

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GINO GUYTON,

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 239720

Wayne Circuit Court

LC No. 01-002938

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from nonjury convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, for which he was sentenced to prison terms of twelve to twenty years and two years, respectively. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that he is entitled to a new trial due to ineffective assistance of counsel. Because the trial court did not conduct an evidentiary hearing on this issue, review is limited to the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), lv gtd on other grounds 467 Mich 868 (2002) (citations omitted).]

Counsel may be ineffective for failing to present a meritorious insanity defense if the failure deprives the defendant of a reasonably likely chance of acquittal. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). The record shows that defendant was examined for criminal responsibility by Dr. Stephen Norris, who concluded that while defendant had a history of mental illness, he was not legally insane at the time he committed the offense.

Defendant contends that in light of his history of mental illness, counsel was ineffective for failing to obtain a second opinion. There is nothing in the record to suggest that another doctor, if consulted, would have reached a conclusion contrary to that of Norris. Therefore, defendant has not shown that but for counsel's error, the outcome of the trial was likely to have been different.

Defendant next contends that counsel was ineffective for failing to call Norris to testify that he lacked the ability to form the specific intent for second-degree murder.

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. 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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In his report, Norris opined that it seemed “plausible” that defendant had been intoxicated and asleep when Holmes knocked on his door and the defendant “was startled and responded by shooting before he was fully awake or alert.” Defendant contends that because he was not fully awake or alert, he must have been unable to form the specific intent necessary to sustain a conviction of second-degree murder. See *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Apart from the fact that the issue is not properly before the Court because defendant has not briefed its merits, *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994); *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992), “evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent.” *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001).

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood