

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD EARL THROWER, JR.,

Defendant-Appellant.

UNPUBLISHED

June 17, 2004

No. 245445

Berrien Circuit Court

LC No. 02-403322-FC

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced to concurrent prison terms of three to fifteen years for the felonious assault and felon in possession of a firearm convictions, to be preceded by a consecutive two-year sentence for felony-firearm. Defendant appeals as of right. We affirm.

Defendant argues that trial counsel provided ineffective assistance of counsel in (1) failing to give timely notice to the prosecution of an alibi witness which resulted in the defense not being able to call that person as an alibi witness at trial, and (2) failing to object to the prosecution's failure to produce the victim as a witness at trial. Because defendant did not raise this issue below, review "is limited to errors apparent on the record." *People v Wilson*, 257 Mich App 337, 363; 668 NW2d 371 (2003) vacated in part on other grounds 469 Mich 1011; 677 NW2d 29 (2004). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the existence of a reasonable probability that but for counsel's error the result of the proceeding would have been different. *Id.* at 362, quoting *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

With regard to trial counsel's failure to provide a timely notice regarding the possible alibi witness, defendant never created a record of what testimony that witness would have provided. Thus, defendant has not established an ineffective assistance of counsel claim because he has not created a factual record to support a conclusion that there was a reasonable probability that testimony from this person would have changed the result of the trial. See *Wilson, supra*, quoting *Carbin, supra* (defendant bears the burden of establishing a factual predicate for an ineffective assistance of counsel claim).

As to trial counsel's decision not to object to the prosecution's request to delete the victim from the witness list and to not be required to produce him as a witness at trial, there is a strong presumption that counsel's performance constituted sound trial strategy. *Wilson, supra*. Given the absence of a factual record on the point, there is no basis to conclude that trial counsel's decision in this regard was outside the bounds of sound trial strategy. Trial counsel might reasonably have feared that objecting to the prosecution's failure to produce the victim would have led to the victim being called as a witness at trial and providing further incriminating testimony against defendant. Notably, the absence of incriminating testimony from the victim may have benefited defendant given that he was charged in one count with assault with intent to do great bodily harm, but the jury only convicted him of the lesser offense of felonious assault as to that count. It is conceivable that testimony from the victim about the incident might have led the jury to conclude that defendant acted with an intent to do great bodily harm. Trial counsel could also have reasonably been concerned that if the victim personally testified and described his injury from the incident this would have resulted in increased sympathy by jurors for the victim which could have worked to defendant's detriment. Thus, defendant has not established an ineffective assistance of counsel claim.

Defendant alternatively requests that this Court remand this case to the trial court for an evidentiary hearing on his ineffective assistance of counsel claim. However, he has not filed a motion to remand as required by MCR 7.211(C)(1). Further, he has not provided an affidavit or offer of proof to support a remand as contemplated by MCR 7.211(C)(1)(a)(ii). Thus, we decline to remand this case for such an evidentiary hearing.

Affirmed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray