

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TERENCE MIKAL WITHERSPOON,

Defendant-Appellant.

---

UNPUBLISHED

June 8, 2004

No. 245007

Wayne Circuit Court

LC No. 02-005392

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant was charged with assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a nonjury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, and felony-firearm, and was later sentenced to prison terms of ten months to ten years and two years, respectively. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that he was entitled to a new trial due to ineffective assistance of counsel. Whether a defendant has been denied effective assistance of counsel is a mixed question of law and fact. The trial court's factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579, 582; 640 NW2d 246 (2002).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233; 661 NW2d 553 (2003) (citations omitted).]

Defendant contends that trial counsel was ineffective because he did not call *res gestae*

witnesses to testify to what they had seen and heard, he did not call character witnesses, and he did not elicit testimony from the witnesses called at trial, and failed to call witnesses to testify, that the victim's wounds may have been self-inflicted by an air gun.

Decisions whether to call and question witnesses are presumed to be matters of trial strategy. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Ineffective assistance of counsel can be predicated on the failure to call witnesses or present other evidence "only if the failure deprives the defendant of a substantial defense." *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866; 577 NW2d 667 (1998). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant has not identified the *res gestae* witnesses or character witnesses whom he contends should have been called at trial. Given the evidence adduced at the evidentiary hearing, one could assume that one character witness would have been defendant's grandfather. Defendant did not call any of these witnesses at the evidentiary hearing to show what testimony they might have offered. Because the record is silent regarding the testimony the witnesses would have offered if called, defendant has not shown that a reasonable probability exists that, if counsel had called these witnesses, the outcome of the trial would have been different. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

The medical record does indicate that the victim was shot by an air gun. However, defendant has not shown the relevance of this evidence. The assault crimes with which defendant was charged and convicted are predicated not upon the use of any particular weapon but upon the intent with which the assault was carried out. Felony-firearm may be predicated on the possession of an air gun. See MCL 750.222(d). As such, and because defendant has not identified any witnesses who could have affirmatively testified that the victim was shot with a weapon that did not constitute a firearm as that term is defined by statute, or presented evidence that the victim's wound was self-inflicted, he has failed to show that counsel's failure deprived him of a substantial defense.

Defendant also contends that trial counsel was ineffective because he did not thoroughly and vigorously cross-examine the prosecutor's witnesses.

The decision whether to question or cross-examine witnesses is presumed to be a matter of trial strategy. *Rockey*, *supra* at 76; *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). Defendant is only entitled to relief where counsel's omission deprived him of a substantial defense. *Id.*

Defendant has not identified which of the prosecution witnesses trial counsel should have examined more thoroughly or vigorously or what evidence would have been brought out by such examination. Therefore, he has not shown that counsel's failure deprived him of a substantial defense.

Affirmed.

/s/ Jane E. Markey  
/s/ Kurtis T. Wilder  
/s/ Patrick M. Meter