

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD D. BALDWIN,

Defendant-Appellant.

UNPUBLISHED

July 16, 1996

No. 175623

LC No. 93-010847

Before: Gribbs, P.J., and Saad and J. P. Adair.* JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the murder conviction, twenty to forty years' imprisonment for the assault conviction, and two years' imprisonment for the felony-firearm conviction; the murder conviction and the assault conviction to ordered run concurrently, but consecutive to the felony-firearm sentence. Defendant appeals as of right. We affirm.

Defendant first contends that he was denied the effective assistance of counsel because trial counsel failed to subpoena and secure the attendance of his alibi witnesses, filed an alibi notice that was not ratified by him, and questioned him about his drug trafficking during direct examination when it bore no relevancy to the case. We disagree.

To establish ineffective assistance of counsel, defendant must first show that counsel's error was serious under an objective standard of reasonableness. Second, defendant must show that the deficient performance prejudiced the defense so that the error may have affected the outcome. Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721(1995); *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994).

* Circuit judge, sitting on the Court of Appeals by assignment.

A review of the record reveals that trial counsel interviewed the witnesses listed on the alibi notice and informed the trial court that he may not call those witnesses because their testimony was unfavorable. Regardless, trial counsel obtained the court's assistance in securing those witnesses for trial. Two of the witnesses were successfully subpoenaed. The other witnesses, however, were avoiding service. The decision not to call these witnesses was sound trial strategy, and hence, defendant did not receive ineffective assistance of counsel *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Further, trial counsel only filed an alibi notice so that he would not be precluded from calling the witnesses should their testimony be favorable. Trial counsel was given an opportunity to explain his rationale for listing the witnesses by calling defendant to the stand; however, counsel declined to do so. There was no offer of proof as to how these witnesses would have assisted defendant with a defense. Counsel's performance did not deprive defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; ___ NW2d ___ (1995).

Lastly, trial counsel's questioning of defendant about his drug trafficking was relevant to his defense. During his testimony, defendant attempted to convey to the jury that, as a drug dealer, he needed to carry a gun for protection and that he had no motive to commit robbery or murder because he made a good income. As a matter of trial strategy, the testimony was necessary. *Barnett, supra*, p 338.

Defendant next asserts that his right to confrontation was denied when the trial court refused to allow counsel to explain to the jury the reason for filing the alibi notice. We disagree. By allowing trial counsel to testify as a hostile witness, counsel would have had to withdraw as defendant's appointed counsel and defendant would have had to hire another attorney. The rights guaranteed by the Confrontation Clause of the Sixth Amendment are not absolute and must be interpreted in the context of the necessities of trial and the adversary process. *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1991). Thus, the trial court properly weighed those rights and determined that defendant could resolve the quandary by taking the stand himself.

Defendant further argues that the introduction of evidence of his drug trafficking denied him a fair trial. We disagree. The defense at trial was that defendant did not commit these crimes. Defendant, however, had to explain that he did not shoot the decedent when in fact his gun was used in the shooting. During direct examination, defendant told the jury that, as a drug dealer, he carried cash and a gun and that he had no motive to commit robbery or murder because he made a good income. Hence, this testimony was relevant to his defense. Similarly, the prosecution's cross-examination of defendant regarding his drug dealings was the consequence of trial counsel's direct examination. Defendant cannot now be heard to complain regarding questions asked by the prosecution when he himself opened the door concerning such evidence in an effort to support his defense. *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988).

Lastly, defendant contends that the trial court erroneously instructed the jury that it could infer that a person intends the usual results which follow from the use of a dangerous weapon, without informing the jury that it was a permissive inference. Defendant did not object to the jury instructions below and this issue is waived absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice. We note that the jury instruction given by the trial court was a verbatim reading of CJI2d 16.21(3) and (4). Also, the word "shall" is generally used to designate a mandatory provision, while "may" designates discretion, and "may be" indicates a possibility. *Mull v Equitable Life Assurance Society*, 444 Mich 508, 519; 510 NW2d 184 (1994); *People v Kelly*, 186 Mich App 524, 529; 465 NW2d 569 (1990). Thus, the jury instruction left the jury with the discretion of inferring an intent to kill.

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ James P. Adair