

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 25, 2013

v

FRANCHOT PRATHER,

Defendant-Appellant.

No. 310005
Wayne Circuit Court
LC No. 11-008969-01-FC

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to commit murder, MCL 750.83, felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to serve concurrent terms of 35 to 75 years for assault with intent to commit murder, 54 months to 15 years for felonious assault, and 72 months to 15 years for felon in possession of a firearm, with a consecutive sentence of five years for his second conviction of felony firearm. We affirm.

BASIC FACTS

On the evening of August 4, 2011, Jamil Lockheart was drinking beer with his neighbor on the neighbor's front porch when defendant rode up on his bicycle and started talking to the neighbor about purchasing some marijuana. A brief verbal exchange between Lockheart and defendant resulted in defendant's challenge to resolve their differences in a nearby vacant lot. Lockheart, presuming they would settle their disagreement by fisticuffs, accepted the challenge. He took two steps toward the lot, saw defendant pull a gun from his waistband, and immediately turned around and headed for home. Lockheart heard a gunshot, felt a bullet hit his leg, and fell to the ground. He hopped up and tried to run home, but defendant shot him in the other leg. As Lockheart tried to crawl away, defendant shot him again. In all, defendant shot Lockheart under the heart, twice in the left-side ribs, twice in the left leg, and once in the right leg. Defendant then pointed the gun at Lockheart's head. As Lockheart pled with defendant and tried to duck and dodge, defendant pulled the trigger again, sending a shot past Lockheart's head before running away.

Prior to the trial, defendant moved to exclude a gunshot-residue field test performed at the police station by the detective in charge of the investigation. Defendant objected to the

admissibility of the test based on the absence of a written document or physical record of the test. The trial court declined to rule the testimony inadmissible, however, stating instead that the prosecutor would lay a foundation for the test results, the defense could voir dire the witness, and the trial court would then decide whether the testimony was admissible pursuant to the rules of evidence.

During the trial, Lockheart testified that defendant shot him. In addition, Vanessa Williams testified to having witnessed defendant shoot Lockheart. Williams stated that she was sitting in a vehicle parked nearby and had an unobstructed view of defendant aiming a gun at Lockheart and of “fire” coming from the defendant’s gun. Steven Salas, the detective who investigated the shooting, testified to the chronology and conduct of the investigation. During the course of her direct examination, the prosecutor asked Salas briefly to describe the gunshot residue field test he had used, how he had performed the test, and whether the results indicated the presence of gunshot residue. Salas explained that the test was a specified “naco [sic] style pouch detection tool that most police departments use in order to identify whether or not a person had fired a handgun or any other type of gun within the past three days.” Describing the results of the test, Detective Salas stated,

I returned that strip [with which he had swabbed defendant’s hands] to the pouch and busted the chemical ampule [sic] inside, the chemical would react with gunpowder, and within the three to four minutes that you’re instructed to wait for that chemical reaction, I did notice the presence of several black or blue particles showing that there was gunpowder residue on those sample swabs.

ANALYSIS

Defendant first argues that the trial court committed reversible error when it admitted scientific evidence without adequate legal foundation, and allowed a non-expert to testify to the results of the gunshot residue test. Defendant objected pretrial to the admissibility of the gunshot residue test because there was no written document or physical record of the test. During the trial, he neither renewed his objection, nor objected to what he now raises on appeal: the alleged scientific nature of Salas’ testimony at trial. Consequently, defendant has failed to preserve this issue for appeal. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (“An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.”). Absent a timely objection or a motion to strike made on the record at trial, a party is precluded from challenging the admission of evidence on appeal except in cases of plain error. MRE 103(a)(1). Therefore, to avoid forfeiture of his appellate claim, defendant must prove that (1) error occurred, (2) the error was plain, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Only when defendant has met this burden of proof does this Court exercise its discretion in deciding whether to reverse. *Id.* We reverse only when the error “resulted in the conviction of an actually innocent defendant or when an error “seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

On the record before us, we do not find that the trial court erred in admitting the detective’s testimony about his performance of the gunshot-residue field test. It appears from the

record that the detective was not testifying as an expert witness (MRE 702), but was describing what he did during his investigation and rendering an opinion based on his perceptions. MRE 701. However, assuming for the sake of argument that the trial court did err in admitting his testimony, the weight of undisputedly admissible testimony renders the error harmless. The victim was clear about who shot him. A witness to the shooting who knew defendant from the neighborhood and had an unobstructed view also testified to seeing defendant with a gun aimed at Lockheart, seeing “fire” coming from the gun’s barrel, hearing a gunshot, and seeing Lockheart bend and fall over. Defendant’s alibi witness was unable to give a complete alibi, admitting that defendant could have gone to the scene and come back before she returned to pick him up. Viewing the evidence as a whole, there was ample evidence to convict defendant without the gunshot-residue testimony, and refusal to reverse defendant’s convictions on this ground is not inconsistent with substantial justice.

Defendant next argues that his counsel was ineffective for failing to renew his objection to the gunshot-residue testimony. To establish ineffective assistance of counsel, 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) (quoting *People v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). With regard to deficient performance, defendant must overcome a strong presumption of adequate representation. *People v Toma*, 462 Mich at 302. With regard to prejudice, defendant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (quoting *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997)). “Because defendant failed to move for a new trial or request a *Ginther* hearing below, our review of this issue is limited to mistakes apparent on the appellate record.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

We conclude that defense counsel’s failure to renew his objection to the admissibility of testimony about the gunshot-residue field test or to object to the alleged scientific nature of Salas’ testimony during the trial was neither deficient nor prejudicial. The record clearly shows that defense counsel employed a strategy of rigorous cross-examination to minimize the significance of Salas’ testimony. Through his cross-examination, defense counsel developed several theories of contamination and established that Salas had not photographed or retained the results of the test. Defense counsel also established that Salas was not an expert in gunshot residue, and did not know the composition of gunpowder, how far a fired weapon would disperse

gunshot residue, or the science behind the results of the gunshot-residue field test. Defense counsel's thorough and painstaking cross-examination does not appear from the record to have been deficient. However, assuming for the sake of argument that it was ineffective, defendant has not established that, but for counsel's alleged deficient performance, there is a reasonable probability that the outcome would have been different. *People v Toma*, 462 Mich at 303.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause