STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2002
v	No. 229440 Oakland Circuit Court
RANDY JOSEPH FOSTER, Defendant-Appellant.	LC No. 2000-171925-FC

Before: Bandstra, P.J., Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to a term of twenty to forty years' imprisonment for the assault conviction and a consecutive two year term for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the presentence investigation report.

Defendant first argues that the trial court erroneously excluded evidence that the victim had a criminal record. At trial, defendant sought to introduce evidence that the victim had previously been convicted of possessing less than twenty-five grams of a controlled substance. According to defendant, this evidence was relevant because it might have convinced the jury that the victim was shot during the course of a drug deal gone bad. Defendant argues that such a conclusion would have supported his theory that he shot the victim in self-defense.

The decision whether evidence is admissible is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Pursuant to MRE 404(b)(1), which governs the admission of prior bad acts:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court set forth the following test for determining whether to admit prior bad acts evidence at trial:

> Prior bad acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered. [*People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001), citing *VanderVliet*, *supra* at 55.]

MRE 404(b) applies to the admissibility of evidence regarding the past acts of any person, including the victim or a witness. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995); *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). Where a criminal defendant seeks to admit evidence of the bad acts of another person, the defendant "remains bound by the requirement that the evidence is not offered to prove conformity with character." *Catanzarite*, *supra* at 579.

In the present case, the defense theory was that defendant shot the victim in self-defense, when the victim attacked defendant with a crowbar or tire iron. However, defendant presented no evidence that the victim possessed a crowbar or tire iron at the time of the shooting.[1] Further, defendant presented no evidence that the victim approached, threatened, or attacked defendant in any way. Indeed, the victim testified that he was approximately fifteen or twenty feet away from defendant when he was shot. Finally, while a police witness testified that defendant had a scabbed-over wound on his arm, some time after the shooting, defendant presented no evidence indicating that he received that injury on the date of the shooting, or that the victim inflicted that injury.

In light of the paucity of evidence supporting the theory of self-defense, defendant's trial counsel sought to introduce evidence of the victim's criminal record. Counsel argued that this evidence might have lead the jury to believe that the victim had attacked defendant because something had gone wrong with a drug deal in which the victim was participating at the time of the shooting. Defense counsel therefore argued that evidence of the victim's criminal record tended to support defendant's theory of self-defense.

We conclude that the evidence of the victim's prior drug convictions was not offered for a proper purpose under MRE 404(b) because defense counsel's reason for seeking admission of this evidence relies on an impermissible inference. Defense counsel sought to convince the jury that the victim must have been participating in a drug deal on the date of the shooting, simply

---

[1] The victim did admit possessing a "jack handle" *before* the shooting, at the nearby car wash, and conflicting evidence was presented regarding whether the victim possessed a crowbar or tire iron *after* the shooting, as he sought assistance for his injuries. However, the victim expressly denied that he had anything in his hands when he was shot, and his was the sole eyewitness testimony on this subject.

because he had a prior conviction for drug possession.[2] This is the exact type of "character to conduct theory" that is prohibited by MRE 404(b). *Hawkins*, *supra* at 447.

Further, even if the evidence had been offered for a proper purpose under MRE 404(b), we would conclude that the evidence was properly excluded because it was relevant to neither an element of the charged offenses nor to defendant's theory of self defense. Pursuant to MRE 401, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In Michigan, the test for determining whether a defendant has acted in lawful self-defense is whether: (1) the defendant honestly believed that he was in danger, (2) the degree of danger which he feared was serious bodily harm or death, and (3) the action taken by the defendant appeared at the time to be immediately necessary. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). The defendant is entitled to use only that amount of force necessary to defend himself. *Id*. Further, the general rule regarding self-defense "is that retreat to avoid using deadly force is required where it is safe to do so." *Canales*, *supra* at 574.

Evidence that the victim may have been involved in a drug transaction at the time of the shooting, without more, does not tend to make it more probable that defendant shot the victim in self-defense. There was no testimony or evidence offered at trial to indicate that the victim even approached defendant, let alone threatened him. There was no testimony to indicate that defendant reasonably believed himself in danger of suffering serious bodily harm or death, that defendant used only as much force as necessary to defend himself, or that defendant lacked the ability to retreat. Even if the victim was buying or selling drugs at the time of the shooting, that fact alone would not tend to support a finding that he attacked defendant with deadly force. Because the proffered evidence was not relevant to the issues involved in the case, we conclude that the trial court did not abuse its discretion in excluding that evidence at trial.

