

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASHIMME BONDS,

Defendant-Appellant.

UNPUBLISHED

April 4, 1997

No. 182706

Oakland Circuit Court

LC No. 94-132924

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Defendant, a minor, was convicted by a jury of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to ten to twenty years' imprisonment for the assault conviction to run consecutive with two years' imprisonment for the felony-firearm conviction. Defendant now appeals by right. We affirm.

On March 20, 1994, Sabian Gaiter, Walter Gaiter and Jimmie Gaiter were walking on Branch Street in Pontiac, Michigan. While walking, the Gaiter brothers noticed defendant who was also on Branch street. Defendant called to the brothers, but disappeared. Upon reappearing, defendant was accompanied by five to eight additional people. A verbal confrontation then ensued between defendant and the brothers. Defendant then procured a revolver from one of his companions. The brothers, seeing the firearm, attempted to flee. Defendant began shooting at the brothers. Jimmie Gaiter was shot in the arm and chest while attempting to run away from defendant.

Upon arriving at the hospital, the police interviewed Jimmie in order to ascertain the identity of defendant. Jimmie indicated that defendant was a member of a gang called the Project Posse (P.J.P.). The police then went to investigate the crime scene and locate possible witnesses. The police interviewed two or three people, but could not obtain any information and the witnesses would not give their names or addresses.

First, defendant asserts that the trial court erred by allowing evidence of his gang membership to be introduced at trial. Defendant also contends that the prosecutor's statements regarding his gang

membership during closing arguments constituted prosecutorial misconduct. However, defendant has failed to properly preserve these issues on appeal. Review of an unpreserved issue on appeal is proper to prevent a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Upon reviewing the record, we find that no miscarriage of justice occurred. Therefore, we decline to address these issues on appeal.

Defendant also argues that he is entitled to a new trial because the police failed to locate all res gestae witnesses and the prosecution failed to identify other witnesses present at the time of the shooting. However, defendant neither objected at trial, made a motion for new trial, nor moved for an evidentiary hearing on this issue. Therefore, the issue has not been preserved for appeal and will only be reviewed for a miscarriage of justice. *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996); *Nantelle, supra* at 87.

Upon reviewing the record, we find that the police and prosecution made reasonable efforts to discover the identity of the members of the crowd that gathered at the time of the shooting, as well as an eyewitness provided by Walter Gaiter. Detective Friedline, the investigative officer, testified that he had returned to the scene of the shooting that night and had attempted to interview potential witnesses. He also testified that he sought to find the eyewitness whom Walter Gaiter had identified. Based on Detective Friedline's testimony, we find that the investigation was reasonable and comports to the standards of due diligence. *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995).

Defendant next argues that defense counsel's failure to make a timely objection to the undue delay between his arrest and preliminary examination, along with counsel's failure to preserve the above issues, constituted ineffective assistance of counsel. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Effective assistance is presumed and defendant has the burden of proving otherwise. *Stanaway, supra* at 687.

At the time of defendant's arrest, MCL 766.4; MSA 28.922 dictated that he was entitled to a preliminary examination within 12 days of his arrest.¹ Defendant was arrested on March 21, 1994 and his preliminary examination did not occur until May 19, 1994. However, defense counsel did not object to the delay, and thus failed to preserve the issue on appeal. MCR 6.110(B)(2); *People v Crawford*, 429 Mich 151, 157, 161; 414 NW2d 360 (1987). While failure to object to this delay may have been unreasonable, defendant has the burden of proving that a different result would have occurred had a timely objection been made. The failure to comply with MCL 766.4; MSA 28.922 entitles the defendant to discharge and dismissal of the charges. *People v Weston*, 413 Mich 371, 376; 319 NW2d 537 (1982). However, after a defendant is discharged, the prosecutor may arrest the defendant

again and reinstate the charges without affecting the merits of the case. *People v McCoy*, 189 Mich App 201, 205; 471 NW2d 648 (1991). In the present case, had defense counsel presented a proper objection, defendant would still have been subject to prosecution on the same charge. Because there is no indication that the result would have been different, defendant's claim must fail on this issue.

Defendant's other claim of ineffective assistance of counsel is based upon counsel's failure to object to the introduction of evidence pertaining to his membership in a gang, failure to object to the police and prosecutor's failure to identify and produce res gestae witnesses, as well as his failure to object to comments made by the prosecutor during closing argument. Decisions whether to raise objections at trial constitute trial strategy. *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995). Issues of sound trial strategy are generally not reviewed by this Court. *People v Ferguson*, 208 Mich App 508, 513; 528 NW2d 825 (1995). The instances at issue all appear to be within the ambit of trial strategy. Furthermore, review of these issues reveals that even had a proper objection been made, the result would not have been different. Consequently this argument is without merit.

Defendant's final issue on appeal is that the sentence imposed for his assault conviction violated the principle of proportionality. This Court reviews sentences imposed by the trial court for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636, 654; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* The sentence imposed by the trial court was within the recommended guideline range and is therefore presumably valid. *Id.* at 636. Contrary to defendant's assertion, his youth is not an unusual circumstance that would overcome this presumption. Moreover, the United States Supreme Court has held that the notion of proportionality should be more lenient for minors, however they have since expressly limited this line of reasoning only to capital cases. *Harmelin v Michigan*, 501 US 957, 994; 111 S Ct 2680; 115 L Ed 2d 846 (1991). Consequently, we find that the sentences were proportionate.

Affirmed.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra

¹ This statute was subsequently amended; however, the amendments did not go into effect until October 1, 1994.