STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2011
v	No. 294652 Wayne Circuit Court
MEECHEE DEMONT MORRIS, Defendant-Appellant.	LC No. 09-010479-FC

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

This case arises out of the shooting death of Jaime McCullough. Defendant Meechee Morris appeals as of right his jury conviction of first-degree premeditated murder,[1] assault with intent to do great bodily harm less than murder,[2] being a felon in possession of a firearm (felon in possession),[3] and carrying a firearm during the commission of a felony (felony firearm).[4] The trial court sentenced Morris as a second habitual offender[5] to concurrent sentences of life in prison for the murder conviction, 5 to 10 years in prison for the assault conviction, 5 to 7 1/2 years in prison for the felon-in-possession conviction, and a consecutive sentence of 5 years for the felony-firearm conviction.[6] We affirm.

I. BASIC FACTS

On April 4, 2009, Morris arrived at the home where Reginald Kendricks and Jaime McCullough lived. Morris knocked on the door and, when Kendricks answered it, Morris asked

[1] MCL 750.316(1)(a).

[2] MCL 769.84.

[3] MCL 750.224f.

[4] MCL 750.227b.

[5] MCL 769.10.

[6] MCL 750.227b(1) ("Upon a second conviction under this section, the person shall be imprisoned for 5 years.").

to see McCullough. McCullough, who had been friends with Morris for years, had bought a car from Morris for $1,000, but still owed him $100. Kendricks did not know Morris well; he had only seen Morris twice before he came to the door on April 4.

When McCullough came to the door, Morris asked for the money that McCullough owed him. When McCullough told Morris that he could not pay him, Morris got mad and asked McCullough to step outside. McCullough did step outside, and after a heated discussion, Morris tried to punch McCullough, but McCullough blocked it. Morris then tried to throw another punch, but McCullough grabbed him, punched him, and kneed him in the face. Morris fell to the ground, but McCullough then backed off and let Morris get back on his feet.

McCullough asked Morris why he was trying to fight him, but Morris just stared back at him. McCullough then told Morris, "Man, go home. Go home. I can tell that you drunk." Kendricks testified that although Morris's eyes were "a little glazey," he was not really acting drunk. After McCullough told him to go home, Morris responded, "[Y]ou ain't the only person with friends and guns and stuff like that." McCullough replied to Morris, stating, "You sold me your gun and I'll kill you with your own gun." Kendricks testified that he did not have a gun and that he had never seen McCullough with a gun. Morris did not respond any further; he just looked at McCullough and then walked away. Morris left the scene in a red Pontiac G6 driven by a woman.

Kendricks testified that, about 25 to 30 minutes after Morris left, Morris came back to the house. He was driving the same red Pontiac G6 that he had left in. According to Kendricks, Morris got out of the car and started shooting. Kendricks testified that the shooting happened "fast." When the shooting started, Kendricks fell to the floor of the porch. McCullough tried to go into the house, but Morris shot him, and he fell to the ground. Morris did not say anything when he got out of the car or while he was shooting. Kendricks testified that Morris shot about ten rounds. At one point, Morris stopped shooting while he reloaded his gun, so Kendricks got up and ran into the house. Kendricks was not sure if he heard another shot or whether Morris was shooting at him. After the shots stopped, Kendricks came back out of the house and checked on McCullough. The police and EMS arrived shortly thereafter. A Wayne County assistant medical examiner testified that McCullough died from multiple gunshot wounds.

The jury convicted Morris, and Morris now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Morris argues that the prosecution presented insufficient evidence to support his conviction for premeditated, first-degree murder. A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law, which we review de novo on

appeal.[7] "[T]his Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt."[8]

B. IDENTIFICATION

Morris argues that the prosecution presented insufficient evidence to support his murder conviction because the discrepancies in Kendricks' testimony did not establish that Morris was the shooter beyond a reasonable doubt. In support of this argument, Morris points to Kendricks' trial testimony that he was not sure if Morris was actually the shooter because he only saw the shooter's clothing and car. And Morris further points out that even Kendricks' testimony regarding the clothing that Morris wore that day was inconsistent with witness Candice Sassie's testimony.

1. UNDERLYING FACTS

Kendricks testified on direct examination that, about 25 to 30 minutes after Morris left following the fight, he returned to the house in the same red Pontiac G6 in which he had left. When the prosecutor asked Kendricks if the woman that had been driving the car earlier in the day was still the driver, the following exchange occurred:

> *A.* No, it was a man driving at the time.
>
> *Q.* A man driving. Was it Mr. Morris or another man driving?
>
> *A.* It was a man driving.
>
> *Q.* Now did Mr. Morris get out of that car and come back up to the house or get out of the car at all?
>
> *A.* He got out of the car.
>
> *Q.* Had Mr. Morris been driving that car before he got out of it?
>
> *A.* The first time?
>
> *Q.* No. I'm talking about when he came back. You said 25 to 30 minutes later Mr. Morris came back, correct?
>
> *A.* Yes.

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[7] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[8] *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Q. When he came back, was he driving the car then?

A. I would say, yes.

Q. All right. Did he get out of the driver's side of the car?

A. Yes.

* * *

Q. Did you ever see anybody else in the car then?

A. No.

The prosecutor then proceeded to question Kendricks about the shooting:

Q. You saw a gun in Mr. Morris' hand?

A. To be honest with you, he got out [of the car] and started shooting you know. I just said, I said, I said, I said that I couldn't really, you know, it was kind of hard to see. All I remember is the same outfit, you know what I'm saying? He had on the same outfit on [sic], the same clothing. When he got out I was ducking. I ducked to the porch.

Q. Now did you see Mr. Morris get out of the that [sic] car and start shooting?

When Kendricks failed to respond to the prosecutor's last question, the prosecutor turned to questioning Kendricks regarding his statement to the police:

Q. And when you gave the statement to the police, did you tell the police that you saw Mr. Morris get out of that car and start shooting?

A. Yes.

Q. And now you've just said the words, "He was wearing the same clothing"?

A. Yes.

Q. Anything that's happened since you gave the statement to the police until now that makes you somehow want to protect Mr. Morris at all?

A. No.

Q. All right. Did you see Mr. Morris get out of that car?

A. I mean, yes, but—

Q. But what?

A. It's kind of, like I said, it was fast.

Upon further questioning, Kendricks confirmed again that he told the police that Morris was the person who fired the shots at them. And when the prosecutor sought further confirmation, Kendricks again testified that Morris fired the shots:

Q. Did Mr. Morris, was he the one that came back and fired those shots?

A. Yes, I would say so.

Q. What do you mean, you would say so?

A. Yes.

Kendricks confirmed that he identified Morris as the shooter when the police showed him a photo identification array the day after the shooting. The prosecutor asked Kendricks whether he had "any reason, back then, not to tell the truth to the police," and Kendricks responded, "I mean my adrenalin was still rushing too." However, Kendricks then confirmed again that he told the police on two separate occasions, in two separate statements, that Morris was the shooter. He also confirmed that he testified during the preliminary examination that Morris was the shooter. The prosecutor asked Kendricks if he told the truth "each and every one of those times," and Kendricks responded, "Yes."

Seeking one last time to clarify Kendricks' testimony, the prosecutor asked,

> Mr. Kendricks, did Meechee Morris come over to the house on that Saturday night and argue with Jaime McCullough and then come back 25 to 30 minutes later in that same red Pontiac G6, get out of that car and fire ten shots at you and Jaime McCullough? Did he do that?

Kendricks responded, "Yes."

On cross-examination, defense counsel asked Kendricks whether he was "certain" that Morris was the shooter. Although, at one point, Kendricks responded that he was not "for sure" that it was Morris, he also repeatedly stated, "I said it was him." Again trying to confirm Kendricks' testimony, defense counsel asked Kendricks, "I believe you testified that you were not sure whether or not Mr. Morris was shooting at you, is that your testimony? You're not sure if he was shooting at you that day?" Kendricks responded, "No[,]" and then added, "He was shooting at us[.]"

On redirect examination, the prosecutor asked Kendricks why he was hesitant to testify that Morris was the shooter, and Kendricks explained:

> Because it's the same car but I ain't want to, I definitely, I don't want to put nobody—

* * *

> Just by me sitting and having the chance to just think, you know, think about the possibility of making the wrong judgments it's just I remember clothes, but, like I say, I remember the car and clothes. I ain't just about to say because I never really looked dead in his eyes. I never really looked dead in his face.

Kendricks testified that he was not threatened or coerced by anyone to change his testimony. And, despite his hesitance to identify Morris, he nevertheless testified that Morris was in fact the shooter. He then stated:

> I looked at—I just looked at—I saw a gun and I just turned around, jumped to the porch and then as I heard the bullets stop, I looked back up and seen him walking back to his car, the back of his head, the clothes he had on that he had on from earlier and then I saw him reloading and then when I seen him trying to turn back like he was coming back up to the house, I just got up and I ran. I turned, not facing, I just ran back up to the porch in the house.

Upon questioning by the Court, Kendricks explained that, when Morris came to the house to ask McCullough about the money, he was wearing a plain blue hat, blue jeans, and a black leather jacket with a Superman emblem. The shooter was not wearing a hat, but he was wearing blue jeans and a black leather jacket with a Superman emblem. Seeking further clarification, the prosecutor asked Kendricks one more time about his identification of the shooter:

> *Q.* You just now said you saw the face of the person who was reloading that gun, correct?
>
> *A.* Yes, a glimpse
>
> *Q.* Who [sic] face were you seeing?
>
> *A.* Meechee's.
>
> *Q.* Meechee's face?
>
> *A.* Yes.
>
> *Q.* Are you sure about that?
>
> *A.* Yes.

Candice Sassie testified that she was at the house visiting Kendricks when Morris came to the door looking for McCullough. She testified that she saw the men fighting and saw Morris leave in a red G6 with a woman. Sassie then left shortly thereafter. Upon the Court's questioning, Sassie testified that, when she saw Morris, he was wearing a red shirt, a black leather jacket, and blue jeans with graffiti in them. She did not recall seeing any emblems, symbols, or colors on the black jacket.

Detroit police officers testified that both in the immediate aftermath of the shooting, and upon further questioning in the days that followed, Kendricks consistently, and without hesitation, identified Morris as the shooter. Detroit Police Sergeant Ernest Wilson testified that when he arrived at the scene of the shooting, Kendricks did not hesitate when he named Morris as the shooter: "He identified him by name." Sergeant Wilson was also the officer who showed Kendricks a photo array on the day following the shooting. According to Sergeant Wilson, when he asked Kendricks if he knew anyone included in the lineup, Kendricks answered, again with no hesitation, "Yes, that's Meech. He shot Jaime and shot at me." Detroit Police Officer Michael Reed testified that when he arrived at the scene of the shooting, he found Kendricks, crying, trying to "grab hold" of McCullough's body, and asking him to breathe. According to Officer Reed, Kendricks was at first hesitant to discuss what happened; he explained that Kendricks had some outstanding traffic warrants. However, once he started talking, Kendricks identified Morris as the shooter without hesitation.

Additionally, Stephanie Solomon, Kendricks' girlfriend, testified that Kendricks called her while he was in jail in June 2009. According to Solomon, Kendricks was "frantic" and "a little afraid" because Morris' uncle was in the next cell and was asking him questions about the shooting. However, Solomon testified that Kendricks never said that he was threatened nor ever indicated that he was going to change his testimony regarding Morris as a result of his interactions with the uncle. Kendricks was recalled on the second day of trial and questioned on a separate record. He confirmed that he called Solomon from jail and told her about meeting Morris' uncle. He further confirmed that he never expressed to her that he was afraid to testify. Kendricks also testified that, while he was nervous that Morris' uncle might want to defend his nephew, the uncle never threatened him and the interaction in no way affected his trial testimony. Kendricks confirmed yet again that he was positive that Morris was the shooter.

After the prosecution rested, defense counsel moved for a directed verdict, arguing that because Kendricks "waffle[d] the way he did" during his testimony, the jury would not be able to find Morris guilty as charged. The trial court denied the motion.

2. ANALYSIS

Clearly, Kendricks' testimony was not entirely consistent. Although at first testifying that Morris was the shooter, he later wavered, claiming that he was not sure because he really only saw the car and the clothing of the shooter. However, even accepting that he only saw the shooter's car and clothing, he also testified that the shooter's car and clothing matched the car and clothing that Morris wore earlier in the day. And Kendricks repeatedly confirmed that despite his hesitation, he ultimately was "positive" that Morris was the person who shot McCullough. Moreover, his statements in the immediate aftermath of the shooting, before he had time to "sit[] and hav[e] the chance to just think, you know, think about the possibility of making the wrong judgments" supported his identification of Morris as the shooter. To the extent that Kendricks' wavering called his credibility into question, resolution of any questions

regarding his credibility were within the province of the jury.[9] And we defer to the jury's superior ability to resolve such questions on the basis of its firsthand observations.[10] Therefore, we conclude that there was sufficient evidence on the record to support a rational trier of fact in finding that Morris was the shooter.[11]

C. PREMEDITATION

Morris also argues that the prosecution presented insufficient evidence to support his conviction for premeditated, first-degree murder. He contends that there was no evidence of prior planning and that he did not have a chance to cool down and reflect after his long-time friend beat him in front of his girlfriend.

Premeditated, first-degree murder is a "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing."[12] "'To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.'"[13] When determining whether a murder was premeditated and deliberate, a court should consider the totality of the circumstances.[14] Timing is an important factor to determine if the elements of premedication and deliberation were present. "'[Some] time span between initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation[.]'"[15] Courts should consider (1) whether the homicide occurred during a sudden affray where the act was done on a sudden impulse or (2) whether the defendant had time to take a "second look."[16] That is, "'[w]hile the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a "second look."'"[17]

> Factors to be considered in determining whether the accused had an opportunity to subject his actions to a second look include: (1) the previous relationship of the

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[9] *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004); *Hawkins*, 245 Mich App 459.

[10] *Fletcher*, 260 Mich App at 561; *Hawkins*, 245 Mich App 459.

[11] *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

[12] MCL 750.316(1)(a).

[13] *People v Meadows*, 80 Mich App 680, 691; 263 NW2d 903 (1977), quoting *People v Morrin*, 31 Mich App 301; 187 NW2d 434 (1971).

[14] *People v Tilley*, 405 Mich 38, 44; 273 NW2d 471 (1979).

[15] *Id.* at 45, quoting *People v Hoffmeister*, 394 Mich 155, 161; 229 NW2d 305 (1975).

[16] *Id.* at 44-45.

[17] *Id.* at 45, quoting *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975).

> parties, (2) the defendant's actions prior to the actual killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide.[18]

"Time and again the Michigan Supreme Court has reversed convictions where the evidence of premeditation and deliberation was insufficient to warrant submission of a charge of first-degree murder to the jury."[19] However, "[i]n each case, the homicide occurred during an affray whose nature would not permit cool and orderly reflection."[20] That is, the intent must be "formed by a mind free from undue excitement. Deliberation means that the act is done in a cool state of blood."[21]

Morris argues that he did not have a cool state of mind, noting that the record did not show that he had calmed down after being beaten and before the fatal shooting. We disagree. Here, Morris and McCullough had a prior relationship that tended to show motive.[22] They had been friends for a long time, and Morris had recently sold McCullough a car. Indeed, the two men had fought earlier in the day over money that McCullough still owed Morris for the car. McCullough could not or would not pay the money, and he ended up punching Morris while Morris' girlfriend watched. Morris also told McCullough that, "[Y]ou ain't the only person with friends and guns and stuff like that." Morris ultimately left in a car with his girlfriend, but then returned alone 25 to 30 minutes later, got out of his car, and started shooting, killing McCullough.

Although Morris was likely still upset about the altercation that had transpired earlier in the day, the evidence supports that he had time to premeditate and deliberate the killing. The homicide did not occur as part of the original affray between the two men.[23] Before he left, Morris indicated that he had access to a gun, but apparently did not have a gun with him at the time. As a result, he left the scene, retrieved a gun, came back 25 to 30 minutes later, got out his car, and started shooting. There was ample time for him to take a second look before the homicide occurred. Accordingly, we conclude that there was sufficient evidence to support the jury's verdict of premeditated, first-degree murder.

III. MANSLAUGHTER JURY INSTRUCTION

Morris argues that the trial court denied him his right to due process when it failed to sua sponte instruct the jury on the elements of manslaughter. However, the trial court specifically

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[18] *Meadows*, 80 Mich App at 691.

[19] *Morrin*, 31 Mich App at 330-331.

[20] *Id.* at 331.

[21] *Id.* at 330 n 46 (citations and quotations omitted).

[22] See *Meadows*, 80 Mich App at 691; *Morrin*, 31 Mich App at 331.

[23] *Morrin*, 31 Mich App at 331.

asked counsel for both parties, "Are there any objections or corrections as to the jury instructions as read to the jury?" Defense counsel answered, "On behalf of Mr. Morris, no, your Honor." By expressly approving the instructions, Morris waived this issue for appeal.[24]

IV. EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Morris argues that his defense counsel was constitutionally ineffective by failing to call an alibi witness, by providing inadequate advice regarding his decision whether to testify, and failing to request a jury instruction on the lesser included offense of voluntary manslaughter.

Morris did not raise these issues in an evidentiary hearing or motion for new trial.[25] Further, this Court denied Morris' motion to remand for an evidentiary hearing.[26] Therefore, these issues are unpreserved, and we will only consider Morris' claims to the extent that defense counsel's claimed mistakes are apparent on the record.[27]

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.[28] To prove that his defense counsel was not effective, a defendant bears the burden to show (1) that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that defense counsel's deficient performance so prejudiced the defendant that it deprived him of a fair trial; that is, but for defense counsel's errors, the result of the proceeding would have been different.[29] In proving these elements, the defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy.[30] We evaluate defense counsel's performance from counsel's perspective at the time of the alleged error and in light of the

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[24] *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

[25] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

[26] *People v Morris*, unpublished order of the Court of Appeals, entered Nov. 16, 2010 (Docket No. 294652).

[27] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[28] US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[29] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[30] *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003); *People v Rice* (*After Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

circumstances.[31] Defense counsel's words and actions at trial are the most accurate evidence of what his strategies and theories were at trial.[32]

C. ALIBI WITNESS

1. UNDERLYING FACTS

Before the prosecution rested, the prosecutor asked the trial court for permission to discuss LaKeisha Smith's status as a prosecution witness. The prosecution explained to the trial court that Smith was Morris' girlfriend, who had made a statement to the police that she was the woman who was driving the car when Morris came to the house to ask McCullough about the money he owed. In her statement, Smith told the police that, after the fight, she and Morris went home and remained there together for the rest of the evening. The prosecutor explained that, based on her alleged, and "incredible," alibi for Morris, the prosecutor chose to list her as a potential witness.

According to the prosecutor, despite his intent to call Smith as a witness, several weeks before trial, the police had told him that they were unable to locate Smith. But then, 10 days before trial, defense counsel informed the prosecutor that he intended to call Smith as an alibi witness. The prosecutor stated that he told defense counsel that, if he could produce her, the prosecution would "have no problem" with her testifying. But then, a few days before trial, defense counsel informed the prosecutor that he was not going to call Smith after all because she was in Colorado and was "not going to come back." Thus, the prosecutor offered, "Under the circumstances, I think, [defense counsel] would agree [Smith] is not available and neither side is going to call her." Defense counsel then agreed, "[t]hat's correct," on the record.

Later in the proceedings, defense counsel asked the trial court for permission to ask Morris about the decision not to call Smith as an alibi witness. The following exchange then transpired:

> *Q.* Mr. Morris, your girlfriend, at the time this incident occurred, her name is LaKeisha?
>
> *A.* Yes.
>
> *Q.* At one point you wanted me to file a Notice of Alibi and call her as a witness; is that correct?
>
> *A.* Yes.

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[31] *Strickland*, 466 US at 689.

[32] *People v Grant*, 470 Mich 477, 487; 684 NW2d 686 (2004).

Q. And after speaking to her, I told you that I thought it was in your best interest not to call her; is that correct?

A. Yes.

Q. But it is your decision that I not call her as a [sic] alibi witness?

A. Yes.

Q. And we did discuss this in depth, did he we [sic] not?

A. Yes.

2. ANALYSIS

A defendant is entitled to have his defense counsel prepare, investigate, and present all substantial defenses.[33] "Decisions concerning which witnesses to call . . . are considered part of trial strategy."[34] Where there is a claim that defense counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial.[35] A substantial defense is one that might have made a difference in the trial's outcome.[36]

The record establishes that Morris had a substantial defense based on alibi: Smith made a statement to police that Morris was at home with her at the time of the shooting. But the record also shows that Morris' defense counsel made a strategic decision not to present Smith as an alibi witness. Rather, defense counsel opted, as a matter of strategy, to base the defense case on impeachment of Kendricks' credibility. That defense counsel's trial strategy was unsuccessful does not render his assistance ineffective.[37] Morris has not overcome the presumption that his defense counsel's strategic decisions were sound or reasonable. He has not offered any reasons why defense counsel's strategic decisions were erroneous. Without such an offer of proof, the presumption applies that defense counsel made sound decisions with regard to what defense to present.

Further, the trial record evidences not only that the parties stipulated that Smith was unavailable to testify, but also that even if she was available, defense counsel made the decision not to offer her as a witness for strategic reasons. And, more importantly, the record establishes

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[33] *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

[34] *People v Bass* (*On Rehearing*), 223 Mich App 241, 252-253; 565 NW2d 897 (1997).

[35] *Kelly*, 186 Mich App at 526.

[36] *Id.*

[37] *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

that Morris expressly approved defense counsel's strategy. Therefore, we conclude that there is no merit to Morris' argument that his defense counsel was ineffective by failing to call Smith as an alibi witness.

D. DEFENSE COUNSEL'S ADVICE

1. UNDERLYING FACTS

Out of the jury's presence, Morris waived his right to testify on the record. Specifically, the following exchange transpired between Morris and the trial court:

> *Q.* Mr. Morris, you have a Constitutional right to defend yourself with your own testimony. So too you have a Constitutional right to remain silent. If you choose to give testimony in your own defense, your testimony will be judged by the ladies and gentlemen of the jury just as they judge the testimony of any other witness who has or may give testimony in regard to this case, do you understand?
>
> *A.* Yes, your Honor.
>
> *Q.* If you choose not to give testimony, I will actually instruct the jury that you have an absolute right to remain silent and they cannot use your silence to determine whether you're guilty or not guilty, do you understand?
>
> *A.* Yes, your Honor.
>
> *Q.* Now you have the opportunity of discussing the advisability or the ill-advise of your testifying with your counsel . . . ever since the inception of this case; is that correct?
>
> *A.* Yes.
>
> *Q.* The decision, however to give testimony or not to give testimony is your to be made not [defense counsel's], do you understand?
>
> *A.* Yes.
>
> *Q.* Knowing that, have you made some decision as to whether you will or will not testify?
>
> *A.* I would like to stay silent.
>
> *Q.* Like to stay silent, okay. Are you pleased with the representation that [defense counsel] has afforded you during the course of this case?
>
> *A.* Yes.

2. ANALYSIS

Despite Morris' arguments regarding the allegedly inadequate advice rendered by defense counsel, because this issue is unpreserved, we review only for errors that are apparent on the lower court record.[38] And the record evidences that Morris not only expressly waived his right to testify in his own defense, but also expressly approved his defense counsel's representation. Waiver by affirmative approval extinguishes any claimed error and precludes appellate review.[39] Therefore, we conclude that there is no merit to Morris' argument that his defense counsel was ineffective in his advice regarding Morris' decision whether to testify.

E. REQUEST FOR JURY INSTRUCTION

Morris' counsel did not object to the trial court's failure to include a voluntary manslaughter instruction in the jury charge, thereby waiving appellate review, unless there is a miscarriage of justice.[40] Here, there was no miscarriage of justice because there was no evidence to support the lesser offense of voluntary manslaughter. "A homicide may be reduced to voluntary manslaughter if the circumstances surrounding the killing show that malice was negated by adequate and reasonable provocation and the homicide was committed in the heat of passion."[41] But the evidence at trial did not support a finding of provocation or that Morris acted with a state of mind incapable of cool reflection. "A claim of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal is without merit."[42] "Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile."[43] Accordingly, defense counsel was not ineffective by failing to object to the trial court's instructions to the jury.

V. DOUBLE JEOPARDY

A. STANDARD OF REVIEW

In his pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, Morris argues that the trial court violated his right to be free from double jeopardy when he was found guilty of both felon in possession and felony firearm and then sentenced to consecutive terms for both offenses. However, Morris' claim of error is without merit. It is well established that the Legislature clearly intended to permit a defendant to

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[38] *Jordan*, 275 Mich App at 667.

[39] *People v Carter*, 462 Mich 206, 208-209, 213-219; 612 NW2d 144 (2000).

[40] *People v Harris*, 190 Mich App 652, 660-661; 476 NW2d 767 (1991).

[41] *Id.* at 661.

[42] *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

[43] *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

be given multiple punishments when charged and convicted of both felon in possession and felony-firearm.[44]

We affirm.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

[44] *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001).