STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LASHONTA A. TRICE,

Defendant-Appellant.

UNPUBLISHED
July 24, 2003

No. 237170
Wayne Circuit Court
LC No. 01-001036-01

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant Lashonta A. Trice appeals as of right his convictions, following a jury trial, of assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced by the circuit court to concurrent terms of imprisonment of fifteen to twenty-five years for the assault and armed robbery convictions, four to twenty years' imprisonment for the home invasion conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

At trial, the complainant, Larry Wynn, testified that he had known defendant for approximately three to five years. Wynn knew defendant from the neighborhood and from working with him at a local party store. Wynn stated that defendant had introduced him to defendant's cousin, Gordon Mitchell; the complainant and Mitchell had a history of prior confrontations. Wynn testified that on January 14, 2000, defendant came by his place of employment and asked to borrow twenty dollars. In response to this request, Wynn told defendant to come by his house later that evening. At approximately 8:30 p.m., he answered his doorbell and talked to defendant via the intercom and saw that defendant was standing alone on the front porch. When the complainant opened the front door, Mitchell jumped over the banister and started shooting a handgun. Wynn was struck several times and defendant then grabbed him and forced him into the house. Once inside, Mitchell and defendant began ransacking the house. Defendant took four hundred dollars out of Wynn's pockets, and the complainant was shot at least three more times in the chest and leg. Shortly thereafter, the assailants left and a neighbor who heard the commotion called the police. Following a ten-day stay in the hospital, Wynn contacted the police and identified defendant and his cousin as the perpetrators.

Defendant testified at trial and denied any involvement in these events. He maintained that he had a job and worked on the day in question, thus he had no reason to borrow money

from the complainant. Defendant testified that he was not at Wynn's house on the night in question. However, the jury convicted defendant as charged on all counts. Defendant now appeals.

Defendant first argues that he was denied effective assistance of counsel because his trial attorney allegedly failed to present or even interview witnesses for his defense. We disagree.

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). [*People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).]

The failure to interview witnesses does not establish ineffective assistance of counsel absent a showing that the failure to interview resulted in the loss of valuable evidence which would substantially benefit the accused. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). "Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds, 453 Mich 902 (1996). See also *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). "A defense is substantial if it might have made a difference in the outcome of the trial." *Hyland, supra* at 710. Trial counsel's decisions concerning what evidence to present and whether to call particular witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). This Court will not second-guess decisions based on trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Here, defendant maintains that before trial, he asked trial counsel to contact his mother and his girlfriend because they purportedly could provide evidence not only that defendant was not involved in the assault, but also that Gordon Mitchell was the actual perpetrator of the crimes against Wynn. However, because there was no evidentiary hearing before the trial court on these allegations, our review is limited to mistakes apparent on the appellate record, *Davis, supra* at

368, *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997), and "[i]f the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Davis, supra* at 368. Defendant has not produced any evidence from the lower court file or trial record which establishes that the testimony of these witnesses would have yielded valuable evidence that would have benefited defendant. The affidavits of these potential witnesses now proffered by defendant to support his claim are not part of the lower court record; thus, this Court is prohibited from considering them on appeal. See *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998); MCR 7.210(A)(1).

In any event, even considering these affidavits, defendant has failed to demonstrate a reasonable probability that the testimony would have altered the outcome of the trial. *Avant, supra* at 508. Defendant was not deprived of a substantial defense, but a weak one at best. Defendant's witnesses are closely connected to him, and given the close relationship, both their credibility and viewpoint are inherently suspect. Defendant's mother affied that two or three days after the incident in question, Mitchell came by her house with several other persons. She overheard Mitchell tell these people that he was the one responsible for the attack; however, she could not remember the names of the other people who came to her house with Mitchell – people who could have (or not) corroborated her story. In another affidavit, defendant's girlfriend averred that on the night in question she and defendant were home together all night and that defendant therefore could not have been involved in the attack. Like defendant's mother, defendant's girlfriend also stated that Mitchell came by her house and she overheard him tell defendant that he (Mitchell) was responsible for the attack on "Larry." However, defendant never testified that Mitchell came to his house and admitted that he had committed the offenses. Given the questionable substance of the prospective testimony and the close relationship shared by the witnesses and defendant, we conclude that defendant was not deprived of a substantial defense or denied effective assistance of counsel by trial counsel's failure to call the two witnesses in question.

In a related argument, defendant in propria persona also alleges ineffective assistance of appellate counsel. Defendant argues that appellate counsel failed to ascertain whether trial counsel's strategic reasons for not calling certain witnesses were sound and reasonable before filing a motion to remand for a *Ginther*[1] hearing with this Court, which motion was denied on April 22, 2002. The standards applicable to a claim of ineffective assistance of trial counsel also apply to a claim of ineffective assistance of appellate counsel. *People v Reed*, 449 Mich 375, 382; 535 NW2d 496 (1995). Here, nothing in the record supports defendant's argument that appellate counsel's performance fell below an objective standard of reasonableness. In light of our finding that trial counsel was not ineffective, defendant was not prejudiced by appellate counsel's alleged failure to elicit certain information from trial counsel before filing the motion to remand with this Court.

Defendant next argues that the trial court's failure to instruct the jury regarding the proper use and effect of the prior inconsistent statements of the victim denied defendant a fair trial and constitutes error requiring reversal. Defendant concedes that neither the trial court nor the

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

prosecution specifically suggested to the jury that the prior inconsistent statements could be used as substantive evidence of guilt. Defendant further concedes that no request for this limiting instruction, and no objection to its omission, appears on the record. This issue is therefore not preserved for appellate review, *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000), and in order to avoid forfeiture, defendant must show plain error that was prejudicial, i.e., that could have affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). When no request has been made for a limiting instruction on the use of prior inconsistent statements, "the general rule is that relief will not be given when there is no demonstration or likelihood of prejudice. . . ." *People v Hodges*, 179 Mich App 629, 632; 446 NW2d 325 (1989), citing *People v Kohler*, 113 Mich App 594, 599-600; 318 NW2d 481 (1981).

Here, we find no basis to conclude that defendant was prejudiced by the omission of the instruction. The record indicates that neither the prosecution nor defense counsel suggested to the jury that the complainant's prior inconsistent statements could be used as substantive evidence, and the trial court otherwise accurately instructed the jury on the burden of proof, material issues, and elements of the charged offenses. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We therefore find no plain error that affected defendant's substantial rights. *Carines, supra*.

In a related argument alleging instructional error, defendant argues that he was denied a fair trial because the trial court failed to instruct the jury that the offenses of armed robbery, home invasion, and assault with intent to murder are specific intent crimes. Once again, defendant did not object at trial to the purported deficiencies in the jury instructions, and we therefore review for plain error affecting his substantial rights. *Carines, supra*.

> This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). 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 Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975); *Piper*, *supra* at 648. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id*. Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *Id*. [*Canales, supra* at 574.]

In this instance, the record belies defendant's contention that the jury was not properly instructed on the specific intent element of the charged offenses. With regard to the offense of assault with intent to commit murder, the trial court advised the jury in pertinent part that "the defendant intended to kill the person assaulted." With regard to the armed robbery charge, the court further instructed the jury "that at the time he took the money, the defendant intended to permanently deprive the complainant of his property." Finally, the court's instruction concerning home invasion included the instruction that "when the defendant broke and entered the dwelling he intended to commit the crime of robbery armed, or assist someone in doing that or commits the crime of assault with intent to murder or assist someone in doing that." These instructions fairly presented to the jury the issues to be decided, including specific intent. *Canales, supra*. No plain error is thus apparent from our review of the record, *Carines, supra*, and defendant's argument is therefore without merit.

Defendant next contends that the evidence presented at trial was insufficient to sustain his felony-firearm conviction. Defendant maintains that although the relevant facts presented at trial identified defendant as being involved in the incident in question, there was no testimony or evidence offered that he had ever possessed or assisted Mitchell in the possession, retention, or procurement of the firearm linked to the assault. We disagree.

When reviewing a sufficiency of the evidence claim, this Court considers the evidence 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. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from that evidence may constitute sufficient proof to find all elements of an offense beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Appellate review of the sufficiency of the evidence is deferential and a reviewing court is required to draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id*. A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt "in the face of whatever contradictory evidence the defendant may provide." *Id.* (citation omitted).

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998); *Avant, supra* at 505. Possession of a weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989).

Here, the victim testified that when he opened his front door thinking defendant was the only person on the porch, Gordon Mitchell jumped across the banister, pulled out a gun, and started shooting. Defendant grabbed Wynn by the neck and pushed him back into the house. As defendant pushed him back, he reached into his belt like he had a gun. Wynn was then shot twice in the chest and also in the back of the leg after he fell face first to the ground. Wynn testified that he heard two different guns fire and two different bullet sounds. On cross-examination, Wynn admitted that he never saw a gun in defendant's hand, but testified that "he [defendant] indicated he had one when he went down in his waistband" after grabbing Wynn by the neck. Wynn reiterated that he heard two guns fire.

We conclude that, viewed in a light most favorable to the prosecution, sufficient evidence was presented from which a rational trier of fact could have found all the elements of the offense of felony-firearm were proved beyond a reasonable doubt. The jury was entitled to draw a reasonable inference that defendant pulled a gun from his waistband and fired it at Wynn. Resolution of witness credibility is a matter reserved to the factfinder, which this Court will not second-guess. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Since possession may be actual or constructive, *Hill, supra*, the evidence was clearly sufficient to support the verdict, and defendant is not entitled to appellate relief on this issue. *Nowack, supra*.

Finally, contrary to defendant's argument made in propria persona, we conclude on the basis of the evidence set forth above that sufficient evidence was produced to sustain the remainder of his convictions. *Nowack, supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage