STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2012
v	No. 301899 Wayne Circuit Court
HILLIARD RENE WILSON, Defendant-Appellant.	LC No. 10-007648-FC

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Defendant Hilliard Rene Wilson appeals by right his jury convictions of assault with intent to murder, MCL 750.83, discharging a firearm in an occupied structure, MCL 750.234b(2), carrying a concealed weapon (CCW), MCL 750.227, being a felon in possession of a firearm, MCL 750.224f, and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to serve concurrent terms of 25 to 60 years in prison for the assault conviction, one to five years in prison for the CCW and felon-in-possession convictions, and to serve one to four years in prison for the discharging a firearm conviction. The trial court ordered defendant to serve those terms consecutive to a two-year term of imprisonment for the felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

I. ADMISSIBILITY OF EVIDENCE

Defendant initially contends that the trial court deprived him of a fair trial by precluding him from calling DeAngelo Martin to impeach the victim's testimony. We review a trial court's decision to admit evidence for an abuse of discretion, but consider de novo any preliminary questions of law involved in the decision. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

At trial, defendant's lawyer explained that he wanted to call Martin to "talk about the character of the house" where the shooting occurred, which Martin "knew . . . to be a drug house." He also stated that Martin would testify that he "had seen [the victim] selling out of that house" and saw the victim and defendant "in the neighborhood together after the event." Defendant's lawyer argued that Martin's sightings of defendant and the victim together after the shooting would contradict the victim's trial testimony "that he did not go back to the scene after the shooting." The trial court refused to permit Martin's testimony about "the character of the

house," finding it irrelevant. The court also did not allow Martin to testify about his alleged sightings of the victim at the house or of the victim and defendant together. The court conditioned Martin's testimony about the sightings on Martin supplying specific dates, "Because I'm just wondering how this guy [the victim] is out there with all these bullet wounds in him, walking around in the neighborhood." After defense counsel conferred with Martin about the precise dates of the sightings, he advised the court that Martin "does not remember specific dates," and the court precluded Martin's testimony.

The rules of evidence strictly limit the parties' ability to present character evidence. *People v Roper*, 286 Mich App 77, 91-92; 777 NW2d 483 (2009). Nevertheless, a party may generally call a witness to offer testimony about another witnesses' character, but may do so only "in the form of opinion or reputation" testimony concerning the witness' character for truthfulness. MRE 608(a). Moreover, a party may not present extrinsic evidence about specific instances of conduct for the purpose of attacking another witness' credibility except under certain limited circumstances. MRE 608(b).

Here, defendant's trial counsel plainly stated that he did not intend to call Martin to offer an opinion about the victim's character for truthfulness or to testify about his reputation for truthfulness in the community. And, to the extent that defendant wanted to call Martin to offer testimony that directly or indirectly implicated the victim in dealing drugs, the trial court correctly precluded that testimony under MRE 608(b) and MRE 404(a) as improper extrinsic evidence of character. See *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 518; 592 NW2d 786 (1999). The proposed testimony about Martin's possible involvement with drugs also constituted improper proof on collateral matters. It did not closely relate to defendant's guilt or innocence and did not tend to illuminate the victim's potential bias or any other matter material to this case. *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984) ("It is a rule of long standing in this jurisdiction that extrinsic evidence may not be used to impeach a witness on a collateral matter.").

Martin could, however, testify that he had seen the victim with defendant after the shooting. That testimony would not have implicated the victim's character; rather, it constituted permissible impeachment because it would be unusual for a victim to socialize with his or her attacker shortly after the attack. See MRE 607. But it was undisputed that the victim socialized with the defendant for months prior to the shooting and, accordingly, Martin's testimony would only be relevant to this point if he could testify that the victim socialized with defendant after the shooting. MRE 401; MRE 402. Because Martin indicated that he could not do so, the trial court could preclude his testimony as irrelevant or, to the extent that it was a matter of weight and credibility, because it was outweighed by the danger of unfair prejudice, or was confusing, or misleading. See MRE 403. Consequently, on this record we cannot conclude that the trial court abused its discretion when it precluded Martin's testimony.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next raises multiple claims of ineffective assistance of counsel, both in his primary brief on appeal and his brief submitted under Administrative Order No. 2004-6, Standard 4. Because the trial court did not hold an evidentiary hearing on these claims, our review is limited to mistakes apparent on the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

In order to establish that his trial counsel was ineffective, defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for those unprofessional errors, the result of the proceeding would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Because there are countless ways to provide effective assistance in any given case, in reviewing a claim that counsel was ineffective, courts must "indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court will not "substitute [its] judgment for that of counsel on matters of trial strategy, nor will [it] use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

A. DEFENDANT'S BRIEF ON APPEAL

In his appellate brief, defendant argues that his trial lawyer's performance fell below an objective standard of reasonableness in four ways. First, he claims that his counsel should have objected to the victim's identification testimony on the basis that he was exposed to an unduly suggestive pretrial photographic lineup. Even assuming that the photographic lineup was unduly suggestive, see *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998), the trial court could have allowed the victim to identify defendant in court if "the prosecution show[ed] by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). "The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the totality of the circumstances." *Gray*, 457 Mich at 115 (internal quotation and citation omitted). The trial court should consider: whether the witness had a prior relationship with or knowledge of the defendant; whether the witness had the opportunity to observe the offense, including such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act; the length of time between the offense and the disputed identification; the accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description; any previous proper identification or failure to identify the defendant; any identification prior to lineup or showup of another person as defendant; the nature of the alleged offense and the physical and psychological state of the victim, including factors like fatigue, nervous exhaustion, alcohol and drugs, and age and intelligence of the witness; and any idiosyncratic or special features of defendant. *Id.* at 116 (internal quotations and citations omitted).

The victim testified that he had known defendant "from the neighborhood" for "about six months" before the shooting, and that he and defendant had socialized together "a few weeks prior to" the shooting. With respect to the victim's opportunity to observe the offense, the victim recalled that he had some alcohol before heading to bed, but that he did not feel any effect from the alcohol consumption when he awoke to use the bathroom early that morning; and, immediately before the shooting, defendant sat down "right next to" the victim at a dining room table, "within arm's reach of each other," and with the light over the table on. The victim said that defendant then stood "at the head of the table," drew a .38-caliber silver revolver, shot him once and then stood over him and shot him five more times.

A brief, 10-day period elapsed between the offense and the allegedly improper photographic identification procedure, a "relatively short period" that helped to "ensure[] that the crime was still fresh in the victim's mind, and should not weigh against finding an independent basis." *Gray*, 457 Mich at 120. Because of the victim's multiple gunshot wounds and blood loss, he did not give a description of defendant before he saw defendant's photo. Two of the police officers who initially arrived at the scene of the shooting confirmed that the victim did not identify defendant, however, at no point did the victim ever identify anyone besides defendant as his attacker.

We conclude that the evidence at trial clearly and convincingly illustrated that the victim possessed a sufficient basis for his in-court identification of defendant as his assailant, independent of the presumptively improper photographic identification procedure. Defense counsel was not ineffective for neglecting to raise a meritless objection to the victim's in-court identification testimony. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Next, defendant argues that his trial counsel was ineffective for failing to present an alibi defense. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant maintains on appeal that "he was with Cidney Dunbar at the time of the shooting," and Dunbar "was present and ready to testify at trial." According to his own affidavit, he was on "a romantic weekend . . . at the Van Dyke Park Motel on Van Dyke and 16 [M]ile Road" in Sterling Heights with Dunbar at the time of the shooting. Notably, defendant failed to present Dunbar's affidavit confirming that she was willing to testify at that time and would have testified to that effect. Accordingly, defendant did not establish the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In any event, given the victim's familiarity with defendant and his certain identification, we conclude that had Dunbar testified, it would not have affected the outcome of the proceeding. Therefore, even if defendant's trial counsel should have called Dunbar, that error would not warrant relief. *Uphaus*, 278 Mich App at 185.

Defendant next contends that his trial counsel "made the ultimate decision that [defendant] would not testify," and "failed to make it clear that [defendant] had an absolute right to testify." Both the trial record and defendant's affidavit remain silent concerning defendant's decision not to testify, leaving unclear the circumstances surrounding defendant's decision against testifying. Furthermore, defendant does not argue on appeal that he was unaware of his constitutional right to testify, and he offers no specific substantiation about the content of the testimony he wished to relate at trial. *People v Simmons*, 140 Mich App 681, 685-686; 364

NW2d 783 (1985). Consequently, defendant has adduced no factual support for his complaint that trial counsel should have clarified his right to testify. *Hoag*, 460 Mich at 6.

Defendant further claims that his trial counsel was ineffective for not "demand[ing] the production of" two res gestae witnesses, Jimia Mitchell and Victor Terrell. Our review of the record reveals that neither Mitchell nor Terrell could have provided testimony that reasonably might have altered the outcome of defendant's trial. The available record establishes that Mitchell was sleeping in the apartment when the shooting occurred and she awoke and came out only after defendant had already left the apartment. Similarly, Terrell presumably heard gunshots and came to the apartment also some point after defendant left. Hence, defendant has not substantiated that Terrell or Mitchell made any observations material to a matter at issue. MRE 401; MRE 402; *Hoag*, 460 Mich at 6. In the absence of such evidence, we cannot conclude that his lawyer's decision not to insist on the production of these witnesses fell below an objective standard of reasonableness.[1] *Uphaus*, 278 Mich App at 185.

B. DEFENDANT'S STANDARD 4 BRIEF

Defendant primarily complains that his trial counsel should have investigated the one-photo identification made by the victim, and moved to suppress the unfairly suggestive identification. But, for the reasons discussed previously, the record clearly and convincingly establishes that the victim had a basis for identifying defendant independent of the photograph he viewed in the hospital.

To the extent that defendant reiterates in his supplemental brief on appeal that his trial counsel should have investigated and produced alibi and res gestae witnesses, for the reasons previously discussed, defendant has not established that his trial lawyer was ineffective.

Regarding defendant's complaints that trial counsel should have prepared better for defendant's preliminary examination and moved to quash the charges against him, these allegations of ineffective assistance lack merit. The victim testified about the shooting at defendant's preliminary examination, in a manner that mirrored his trial testimony and established the elements of assault with intent to murder, CCW, and felony-firearm charges.[2] "Because sufficient evidence existed at the preliminary examination to support a bindover, defense counsel was not ineffective for failing to move to quash the information." *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

[1] Although defendant also suggests that his trial counsel should have objected to "inadmissible hearsay police statements" by Martin and Terrell, he does not clearly explain on what basis he views any particular statements to be hearsay and fails to explain how that evidence prejudiced him. MRE 103(a); MCL 769.26.

[2] At the preliminary examination and trial, the parties stipulated that defendant "was ineligible to use or possess a firearm," given that he had a prior felony conviction.

Defendant further avers that he discussed with trial counsel "the prejudice [occasioned] by the delay in arrest of over 2 years," but he never specifies what prejudice arose from the two-year period that elapsed between the shooting and his arrest. He also criticizes counsel for not arranging a pretrial interview with the victim and not investigating the reputation of the shooting site as a drug house, yet defendant again omits any reference to what prejudice these purported failures caused. Further, he maintains that "counsel failed to reasonably request further discovery of the police reports or notes," specifically a police laboratory report "or Evidence Tech reports," which could have lent clarity to the discrepancy between the victim's account that he was shot six times and the evidence that only two bullets were found. But defendant identifies no prejudice. Because defendant has offered no substantiation that any of this conduct of trial counsel might reasonably have affected the outcome of his trial, these claims of ineffective assistance must fail. *Uphaus*, 278 Mich App at 185.

III. DEFENDANT'S RIGHT TO TESTIFY

Defendant additionally alleges that the trial court should have required that he waive his constitutional right to testify on the record. Because defendant did not raise an objection on this ground in the trial court, we review this claim for plain error. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

In *Simmons*, 140 Mich App at 682, this Court addressed a defendant's assertion that "the trial court erred by not insisting upon an on-the-record waiver by defendant of his right to testify in his own behalf," but concluded "that no such procedure is required." The Court initially recognized the constitutional dimension of a criminal defendant's right to testify. *Id*. at 683-684. But the Court nonetheless reasoned that trial courts need not place waivers on the record:

> We agree with the majority of courts which have addressed this issue and decline to require an on-the-record waiver of defendant's right to testify. Such a requirement would necessarily entail the trial court's advising defendant of his right to testify. . . . [A] formal waiver requirement might provoke substantial judicial participation that could frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy.
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> Our holding does not leave defendants without protection insofar as their right to testify is concerned. If the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection. If the record shows that the trial court prevented defendant from testifying, we will not hesitate to reverse its judgment. On the other hand, *if defendant, as in this case, decides not to testify or acquiesces in his attorney's decision that he not testify, the right will be deemed waived*. [*Id*. at 684-685 (internal quotation and citation omitted, emphasis added).]

See also *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991) (concluding that "contrary to [the defendant's] argument, the trial court had no duty to advise her of the right [to testify on her own behalf], nor was it required to determine whether she made a knowing and intelligent waiver of the right").

In conclusion, we reject defendant's unfounded suggestion that the trial court had a responsibility to place on the record his waiver of his right to testify.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant lastly challenges the sufficiency of the evidence that he intended to kill the victim. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *Roper*, 286 Mich App at 83. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A conviction of assault with intent to commit murder, MCL 750.83, requires proof that the defendant committed "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). A defendant's intent to kill may arise by reasonable inference:

> And in considering the question [the jury] may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Drayton*, 168 Mich App 174, 177; 423 NW2d 606 (1988) (internal quotation and citations omitted).]

The prosecutor introduced evidence that defendant first shot the victim from a few feet away and then fired several more shots as the victim tried to scurry away. Viewed in the light most favorable to the prosecutor, this evidence amply supported a reasonable jury's conclusion beyond a reasonable doubt that defendant assaulted the victim while specifically intending to kill him. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992) (stating that "[t]he intentional discharge of a firearm at someone within range is an assault"); *Drayton*, 168 Mich App at 176-177.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio