

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN SEWELL,

Defendant-Appellant.

UNPUBLISHED

January 25, 2011

No. 295021

Wayne Circuit Court

LC No. 09-003316-FH

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of unarmed robbery, MCL 750.530, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to concurrent prison terms of 4 to 15 years for the robbery conviction and 3 to 10 years for the assault conviction. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant raises two separate claims of ineffective assistance of counsel. Because no evidentiary hearing was held pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). “Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel’s errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable.” *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A defendant must also overcome the presumption that counsel’s challenged action constituted sound trial strategy. *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).

Defendant first argues that counsel was ineffective for failing to call additional alibi witnesses. A defendant must establish the factual predicate for his claim that counsel was ineffective. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant states that his mother provided names of alibi witnesses to defense counsel before trial. However, nothing in the record factually supports defendant’s claim that the names of potential witnesses were given to defense counsel; nor does the record indicate the substance of any testimony the proposed

witnesses would have provided. On this record, there is no basis for concluding that defense counsel was ineffective for failing to call additional alibi witnesses.¹

Defendant also argues that trial counsel was ineffective for failing to object to hearsay testimony from the complainant's wife and daughter concerning the complainant's statements about the incident. We disagree. The record indicates that there were strategic reasons for not objecting to the challenged testimony, and defendant has not overcome the presumption that counsel's actions in this regard constituted sound trial strategy. The complainant had known defendant for several years and had ample opportunity to observe him. At trial, counsel strategically focused on the complainant's memory impairments, presenting a theory that the complainant was "easily swayed" and had been "coach[ed]" by his wife after she heard about his encounter with defendant. Defense counsel's exploration of the purported statements on cross-examination supports the conclusion that counsel's failure to object was strategic, not the result of oversight. The fact that the strategy was unsuccessful does not establish that counsel was ineffective. *Kevorkian*, 248 Mich App at 414-415.

Defendant also claims that defense counsel was ineffective for failing to object to hearsay testimony from the complainant's wife about defendant's drug use. Again, however, defendant has failed to overcome the presumption of sound trial strategy. The complainant's wife first mentioned the issue in a rambling answer that was not responsive to the prosecutor's question. Rather than objecting, defense counsel questioned the witness about the subject on cross-examination to show that she lacked personal knowledge. He also used the testimony to support his theory that the complainant's wife was predisposed to suspect defendant. Furthermore, defendant's purported drug use was not an important issue at trial, so there is no reasonable probability that counsel's handling of this matter in a different way would have changed the outcome of the proceedings. See *Seals*, 285 Mich App at 17. The record does not support defendant's claim that defense counsel was ineffective.

Defendant also argues that there was insufficient evidence to establish his identity as the perpetrator of the charged offenses because the complainant's memory impairments rendered his identification testimony unreliable. When reviewing the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime, including the defendant's identity as the person who committed the crime, were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Oliphant*, 399

¹ Although defendant asks this Court to remand for an evidentiary hearing on this issue, this Court previously denied defendant's motion to remand because defendant had "failed to demonstrate by affidavit or offer of proof the facts to be established at a hearing." *People v Sewell*, unpublished order of the Court of Appeals, entered April 19, 2010 (Docket No. 295021). Defendant has not made any additional offer of proof to justify a remand. Therefore, we again decline his request for a remand. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

Mich 472, 489; 250 NW2d 443 (1976); *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Here, the complainant identified defendant, whom the complainant had known for several years, as the person who assaulted and robbed him. This testimony, if believed, was sufficient to establish defendant's identity as the perpetrator of the charged crimes beyond a reasonable doubt. Although defendant attacked the complainant's memory and argued that his history of memory problems rendered his testimony unreliable, the credibility and reliability of the identification testimony was a matter for the jury to resolve, and this Court will not resolve it anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Affirmed.

/s/ Kathleen Jansen

/s/ Donald S. Owens

/s/ Douglas B. Shapiro