STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2012
v	No. 301665 Wayne Circuit Court
OSVALDO JUNIOR PADILLA, Defendant-Appellant.	LC No. 10-006148-FC

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (second offense), MCL 750.227b. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 35 to 60 years for the assault conviction and 5 to 15 years for the felon-in-possession conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant's convictions arise from a May 1, 2010, shooting incident in which April Velez was ambushed and shot 16 times outside her Inkster home. The prosecution's theory of the case was that Velez was shot by defendant, who is a close friend of Valez's husband, and an accomplice, in retaliation for Valez's report of a domestic violence assault by her husband that resulted in her husband's return to prison. Velez testified that, during the shooting incident, she recognized defendant from her husband's photographs, which were taken while defendant and her husband were previously in prison. The defense theory at trial was that Velez erroneously identified defendant as one of the assailants. In addition, the defense claimed that Velez was motivated to falsely accuse defendant because defendant's sister was having an affair with Velez's husband.

I. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that defense counsel was ineffective for failing to call two alibi witnesses, failing to call two impeachment witnesses, and failing to object to Velez's references to defendant's imprisonment. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue 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 Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance fell below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A. FAILURE TO CALL TWO ALIBI WITNESSES

At defendant's June 16, 2010, arraignment, defense counsel stated that "the case is based on identification," and asserted that at the time of the offense, defendant was with his fiancée, Ashia Penick, planning their wedding. At the July 23, 2010, final conference, defense counsel stated that he planned to file a "lack of presence defense" and intended to call one witness, Penick. On August 20, 2010, two months before trial, defense counsel filed a notice of alibi, which indicated that defendant was with Penick at the time of the offense, that Penick resided in Texas, and that her current address was unknown. At the August 26, 2010, pretrial hearing, defense counsel indicated that he did not intend to call Penick.

Defendant now asserts that he had two other alibi witnesses, his mother Elba Padilla and his grandmother Dora Morales, who would have testified that he was with them in Detroit at the time of the shooting, but his trial counsel chose not to have them testify at trial. In support of defendant's claim, he relies on affidavits of his mother and grandmother that were submitted with his motion to this Court to remand.[1] However, because our review is limited to the existing record and because the affidavits are not part of that record, we will not consider them. *People v Seals*, 285 Mich App 1, 20-21; 776 NW2d 314 (2009). The record does show that defendant's mother and grandmother were both present at defendant's arraignment and no mention was made that defendant was with them on the night of the shooting. Rather, it was noted that both believed that defendant was a "good boy." Given that there is "nothing in the record concerning what the witnesses' testimony might have been, there are no mistakes apparent on the record with respect to counsel's failure to call defendant[']s proposed alibi witnesses." *Id.* at 21. Moreover, the decision whether to call a witness is a matter of trial strategy, and this Court will not substitute its judgment on matters of strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[1] This Court denied that motion. *People v Padilla*, unpublished order of the Court of Appeals, entered July 19, 2011 (Docket No. 301665).

Defendant also claims that when defense counsel chose to forego an alibi defense, he effectively failed to present any defense. We disagree. The record discloses that throughout trial, defense counsel consistently and vigorously argued a defense theory of misidentification. In opening statement, defense counsel advised the jury that "this is clearly a case of misidentification." Counsel specifically highlighted problems with Velez's identification of defendant as one of the gunmen and elicited testimony intended to undermine the reliability of her identification testimony. Counsel questioned Velez extensively and challenged her ability to accurately identify defendant when she had never met him personally, the conditions were dark, and she was under gunfire, severely wounded, and "playing possum." Counsel also highlighted that Velez had a motivation to falsely identify defendant because of his sister's affair with Velez's husband. In closing argument, defense counsel summarized the testimony and again argued that defendant's identification as one of the gunmen was not established beyond a reasonable doubt. Counsel argued that many circumstances rendered Velez's identification testimony suspect, including (1) that she told a police officer that she had seen defendant in person before, but then stated that she was mistaken; (2) Velez had never seen or spoken to defendant in person; (3) it was dark outside and Velez was the only person who claimed that the area was well-lit; (4) Velez's claim that she was able to observe defendant's tattoo "defies common sense" because of the darkness and because the gunman was wearing a hoodie and bandana; (5) the gunman was positioned behind a tree and ten feet away at one point; (6) Velez had a motive to falsely accuse defendant; and (7) Velez could not reasonably have seen defendant under the conditions of being shot 16 times, being severely wounded, bleeding heavily, and closing her eyes to play dead.

