

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMY D. PAFFORD,

Defendant-Appellant.

UNPUBLISHED

February 20, 2001

No. 220101

Wayne Circuit Court

LC No. 98-009976

Before: Whitbeck, P.J., and Murphy and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced, as a third habitual offender, MCL 769.11; MSA 28.1083, to four to twenty years in prison. Defendant appeals as of right. We affirm.

The victim's girlfriend was involved in an altercation in a bar in Detroit. When the victim stepped in to break up the fight, defendant pulled him away. Defendant, however, was then escorted out of the bar by his brother, the bar owner. Later, the victim went outside to find out the reason for the altercation. On leaving the bar he was confronted by defendant and codefendant Larry Roberts.¹ Defendant tried to punch the victim several times, but missed. Roberts walked up behind the victim and hit him in the head with an object. The victim was knocked unconscious by the blow. Roberts then kicked the victim in the head two or three times and punched him once when he was on the ground. The victim sustained serious injuries from the incident.

Defendant first argues that his sentence is invalid because it was based on the incorrect factual finding that he was the one who injured the victim. We disagree. Due process requires that a sentence be based on accurate information and that a defendant have a reasonable opportunity at sentencing to challenge the information. *People v Zinn*, 217 Mich App 340, 347-348; 551 NW2d 704 (1996). A sentence is invalid if it is based on inaccurate information.

¹ Roberts was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and was sentenced to five years of probation, with one of those years to be spent in prison.

People v Miles, 454 Mich 90, 96; 559 NW2d 299 (1997). The trial court may correct an invalid sentence. MCR 6.429(A); *Miles, supra* at 96. A defendant who seeks to challenge a trial court's finding on an issue of fact that is relevant to the sentencing decision bears the burden of going forward with an effective challenge. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). Once a defendant has effectively challenged an adverse factual assertion relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted. *Id.* In the instant case, neither defendant nor his counsel objected to the trial court's findings during sentencing. Therefore, this issue was not properly preserved for appeal. In order to avoid forfeiture of an unpreserved claim of constitutional error, an error must have occurred, the error must have been plain, and the plain error must have affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Defendant contends that despite the court's finding at trial that codefendant Roberts caused the victim's injuries, the court sentenced defendant as if he were the party who caused the injuries. At trial, the court stated that it was convinced beyond a reasonable doubt that an assault had occurred, and that defendant was an aider and abettor in the situation. The court noted that codefendant Roberts "apparently, was the main person who did the assault." When imposing defendant's sentence, the court used the word "they" when describing who injured the victim. The court never stated that defendant, as opposed to Roberts, was the party who caused the injuries. Thus, the court said nothing at defendant's sentencing that was inaccurate.

The court's statements at defendant's sentencing were consistent with its finding at trial that defendant aided and abetted Roberts. Although it appears that the court subsequently based Roberts' lesser sentence on an inaccurate finding of fact — that defendant, not Roberts, had caused the injuries — defendant has not shown that the court committed a plain error that affected substantial rights when imposing *his* sentence. *Carines, supra*. Therefore, defendant has forfeited appellate review of this unpreserved issue.

Next, defendant argues that the prosecution failed to present sufficient evidence to support his conviction. We disagree. Due process requires that the prosecution introduce sufficient evidence that could justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

The elements of a crime may be proven by circumstantial evidence and reasonable inferences arising from the evidence. *Carines, supra* at 757. The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force and violence to do corporal hurt to another, and (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657; 668-669; 549 NW2d 325 (1996). To establish guilt under an aiding and abetting theory, the prosecution must show that: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement

that assisted the commission of the crime, and (3) at the time the defendant gave aid and encouragement, he intended the commission of the crime or had knowledge that the principal intended its commission. *Carines*, *supra* at 768.

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the prosecution proved beyond a reasonable doubt that defendant aided and abetted the assault with intent to do great bodily harm less than murder. The evidence that an assault occurred is clear, and the nature of the blows inflicted and the injuries sustained support conviction at the level of intent to do great bodily harm less than murder. In addition, defendant clearly performed acts and gave encouragement that assisted the commission of the crime. It was defendant's female companion who was involved in the altercation with the victim and his girlfriend inside the bar. Accordingly, it is reasonable to infer that it was defendant who recruited Roberts to wait with him outside the bar with the intention of confronting the victim. Also, when the victim left the bar it was defendant who initially confronted him and attempted to punch him. Lastly, defendant's intent to commit the crime is evidenced by the facts that he waited with Roberts to confront the victim, that he first attempted to strike the victim, and that he made no efforts to stop Roberts' subsequent vicious beating of the victim.

Finally, defendant argues that he was denied the effective assistance of counsel at trial. We again disagree.

To establish effective assistance of counsel, a defendant must show (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must also overcome a strong presumption that the assistance of counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court denied defendant's motion to remand the case for a *Ginther*² hearing. Because defendant otherwise failed to create a testimonial record in the trial court with regard to his claims of ineffective assistance, our review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant first contends that his counsel was ineffective because he failed to call any witnesses whose testimony would have been favorable to defendant. Counsel's failure to call witnesses is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In the instant case, defendant identifies only one potential witness that his counsel did not call, and he fails to indicate the substance of the "favorable" testimony that this or any

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

other potential witnesses would have provided. Defendant has not shown that he was deprived of a substantial defense that would have affected the outcome of the proceedings.

Next, defendant contends that his trial counsel was ineffective because he did not cross-examine any of the prosecution witnesses. Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered to be part of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess trial counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). In the instant case, counsel for codefendant Roberts cross-examined two of the three prosecution witnesses. Defendant has not shown that further cross-examination of the witnesses by his counsel would have elicited testimony favorable to him and affected the outcome of the trial. Accordingly, defendant has failed to demonstrate that his counsel's decision not to conduct additional cross-examination was not trial strategy or that there is a reasonable probability that, but for this decision, defendant would have been acquitted.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper