

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL DENARD DANCY,

Defendant-Appellant.

UNPUBLISHED

June 13, 2013

No. 309319

Wayne Circuit Court

LC No. 11-010046-FC

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant Daniel Denard Dancy appeals by right his jury convictions of assault with intent to commit murder (two counts), MCL 750.83, assault with intent to commit armed robbery, MCL 750.89, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. The trial court sentenced him to serve concurrent prison terms of 12 years and six months to 25 years in prison for the three assault convictions, to serve five to 20 years for the home invasion conviction, and to serve a consecutive two-year term for felony firearm conviction. Because we conclude there were no errors warranting relief, we affirm.

On appeal, Dancy argues that his trial lawyer did not provide him with effective assistance at trial. Specifically, he contends that his lawyer's failure to obtain an expert on eyewitness testimony fell below an objective standard of reasonableness, as did his failure to properly impeach certain eyewitnesses. Because the trial court did not hold an evidentiary hearing on Dancy's ineffective assistance claims, this Court's review is limited to mistakes that are apparent on the record alone. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), leave denied in relevant part 493 Mich 864.

In order to establish his ineffective assistance claims, Dancy must establish that his trial lawyer's decision to refrain from calling an expert on eyewitness identification and his decision to address the eyewitnesses' testimony in the manner that he did fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for these errors, the result of his trial would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "This Court reviews de novo, as a question of constitutional law, the determination that a particular act or omission fell below an

objective standard of reasonableness under prevailing professional norms and prejudiced the defendant's trial." *Gioglio*, 296 Mich App at 19-20.

Dancy must also overcome the presumption that his trial lawyer's decisions were matters of sound trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *Gioglio*, 296 Mich App at 22 (citation omitted). As such, "if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known" to this court, "there might have been a legitimate strategic reason for the act or omission," we must conclude that Dancy's trial lawyer's decision to proceed as he did "fell within the range of reasonable professional conduct." *Id.* at 22-23.

Here, because the video surveillance was so poor, the verdict depended on the reliability of the eyewitness testimony. Dancy's lawyer thoroughly covered the flaws in the identification testimony during cross-examination and closing arguments. He even told the jury that an expert on identification was unnecessary, essentially because the flaws were so obvious. Moreover, we can conceive of reasons that might lead a reasonable lawyer to forego an expert on eyewitness testimony. Dancy's lawyer might have thought that an expert was unnecessary given the obvious flaws in the eyewitness testimony and, for that reason, might have reasonably concluded that the expert's testimony would distract, annoy, or bore the jury. Therefore, on this record, Dancy has not overcome the presumption that his trial lawyer's decision to forego an expert on eyewitness testimony fell within the range of reasonable professional conduct. *Id.*

At trial, Dancy's lawyer conceded that someone committed the crimes at issue, but argued that the eyewitnesses misidentified Dancy as that man. To that end, Dancy's lawyer explored the inconsistencies between the witnesses' past statements and their testimony during cross-examination and closing arguments. And an officer testified regarding their initial description of the perpetrator as significantly taller. Although Dancy might have preferred a harsher or more extensive cross-examination on these issues, a reasonable lawyer might conclude that such a course of cross-examination would alienate the jury and was otherwise unnecessary. See, e.g., *People v Nickson*, 120 Mich App 681, 686 & n 2; 327 NW2d 333 (1982).

Dancy's lawyer also explored the fact that the witnesses might have been involved with drugs. He elicited testimony that one witness had sold marijuana from the home. He used this evidence to argue that the robbery may have been a drug house robbery and he suggested that the witnesses' identification testimony was unreliable because they were under the influence of marijuana. He did not ask the witnesses whether they smoked marijuana that day; however, the primary eyewitness had previously testified that she did not and there is nothing on the record indicating Dancy's lawyer could have proven otherwise. Therefore, the decision to proceed in this way might have been the most effective strategy available to Dancy's lawyer.

Dancy has not overcome the presumption that his trial lawyer's decision to forego an expert on eyewitness testimony and to challenge the eyewitness testimony in the manner that he did fell below an objective standard of reasonableness under prevailing professional norms. *Gioglio*, 296 Mich App at 22-23. Therefore, he has not established that his trial lawyer was ineffective. *Uphaus*, 278 Mich App at 185.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly

/s/ Christopher M. Murray

/s/ Mark T. Boonstra