Defendant has not overcome the strong presumption that defense counsel chose to forgo a questionable alibi defense and to instead focus on presenting a defense theory of misidentification as a matter of strategy. *Armstrong*, 490 Mich at 290. To the extent that defendant relies on the fact that defense counsel's strategy was not successful, nothing in the record suggests that defense counsel's presentation of the misidentification defense was unreasonable or prejudicial. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

B. FAILURE TO CALL THE SABINS

On the first day of trial, defense counsel informed the trial court that Clifford and Ethel Sabin had advised him that they had observed Velez and a police officer outside the courtroom and overheard the officer tell Velez to lie in court. After making a separate record of the Sabins' proposed testimony outside the presence of the jury, the trial court ruled that defense counsel would be permitted to call the Sabins as witnesses. Defense counsel then informed the court that he had discussed the matter with defendant and, "[a]s a matter of trial strategy," he did not intend to call the Sabins. When asked by the trial court, defendant expressly agreed with this decision. The record indicates that defense counsel thereafter addressed this matter during his cross-examination of Velez and the police officer.

Defendant now argues that defense counsel should have called the Sabins to impeach Velez's identification testimony. The record clearly discloses that defense counsel was aware of the Sabins and their proposed testimony, and that counsel considered calling them as witnesses,

but ultimately chose not to do so as a matter of trial strategy. While the record does not disclose counsel's reasons for not calling them, defendant expressly agreed with counsel's decision. Thus, not only has defendant failed to overcome the strong presumption that counsel's decision not to call the Sabins was trial strategy, *Rockey*, 237 Mich App at 76, defendant waived any claim challenging the decision by expressly agreeing not to call them, see *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Moreover, it is not reasonably probable that the outcome of trial would have been different had the Sabins testified. The Sabins are twice related to defendant's family because their daughter is married to defendant's brother, and their son has a daughter with defendant's sister. Although their proposed testimony indicated that the officer's instruction to Velez to lie at trial occurred immediately before trial, Velez had consistently identified defendant as one of the gunman since the night of the shooting. Immediately after the shooting, Velez told witness Roycester Moore that defendant shot her. Velez also told the first responding police officer that defendant shot her. The next day, while in the hospital, Velez selected defendant's photo from a photographic array and identified him as one of the gunmen. Throughout the subsequent court proceedings, Velez did not waver on her identification of defendant. Consequently, defendant has not established a reasonable probability that the Sabins's proposed testimony would have favorably altered the outcome of trial. Thus, defendant has not demonstrated the requisite prejudice to succeed on this ineffective assistance of counsel claim.

C. FAILURE TO CHALLENGE REFERENCES TO DEFENDANT BEING IN PRISON

The record does not support defendant's claim that defense counsel failed to challenge Velez's references to defendant's imprisonment. Rather, before jury selection, defense counsel requested that the trial court prohibit Velez from referring to defendant's status as a convicted felon or from making other references to defendant's imprisonment. The trial court held that evidence that Velez knew defendant from seeing her husband's prison photographs and that defendant was one of the people who threatened her after her husband returned to prison was relevant and admissible. Defendant has not challenged the admissibility of this evidence, and he does not indicate what additional arguments defense counsel could have made to preclude the evidence.

Further, we note that defendant was charged with felon in possession of a firearm and had already stipulated that he had a prior conviction. As a result, the jury was aware that defendant was a convicted felon. Moreover, as the trial court aptly found, the references to defendant's imprisonment were relevant to show defendant's connection to Velez's husband, to explain how Velez knew defendant and was able to identify him, and to show a motive for defendant to commit the crime. The testimony was not prohibited by MRE 404(b)(1), which only prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. The evidence here was offered for proper non-character purposes. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). In addition, the evidence was not unduly prejudicial under MRE 403. The prosecutor focused on the proper and relevant purposes for which the evidence was admissible, and the trial court gave a cautionary instruction to the jury concerning the proper use of the evidence, thereby limiting any potential for unfair prejudice. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not established that defense counsel was ineffective.

II. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to establish his identity as one of the gunmen. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction of a crime. *Nowack*, 462 Mich at 400; *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Davis*, 241 Mich App at 700.

Velez testified that there were two shooters and that one gunman was standing behind a tree while the second gunman was in some bushes. Velez positively and unequivocally identified defendant as the gunman behind the tree. Although Velez had never met defendant in person, she explained that defendant was her husband's good friend and that she recognized him from several of her husband's photographs from prison. Velez explained that she had no problem seeing defendant during the offense because the tree was not large, a "lit up" lamp post illuminated the area, and "there's also several streetlamps . . . so it's very easy to see a person who is ten feet away from you." Velez stated that she recognized defendant's face and also recognized a tattoo on his neck that "gave it all away." Velez also observed that defendant's hair was pulled into a ponytail and that he wore a dark hoodie and a baseball cap. Although another eyewitness, Moore, did not see the shooters' faces from his vantage point, his descriptions of their location and clothing were consistent with Velez's descriptions. Velez identified defendant as the shooter to Moore immediately after the shooting. She also identified defendant as the shooter to the first police officer who arrived at the scene and provided detailed biographical information about defendant. The officer noted that Velez never wavered on her identification of defendant as the shooter and never appeared confused about who shot her. While in the hospital, Velez again identified defendant to another officer and, according to that officer, selected defendant's photo from a photographic array. At trial, Velez testified that she identified defendant because "[h]e shot [her]," that she "saw him that day with [her] own eyes," and that there was no doubt in her mind that defendant shot her.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's identity as the shooter near the tree. Although defendant argues that Velez's identification testimony was not credible, this challenge is related to the weight rather than the sufficiency of the evidence. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). This Court will not interfere with the jury's role of determining issues of weight and credibility, *Wolfe*, 440 Mich at 514. Rather, in resolving defendant's sufficiency challenge, we are required

to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Nowack*, 462 Mich at 400. As a result, there was sufficient evidence of defendant's identity to support his convictions.

III. CRUEL AND UNUSUAL PUNISHMENT

Defendant next argues that he is entitled to resentencing because, despite being sentenced within the sentencing guidelines range, his minimum sentence for assault with intent to commit murder, when added to his five-year consecutive sentence for felony-firearm, constitutes cruel and/or unusual punishment, contrary to US Const, Am VIII, and Const 1963, art 1, § 16.[2] Defendant did not advance a claim below that a sentence within the sentencing guidelines range would nonetheless be unconstitutionally cruel or unusual. Therefore, this issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant's 35-year minimum sentence for his assault conviction is within the adjusted sentencing guidelines range of 171 to 570 months. Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence, this limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). But a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and a proportionate sentence is not cruel or unusual, *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Defendant contends that his sentence is cruel or unusual because of his age, which was 34 years at the time of sentencing. That factor is insufficient to overcome the presumptive proportionality of defendant's sentence, especially considering defendant's lengthy criminal record and the extremely assaultive nature of the offense. Further, the fact that defendant's assault sentence is to be served consecutive to his sentence for felony-firearm does not overcome the presumption of proportionality. "In determining the proportionality of an individual sentence, this Court is not required to consider the cumulative length of consecutive sentences." *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). Because defendant has not overcome the presumptive proportionality of his sentence, we reject his claim that his sentence is cruel or unusual.

IV. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant raises an additional sentencing claim in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Specifically,

[2] Defendant was originally sentenced to a prison term of 50 to 75 years for the assault conviction. After defendant filed his claim of appeal, this Court granted his motion to remand to allow him to move for resentencing. The trial court granted defendant's motion for resentencing and resentenced him to a reduced prison term of 35 to 60 years for the assault conviction. Because defendant has not withdrawn his proportionality challenge after being resentenced, we have reviewed this issue as applied to defendant's 35-year minimum sentence.

defendant argues that he is entitled to resentencing because the trial court erroneously scored 25 points for prior record variable (PRV) 1 of the sentencing guidelines. After defendant filed his claim of appeal, this Court granted defendant's motion to remand to allow defendant to raise this issue in a motion for resentencing. On remand, the trial court granted defendant's motion for resentencing and resentenced him to a reduced term. Because defendant has already received the relief he requests, this issue is moot. See *People v Bonilla-Machado*, 489 Mich 412, 416; 803 NW2d 217 (2011). Defendant's related ineffective assistance of counsel claim is also moot. The trial court's resentencing renders it impossible to grant any further relief. See *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994).

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder