

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON MAGEE,

Defendant-Appellant.

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UNPUBLISHED

September 26, 2006

No. 261158

Wayne Circuit Court

LC No. 04-009084-01

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court vacated the armed robbery conviction on double jeopardy grounds and sentenced defendant to a two-year term of imprisonment for the felony-firearm conviction, to be followed by concurrent terms of life imprisonment for the first-degree murder conviction and two to five years for the felon in possession conviction. Defendant appeals by right. We affirm.

Defendant first argues that the prosecutor improperly introduced evidence of his status as a convicted felon and improperly commented on this evidence in closing argument. Because defendant did not object to the evidence or the prosecutor's remarks, we review this issue for plain error affecting substantial rights. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003); *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002).

Defendant was charged with being a felon in possession of a firearm, MCL 750.224f, an element of which is the defendant's status as a convicted felon. *People v Tice*, 220 Mich App 47, 53; 558 NW2d 245 (1996). The following stipulation was presented at trial:

The prosecution and the defendant agree that the defendant was convicted of a specified felony on March 14 of 1996. On November 15, 1999, less than five years had passed since the defendant was convicted of the specified felony.

It was proper for the prosecutor to refer to this stipulation in his closing argument and argue that it established defendant's status as a convicted felon for purposes of the felon-in-possession charge. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The prosecutor did

not comment on any details of defendant's prior conviction beyond those identified in the stipulation. Accordingly, there was no plain error.

To the extent that defendant argues it was improper to introduce evidence advising the jury of his status as a convicted felon, he has waived this issue because defendant expressly stipulated to the jury's receiving this evidence. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003); *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). In any event, defendant's status as a convicted felon was essential to the felon-in-possession charge, and the stipulation included adequate safeguards to ensure that defendant suffered no unfair prejudice from the admission of this evidence. *Id.* For these reasons, there is no merit to this issue.

Defendant next argues that evidence of flight was improperly admitted. Because defendant did not object to this evidence at trial, our review is limited to plain error affecting his substantial rights. *McGuffey, supra* at 161. The prosecutor elicited evidence that defendant attempted to avoid an arrest by hiding in an attic. This evidence was admissible as evidence of defendant's consciousness of guilt and was not unduly prejudicial. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The evidence did not amount to plain error.

Similarly, plain error did not result from the admission of evidence of the codefendants' guilty pleas, which drew no objection at trial. Our Supreme Court has observed that evidence of an accomplice's conviction by *trial* is unfairly prejudicial. *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982). But a prosecutor may question an accomplice about a plea-based conviction and plea agreement. *People v Dowdy*, 211 Mich App 562, 571; 536 NW2d 794 (1995). The *Dowdy* Court observed, "[w]e will not allow a defendant to use the plea information to undermine the accomplice's credibility at trial, and then allow him to argue on appeal that introduction of the evidence of the plea was prejudicial." *Id.* at 572. Here, defense counsel did not object to the evidence at issue, used the evidence in his cross-examination of both codefendants, and commented on the evidence in his closing argument to undermine the codefendants' credibility. Under these circumstances, no plain error occurred.

Next, defendant argues that the trial court erred in instructing the jury on aiding and abetting a felony murder. Defendant asserts that the evidence did not support an aiding and abetting instruction. We disagree. As this Court stated in *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002):

We review de novo defendant's claim of an erroneous jury instruction. The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. [Citations and internal punctuation omitted.]

The jury may be instructed on aiding and abetting where there is evidence that (1) more than one person was involved in committing a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing. *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998).

In this case, there was evidence that defendant participated in the offense along with codefendants Terrence Gaines and Tavaree Clark, and that defendant and Gaines both entered the victim's house intending to rob him while Clark stood by outside. Although Gaines testified that defendant shot the victim, the jury could have concluded that Gaines shot the victim and that he was attempting to blame defendant for the shooting. Moreover, although there was evidence that the victim sustained seven gunshot wounds, only five bullets were recovered. So the evidence did not exclude the possibility that both Gaines and defendant shot the victim. This evidence supported an aiding and abetting instruction.

Defendant also argues that the trial court's aiding and abetting instructions were confusing and legally erroneous. Defendant did not object to the instructions on these grounds at trial and, in fact, expressed satisfaction with the instructions as given, thus waiving any error. *Hall, supra* at 679. But even if defendant did not waive this issue, he has not established a plain error because the instructions comported with CJI2d 8.1 and CJI2d 8.4. *Heikkinen supra*.

Next, contrary to what defendant argues, the trial court was not required to automatically instruct the jury on second-degree murder as a lesser offense of first-degree murder. *People v Cornell*, 466 Mich 335, 358 n 13; 646 NW2d 127 (2002); *Hall, supra* at 677. Defense counsel's express request that the trial court not instruct the jury on second-degree murder precludes his now asserting any error arising from the failure to instruct on this offense. *Id.* at 679.

Defendant alternatively argues that defense counsel was ineffective for not requesting a second-degree murder instruction. Because defendant did not raise this issue in a motion for a new trial or evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

"A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden." *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Carbin, supra* at 599-600. First, the defendant must show that counsel's performance was so deficient that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 600. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* Second, the defendant must show that he was prejudiced by the deficient performance, i.e., that there was a reasonable probability that but for counsel's error the result of the proceeding would have been different. *Id.*

Defendant has not overcome the presumption that counsel's decision to pursue an "all-or-nothing" approach to conviction or acquittal was a matter of sound trial strategy. See *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981).

Defendant also maintains that counsel was ineffective because he failed to present a defense. We disagree. The record discloses that defendant was questioned regarding his desire to testify or present witnesses and specifically indicated he did not want to do so. Moreover, the failure to present evidence can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, defendant does not explain what evidence could have been presented or how it

might have helped his case. Thus, there is no basis for concluding that defendant was deprived of a substantial defense.

Defendant also argues that counsel was ineffective because he failed to object when the trial court allegedly instructed the jury that “it could determine the admissibility of evidence presented to them.” Defendant has not properly presented this issue because he has not provided a citation to the record showing where this instruction was allegedly given. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). We find no support in the record for defendant’s contention that this instruction was given. We therefore reject this claim of error.

We affirm.

/s/ Michael J. Cavanagh  
/s/ Jane E. Markey  
/s/ Patrick M. Meter