Next, defendant argues that the trial court erroneously refused to instruct the jury regarding his theory of self-defense. We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). A court must instruct the jury so that it may correctly and intelligently decide the case. *Id*. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). However, a defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding that defense. *People v Lemons*, 454 Mich 234, 248; 562 NW2d 447 (1997); *Crawford*, *supra* at 619.

We conclude that the trial court did not err in refusing to instruct the jury on self-defense. As set forth above, there was no evidence presented that defendant possessed a crowbar or tire iron at the time of the shooting. There was no evidence presented that the victim threatened defendant, that defendant honestly believed that he was in danger of serious bodily harm or

---

[2] Further, defendant fails to explain how the victim's mere *possession* of drugs on a prior occasion made it more likely that the victim was *dealing* drugs on the date of the shooting.

death, or that defendant's action of shooting the victim appeared at the time to be immediately necessary. Indeed, because the evidence indicated that defendant was sitting in a car and the victim was on foot fifteen or twenty feet away, retreat was apparently available to defendant.[3] The evidence admitted at trial did not support a theory that defendant shot the victim in self-defense, and the trial court did not err in declining to instruct the jury on that theory.

Defendant next argues that the trial court erroneously admitted into evidence a sawed-off rifle that defendant allegedly used to shoot the victim. Defendant contends that the prosecutor failed to adequately link the rifle either to the crime or to defendant, and that he was therefore deprived of a fair trial. Our review of the record reveals that defense counsel expressly waived objection to admission of the rifle.[4] Waiver is the intentional relinquishment or abandonment of a known right, and "[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Because appellate review of this issue has been waived, we need not address it.

Defendant next argues that he was denied a fair trial because a res gestae witness named "Cody Stephens" was "never questioned by any law enforcement agency, interviewed by officers of the court, or called upon to testify." Defendant avers that this witness was "crucial" to his defense, and that "his testimony would have dramatically affected the jury's verdict." Yet, defendant fails to explain the identity of this witness, the subject of his anticipated testimony, or the reasons why he failed to appear and testify at trial. Indeed, a thorough review of the lower court record reveals no mention of an individual named "Cody Stephens."[5] Because defendant has failed to adequately present and brief this argument, we decline to address it.

Defendant next argues that his trial counsel rendered ineffective assistance, in three respects: (1) defense counsel failed to object to admission of the rifle into evidence, (2) defense counsel failed to produce the res gestae witness "Cody Stephens" during trial, and (3) defense counsel failed to offer into evidence a statement given by Daniel Stephens to police. We conclude that defendants' arguments regarding ineffective assistance are without merit.

In order to establish ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance fell below an objective standard of reasonableness under

---

[3] In addition, the victim testified that he heard the vehicle speed away after he was shot.

[4] When the prosecutor offered the rifle into evidence, defense counsel responded, "No objection."

[5] Because defendant represents that the missing witness was "never questioned by any law enforcement agency," we conclude that defendant is not referring to Daniel Stephens, the individual who was driving the car when defendant shot the victim. Daniel Stephens clearly gave a statement to police, and one of defendant's allegations of error on appeal is that Daniel Stephens' statement should have been admitted as substantive evidence at trial. Further, defendant contends that the missing witness was never "called upon to testify," and Daniel Stephens was called upon to testify at defendant's trial, but invoked his Fifth Amendment rights and refused to do so.

prevailing norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Effective assistance of counsel is presumed and a criminal defendant bears a heavy burden of proving that counsel was ineffective. *Id.* Further, because no record was made in the trial court, our review of defendant's ineffective assistance of counsel claim is limited to the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

With regard to defendant's first ineffective assistance issue, we conclude that defense counsel's express waiver of any potential objection to the admission of the rifle was a matter of trial strategy. "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). Further, "[t]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The defense theory of the case, maintained from the very beginning of trial, was that defendant shot the victim in self-defense. Because it would have been inconsistent for defense counsel to argue that defendant was not the shooter, counsel reasonably chose to forego such an argument and instead focused on defendant's theory that the victim attacked him with a crowbar or tire iron. The fact that defense counsel's trial strategy was ultimately unsuccessful does not render counsel's performance constitutionally defective. *Id*.

With regard to defendant's second ineffective assistance issue, defendant has failed to adequately explain either the identity of the missing witness or the subject of his anticipated testimony. Without such explanation, we cannot say that counsel was ineffective for failing to call this witness at trial.

Defendant next argues that his trial counsel rendered ineffective assistance because she failed to offer into evidence a statement given to police by Daniel Stephens, the driver of the vehicle in which defendant was seated when he shot the victim. In an interview with the police, which apparently took place eleven days after the date of the charged offenses, Stephens maintained that the victim approached his car with a tire iron in his hand and began swinging the tire iron, hitting defendant on the arm. Stephens claimed that he started the car and began to drive away, but defendant pulled out a sawed-off rifle and shot the victim.[6]

Defendant contends that Stephens' statement to police was admissible under MRE 804(b)(7), the "catch-all" hearsay exception applicable when a declarant is unavailable.[7] Defendant further contends that his trial counsel's failure to introduce Stephens' statement was prejudicial because that statement would have established that the victim attacked defendant with

---

[6] Because the statement at issue was never made part of the lower court record, it is not properly before this Court. Nonetheless, we will briefly consider the statement to determine whether defendant's argument has any merit. We conclude that it does not.

[7] Because Stephens declined to testify by invoking his Fifth Amendment privilege, he was "unavailable" within the meaning of MRE 804. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998).

potentially deadly force immediately before the shooting, thereby enabling the trial court to instruct the jury on self-defense.

For a hearsay statement to be admissible under MRE 804(b)(7), the statement sought to be admitted must show particularized guarantees of trustworthiness. *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000), remanded on other grounds, 465 Mich 928 (2001). Without such a showing, a statement will be deemed presumptively unreliable and therefore inadmissible. *Id*. We conclude that Stephens' statement does not bear sufficient indicia of reliability to have been admissible at trial. The statement was not made contemporaneously with the incident and was made to police officers during an interview. Further, the statement was not made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry and were not, as a whole, clearly against the declarant's penal interests. Finally, the statement does not truly inculpate Stephens, but seeks to shift the blame for the shooting to defendant. Therefore, Stephens' statement does not qualify for admission under MRE 804(b)(7).

Even if Stephens' statement qualified for admission under MRE 804(b)(7), "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," *Rockey*, *supra* at 76, and "[t]his Court will not second-guess counsel regarding matters of trial strategy." *Rice*, *supra* at 445. Defendant contends that failure to introduce Stephens' statement deprived him of the defense of self-defense. However, from the context of Stephens' statement, it appears that defendant's trial counsel may have avoided seeking admission of the statement as a matter of trial strategy. Stephens told police that he was driving away from the scene when defendant pulled out a gun and shot the victim. Therefore, introduction of Stephens' statement would have been extremely damaging to defendant's theory of self-defense, which would have required a showing that defendant retreated if able to do so. Because defendant has not shown that counsel made an error or that, but for counsel's actions the result of the proceedings would have been different, he has not established that his trial counsel was constitutionally ineffective.

Finally, defendant argues that he is entitled to correction of his presentence investigation report. We agree. Pursuant to MCL 771.14(6) and MCR 6.425(D)(3), a party may challenge the accuracy of any information contained in the presentence report. If the court finds on the record that the challenged information is inaccurate, that information must be stricken before the report is transmitted to the department of corrections. At sentencing, defendant challenged the accuracy of two statements contained in his presentence investigation report. The first statement indicated that defendant declined to submit a written statement or discuss the offense. The second statement indicated that defendant falsely reported to the probation officer that he had a juvenile arrest for shoplifting. Although the trial court agreed to strike those two statements, it appears that the report was not corrected before it was sent to the department of corrections. Therefore, we remand to the trial court for the ministerial task of correcting defendant's presentence report as agreed on the record at defendant's sentencing. Defense counsel should be given an opportunity to review the corrected report before it is sent to the department of corrections.

Defendant's convictions and sentences are affirmed and we remand for correction of the presentence report. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter