantial if it might have made a difference in the outcome of the trial." *Id.*

Blanks was listed on the prosecution's witness list and was subpoenaed for trial. Blanks did not appear, and the prosecutor moved to strike her because "her testimony ha[d] come in through the testimony of other witnesses." Defense counsel did not object. Defendant now claims that Blanks would have supported his alibi, but he has not provided a witness affidavit, or identified any evidence of record establishing that the proposed witness's testimony would have yielded favorable evidence that would have affected the outcome of trial. See MCR 7.210(A)(1). Defendant's unsupported assertion in his brief that the witness would have supported an alibi is insufficient to demonstrate that he was deprived of a substantial defense. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d (2003).

Moreover, given defendant's own trial testimony, the proposed alibi evidence would not have placed him in a different locale at the time of the shooting. Defendant testified at trial that he stayed in Secord's apartment with Secord's child while the victim, Moore, and Secord went to Moore's apartment. Defendant stated that after about 30 minutes, he knocked on Moore's door to tell Secord he was leaving, and then walked to a nearby store. Defendant claimed that he saw the victim at a nearby car wash on the way back, at which time the victim said that he had been robbed and shot. Defendant claimed that he ran to avoid police contact because he had drugs in his possession, and because the person who shot the victim might be looking for him too because

of his drug dealing. He explained that as he was running, he saw Blanks and her mother outside, and briefly stopped to ask Blanks if she heard that the victim had been shot because she was familiar with the victim. Under these circumstances, the fact that Blanks saw defendant in the immediate area *after* the shooting would not support an alibi defense or otherwise exonerate him. Consequently, defendant has not shown that defense counsel was ineffective for failing to call Blanks.

B. *BRADY* VIOLATION

Defendant argues that by failing to obtain gunshot residue test results, defense counsel allowed a violation of the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "A criminal defendant has a due process right of access to certain information possessed by the prosecution . . . . [if that] evidence might lead a jury to entertain a reasonable doubt about a defendant's guilt." *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998), citing *Brady*. Specifically:

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself 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. [*Lester,* 232 Mich App at 281-282.]

Defendant has failed to establish a *Brady* violation. There is no indication that the prosecutor either possessed or suppressed gunshot residue test results. An officer testified that he did not submit gunshot residue for testing. Further, defendant has not shown that any such evidence would have been favorable to his defense. Because there is no basis for finding a *Brady* violation, defendant cannot establish a claim of ineffective assistance of counsel in this regard. See *Snider*, 239 Mich App at 425.

C. CUSTODIAL STATEMENTS

Defendant's last claim is that he was denied the effective assistance of counsel because he was subjected to a custodial interrogation in violation of his right to counsel and was physically assaulted during the interrogation. "A criminal defendant has a constitutional right to counsel during interrogation." *People v Tierney*, 266 Mich App 687, 710; 703 NW2d 204 (2005) (citation omitted). Further, "statements . . . made during custodial interrogation are inadmissible unless the [defendant] voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999); see also, *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Here, defendant has failed to provide any factual support for this claim. Indeed, he has not identified any custodial statements that he made or were admitted as evidence. Defendant must provide a factual basis to sustain his position. *People v Traylor*, 245 Mich App 460, 464;

628 NW2d 120 (2001) (citation omitted). Consequently, defendant has not established that defense counsel was ineffective in this regard.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder