STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK SAPHINE BOOKER, a/k/a STAFNIE FRANK BOOKER,

Defendant-Appellant.

UNPUBLISHED
September 25, 1998

No. 196660
Muskegon Circuit Court
LC No. 95-138294

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree murder, MCL 750.316; MSA 28.548, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant was sentenced to life in prison for his murder conviction, to two years' imprisonment for his felony-firearm conviction, and to three to five years' imprisonment for his concealed weapon conviction. We affirm.

Defendant fatally shot the victim from the passenger seat of a parked minivan while the victim was sitting in the driver's seat. At trial, a county medical examiner testified that the victim suffered a contact gunshot wound to the back of his head.[1] Two or three weeks before the shooting, defendant and the victim had been involved in an altercation in which the victim hit defendant in the face with a handgun. Defendant testified that he only intended to speak to the victim, but was forced to shoot the victim in self defense when the victim retrieved a handgun from under the driver's seat.

On appeal, defendant argues that he was denied his right to the effective assistance of counsel as a result of several "failures" by defense counsel at trial. We disagree. To properly advance a claim of ineffective assistance of counsel, a defendant must make a testimonial record at the trial court level in an evidentiary hearing or in connection with a motion for a new trial. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). Because there is no such testimonial record in this case, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

A criminal defendant attempting to prove that trial counsel was ineffective bears a heavy burden. E.g. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, *supra* at 694.

Defendant contends that defense counsel was deficient in failing to question Gwendolyn Shelton about whether the victim was a drug dealer, failing to impeach Shelton's testimony that she did not know where the victim got his money, failing to elicit police testimony that drug dealers frequently carry guns, and failing to question certain unspecified prosecution witnesses regarding the victim's alleged drug dealing. However, nothing contained in the record indicates that Shelton would have testified that the victim was a drug dealer, that defense counsel had any basis to impeach Shelton,[2] that a police officer would have testified that drug dealers frequently carry guns, or that the unspecified prosecution witnesses would have testified that the victim was a drug dealer. See MCR 7.210(A)(1). Accordingly, defendant cannot show that defense counsel's performance was deficient or that counsel's performance prejudiced the defense. *Strickland*, *supra* at 687.

In any event, even if defendant could show that defense counsel might have been able to establish at trial that the victim was a drug dealer and that drug dealer's frequently carry guns, this showing would be insufficient to demonstrate a reasonable probability that the result of the proceeding would have been different. *Strickland*, *supra* at 694. The central issue at trial was whether defendant shot the victim in self defense. Although evidence that the victim was a drug dealer may have been tangentially relevant to this central issue, its probative value would have been too slight to overcome the impact of the evidence that the victim was killed by a contact wound to the back of his head.

Defendant next contends that defense counsel was deficient in failing to question Kunta Braylock regarding his opportunity to discard the handgun allegedly "used" by the victim. Braylock testified that he never saw a gun in the minivan before or after the shooting. Accordingly, it is unclear what defense counsel would have accomplished by questioning Braylock regarding his opportunity to discard the handgun allegedly "used" by the victim. Nothing in the record indicates that Braylock would have admitted to discarding a gun. Accordingly, defendant cannot show that defense counsel's performance was deficient or that counsel's performance prejudiced the defense. *Strickland*, *supra* at 687.

Defendant also contends that defense counsel was deficient in failing to argue to the jury that Braylock had an opportunity to discard the handgun allegedly "used" by the victim, that none of the trial

testimony directly contradicted defendant's claim of self defense, and that there were numerous inconsistencies in the testimony of the prosecution's witnesses. In our view, the substance of defense counsel's closing argument, which stressed several appropriate points, was a matter of trial strategy, and thus cannot provide the basis for a claim of ineffective assistance of counsel. *Strickland*, *supra* at 690-691; *In re Rogers*, 160 Mich App 500, 505; 409 NW2d 486 (1987).

Finally, defendant contends that defense counsel was deficient in failing to request a curative instruction after the prosecutor improperly asked defendant whether he had talked to defense counsel about self defense. Because the primary effect of such a curative instruction might have been to highlight the prosecutor's damaging insinuation, we conclude that defendant has failed to overcome the presumption that defendant's decision not to request a curative instruction constituted sound trial strategy.

For the reasons stated, defendant is not entitled to relief on appeal.

Affirmed.

/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[1] The medical examiner testified that if it was not a true contact wound, then it was a "near contact" wound, meaning that the barrel of the gun was not more than a quarter inch from the back of the victim's skull.

[2] The newspaper article attached to defendant's brief on appeal was not contained in the lower court record.