

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMEL WATTS,

Defendant-Appellant.

UNPUBLISHED

July 30, 1996

No. 182210

LC No. 93-008740

Before: Hood, P.J., and Griffin and J. F. Foley,* JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

I

Defendant argues that he was denied the effective assistance of counsel. When considering such a claim, this Court reviews the available record to determine whether defendant's counsel's performance "fell below an objective standard of reasonableness and . . . so prejudiced the defendant that the defendant was deprived of a fair trial." *People v Northrop*, 213 Mich App 494, 497; 541 NW2d 275 (1995). Defendant claims that his counsel was ineffective in failing to interview and call at trial various witnesses. A defense counsel's decisions whether to call witnesses are presumed to be matters of trial strategy which cannot give rise to a claim of ineffective assistance of counsel. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To overcome this presumption, a defendant must demonstrate that the failure to call the witness deprived him of a substantial defense which would have affected the outcome of the trial. *Id.* Neither of the witnesses who testified at the evidentiary hearing would have provided defendant with a substantial defense which would have affected the outcome of his trial. Defendant has not overcome the presumption of trial strategy.

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

Defendant argues that his counsel was ineffective in failing to file a notice of alibi or otherwise anticipating that the trial court would rule that defendant's witness was giving alibi testimony. Defendant cannot establish that he was prejudiced because the witness testified at trial and the prosecution was free to argue the witness' credibility regardless of whether the alibi notice instruction had been given.

Defendant claims that his counsel was ineffective because he failed to call defendant to testify at trial. Because defendant did not testify at the evidentiary hearing, his testimony is not known and this Court cannot determine whether defendant was prejudiced by not testifying.

Next, defendant argues that his counsel was ineffective because he failed to discover, prior to trial, that witness Adkins would identify defendant as the person who shot the victim. Because Adkins did not give a statement to the police and did not testify at the preliminary examination, and the prosecutor indicated he did not know until the weekend before trial that Adkins could identify defendant, his counsel did not act unreasonably in failing to discover Adkins' testimony.

Defendant claims that his counsel was ineffective by failing to object to the trial court's prohibition on obtaining home or work addresses for prosecution witnesses. Defendant cannot show that he was prejudiced by this failure, and thus has failed to establish that his counsel was ineffective in this respect.

Defendant asserts that his counsel was ineffective because he did not object to comments by the prosecution regarding gangs and gang violence. Since none of the remarks defendant cites caused him to be denied a fair trial, his counsel was not ineffective in failing to make this objection.

Defendant argues that his counsel was ineffective in failing to object to prosecution questions which elicited the fact that defendant had been charged with this crime and incarcerated. The testimony defendant cites does not clearly state that defendant was incarcerated at the time of trial, and the jury obviously knew already that defendant had been charged with this crime. There was no ineffective assistance.

Defendant also claims that his counsel was ineffective because he failed to object to the prosecution's questioning of defense witness Kinney regarding why she did not contact the police and regarding her contacts with defendant's friends. Defendant has not demonstrated how he was prejudiced by these questions.

Finally, defendant argues that his counsel was ineffective in failing to object to the aiding and abetting instruction given to the jury. Because the instruction was proper, defendant cannot demonstrate prejudice. We thus conclude that defendant was not denied the effective assistance of counsel.

II

Defendant contends that the trial court abused its discretion in determining that defense witness Kinney was an alibi witness. An alibi witness is one who testifies that defendant was elsewhere than at

the scene of the crime. *People v Mott*, 140 Mich App 289, 292; 364 NW2d 696 (1985). Because Kinney testified that defendant had just entered her house when she heard the shots which killed the victim, Kinney was an alibi witness. See *People v Gillman*, 66 Mich App 419, 424-425; 239 NW2d 396 (1976).

Defendant also contends that the trial court erred by instructing the jury that defendant failed to file the notice of alibi required by MCL 768.20; MSA 28.1043. The trial court was actually required by MCL 768.20; MSA 28.1044 to exclude defendant's alibi testimony altogether since he failed to file the required notice. Defendant cannot complain regarding the compromise the trial court chose under these circumstances.

III

Defendant asserts that the trial court abused its discretion by refusing to permit him to cross-examine prosecution witnesses regarding their home or work addresses. A trial court has the discretion to limit questioning regarding residence but normally cannot preclude it altogether. *People v Sammons*, 191 Mich App 351, 366-367; 478 NW2d 901 (1991). The concern is whether a defendant is prejudiced. *Id.* Defendant has not shown that he was prejudiced by the trial court's prohibition.

IV

Defendant argues that the prosecution improperly emphasized the theme of gangs and gang violence during the trial. However, defendant fails to identify any explicit references in the record to "gangs" or to "gang violence." Accordingly, there was no miscarriage of justice.

Defendant also argues that the prosecution engaged in reversible misconduct by arguing that the theme of the case was, "Boys in the 'hood.'" Considered in context, the prosecution was arguing its theory of the case, which was not improper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant also argues that the prosecution made improper remarks when he spoke about justice in America and due process of law for the Ruff family and the other boys in the van. These remarks were made during rebuttal in response to defendant's counsel's reference to "justice in America" and were not improper. *People v Sharbnow*, 174 Mich App 94, 100-101; 435 NW2d 772 (1989).

V

Defendant asserts that the trial court erred in giving an aiding and abetting instruction to the jury. An aiding and abetting instruction is proper where evidence has been presented that more than one person was involved in the commission of a crime and the defendant's role in the crime may have been something less than direct participation in the wrongdoing. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). In this case, one of the other young men in the van testified that he saw defendant and another man come out of the bushes and shoot into the van. The young man heard fifteen

to sixteen shots. Since the victim was killed by one shot, and there was evidence that another person besides defendant shot at the van, the aiding and abetting instruction was proper.

Affirmed.

/s/ Harold Hood

/s/ Richard Allen Griffin

/s/ John F. Foley