STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 1, 2012
v	No. 302502 Oakland Circuit Court
BOBBY PRINCE MCGOWAN, Defendant-Appellant.	LC No. 2010-230996-FC

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

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316; assault with intent to murder, MCL 750.83; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Before the jury trial, defendant pleaded guilty to felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals by right. We affirm.

There was a Sweet Sixteen birthday party on December 18, 2009 at the VFW Hall at 177 Vester in the City of Ferndale. About 100 to 150 people attended the party. At the party, Tyshawn Thompson was shot but survived, and Charles Dorchy was shot and died. Defendant went to the party with Jonathan Woods, Willie Johnson, KJ Glover, and someone referred to only as Daniel. Some guests at the party recalled seeing defendant and his friends having an argument with Thompson and Dorchy. Woods testified that at the party there was a man flashing his money, so Woods, defendant, and Glover left the party to get a gun from the house where defendant and Woods lived, brought the gun back to the party, and were planning to rob the man with the money. Someone referred to only as Nunu was at defendant's house during this evening, but he did not go to the party.

Once Woods and his friends returned to the party, people were yelling or chanting to a song where they were from, saying either "8 Mile," "State Fair," or "Joy Road." At this point, the party was getting rowdy. According to Woods, defendant was wearing a jacket that said "High Roller" on it and had the gun pulled inside his sleeve. When the song ended, defendant pulled the gun out of his sleeve and shot it. Woods saw two people, Thompson and Dorchy, fall down at the same time.

Eretawyelsomondia Jackson was standing behind defendant when he shot the gun. He wrestled the gun from defendant. Jackson was on probation at the time and concerned about

getting caught with a gun. He took the gun, wiped off any fingerprints, wrapped the gun up, and then threw it on the roof of a recreation center. Jackson later led police to the gun. An expert testified that the fragments removed from Dorchy's body were consistent with both ammunition from a 12-gauge shotgun and the gun recovered from the roof of the recreation center.

Javonte Riggins was at the party and testified that he saw defendant reach for the gun and then heard the shot. Although Desiray France was at the party and testified that she saw defendant with a gun at the party, she did not see him actually fire it.

When shown photographic lineups, Jackson identified defendant; France and Thompson did not.

LaShawnda Hawkins called the police department after the shooting and reported that Willie Johnson told her he did the shooting. Lieutenant William Wilson met with Hawkins. Hawkins was subpoenaed for trial but did not appear. When officers went to her home to bring her to court, Hawkins's mother informed them Hawkins had left the state because she was afraid. Lieutenant Wilson testified that Hawkins told him that Johnson said he had shot the victims. Although Johnson was arrested and interviewed, he was released without being charged.

During the trial, defense counsel questioned witnesses about gang involvement. Riggins testified that Jackson, Dorchy, and Thompson were not in gangs. But he also testified that Jackson was "giving signs" for 8 Mile at the party, that 8 Mile was not a gang; it was where Jackson lived. Thompson was wearing a hat that said "8 Mile" on it, but he too testified that 8 Mile was not a gang. Dorchy also had a hat that said "8 Mile" on it. Jackson testified that none of his friends were in gangs, but that he had heard of the 8 Mile gang. When asked about gang signs at the party, Jackson acknowledged that some of the boys with defendant wore shirts that said "RIP, DJ" and that people were calling out what street they were from. Woods testified that he was not a member of any gang, and he did not know if defendant was.

Defendant appeals his convictions, asserting he is entitled to a new trial or remand for an evidentiary hearing. He claims he was denied effective assistance of counsel when trial counsel asked witnesses gang-related questions and failed to call Johnson, Daniel, and Nunu as witnesses.

Defendant failed to preserve the issue of ineffective assistance of counsel, and this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the strong presumption that trial counsel's action was sound trial strategy. *Id.* To establish prejudice, defendant must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. at 302-303 (citation omitted).

First, defendant argues trial counsel was ineffective because he portrayed the events that culminated in the shooting as gang-related and unnecessarily provided a motive for the shootings. Although defense counsel asked gang-related questions, defense counsel's strategy

was premised on the fact that Hawkins told police that Johnson admitted the shootings and that Hawkins was afraid to testify. Defense counsel did not mention gangs in closing arguments. The questions defense counsel asked about gangs elicited little testimony and, most notably, denials from Thompson, Woods, Riggins, and Jackson that they were involved in gangs. Defendant has not shown it was an unreasonable strategy for counsel to lay seeds of doubt about the prosecution's case by suggesting the incident was a gang-related shooting as to which the full truth was not revealed by the prosecution's witnesses. *Toma*, 462 Mich at 302.

Moreover, the evidence against defendant was substantial. Riggins, Jackson, and Woods all testified that defendant did the shooting. Defendant was arrested wearing the jacket France described the shooter wearing. Given the evidence against defendant, there were not many trial strategies available to defense counsel. "[T]his court neither substitutes its judgment for that of counsel regarding trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Here, defense counsel's strategy took advantage of the evidence that was the most beneficial to defendant: that Hawkins told the police Johnson said he committed the shooting.

Moreover, defendant cannot establish that, but for defense counsel's conduct, there is a reasonable probability that the outcome of the trial would be different. *Toma*, 462 Mich at 302-303. No witnesses testified that there was gang activity involved. Further, the trial court instructed the jury that although they could consider if defendant had a reason to commit the alleged crime, a reason to commit the crime is not sufficient evidence on which to base guilt. The trial court also instructed the jury that counsel's questions were not evidence, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Given the evidence against defendant, he has not established a reasonable probability that if counsel had chosen another trial strategy, the outcome of trial would have been different. *Toma*, 462 Mich at 302-303. Defendant has not established his claim of ineffective assistance with respect to trial counsel's questioning witnesses about gang involvement.

Second, defendant argues that defense counsel was ineffective because he failed to request that certain witnesses testify. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Further, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense is substantial if it might have altered the trial's outcome. *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

Defendant argues that Johnson, Daniel, and Nunu should have been called as witnesses. As to Johnson, defendant notes the double hearsay that Hawkins said he was the shooter. But the police investigated this allegation, arrested and interviewed Johnson before releasing him without filing any charges. The record does not indicate Johnson would have testified that he did the shooting. Instead, it is likely he would have asserted his Fifth Amendment right to silence or implicated defendant. Furthermore, had Johnson testified, he might have denied ever making the statement that he was the shooter.

As for Daniel, defendant argues that Daniel was the one who suggested they leave the party to get the gun. But, nothing in the record supports that Daniel would admit this, and he,

too, might have simply asserted his Fifth Amendment to not testify. Further, even if Daniel admitted that he suggested getting the gun, it would not negate the evidence that defendant was the shooter.

Finally, defendant argues that Nunu might have provided valuable testimony. Again, there is no evidence in the record suggesting as to how Nunu might have testified. In sum, defendant has not established that counsel's failure to present Johnson, Daniel and Nunu as witnesses denied him a substantial defense. *Dixon*, 263 Mich App at 398; *Kelly*, 186 Mich App at 526-527. He has not demonstrated that counsel's decision as to these witnesses fell below an objective standard of reasonableness, or that if these witnesses had been called, there is a reasonable probability the outcome of the trial would have been different. *Toma*, 462 Mich at 302-303.

Finally, while defendant argues that he is, at least, entitled to an evidentiary hearing, he has failed to follow the requirements necessary to seek such a hearing. MCR 7.211(A), (C)(1).

We affirm.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey