

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM M. JACKSON,

Defendant-Appellant.

UNPUBLISHED
February 22, 2007

No. 265140
Wayne Circuit Court
LC No. 05-002799-01

Before: O’Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of voluntary manslaughter, MCL 750.321, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as a second habitual offender, MCL 769.10, to 107 months to 22½ years’ imprisonment for the voluntary manslaughter conviction, to be served consecutive to a two-year prison term for felony-firearm. Defendant was sentenced to time served for the felon in possession conviction. We affirm.

Despite having been convicted of the reduced offense of voluntary manslaughter after having been charged with first-degree premeditated murder, defendant contends that he was denied the effective assistance of counsel. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To demonstrate ineffective assistance of counsel, a defendant must show that counsel’s deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel’s errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Because defendant did not properly preserve this issue, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Defendant first argues that he was denied effective assistance at trial by counsel’s failure to either call him as a witness or to obtain defendant’s express waiver of his right to testify. The trial court record below does not include any indication that defendant wished or sought to testify at trial. When a defendant “decides not to testify or acquiesces in his attorney’s decision that he not testify,” the right is waived. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). The failure to have a defendant testify at trial is presumed to be trial strategy and

cannot be an indictment of counsel's competence merely based on outcome. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). In addition, contrary to defendant's assertion, "there is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify." *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).

Defendant also contends that he was denied effective assistance of counsel because defense counsel did not call defendant's nephew and niece as witnesses, to support defendant's assertion that the shooting was accidental. Defendant maintains that he repeatedly asked counsel to call these two individuals as witnesses, but the record does not support defendant's assertion regarding this repetitive request. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Moreover, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Because defendant raised the defense of accident throughout the proceedings, counsel's failure to call defendant's nephew and niece to testify did not deprive defendant of a substantial defense. *Id.*

Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant asserts that he is entitled to resentencing because the trial court violated his constitutional rights when scoring Offense Variable (OV) 5 (psychological injury to a member of the victim's family) by considering facts that were neither proved beyond a reasonable doubt at trial nor admitted by defendant. This Court is unable to accept this argument in light of the Michigan Supreme Court's position that *Blakely* is not applicable to Michigan's sentencing guidelines. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Hence, this Court reviews the contested score under the current framework, which requires us to uphold a scoring decision that is supported by any evidence on the record. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). The trial court scored OV 5 at 15 points. MCL 777.35(2) indicates that OV 5 should be scored at 15 points if "the serious psychological injury to the victim's family may require professional treatment." In scoring this variable the trial court relied on verbal and written statements submitted by members of the victim's family regarding the difficulties they were experiencing in dealing with their loss. Because the trial court record contains some evidence supporting the scoring of OV 5 at 15 points, there was no abuse of discretion by the trial court and defendant's contention of error regarding the scoring of this offense variable is without merit.

Finally, we reject defendant's assertion that the evidence presented at trial was insufficient to convict him of voluntary manslaughter. "An unlawful act, committed with the intent to injure or in a grossly negligent manner, that proximately causes death is involuntary manslaughter." *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). "The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

Evidence was presented that defendant and his fiancée were dissatisfied with the victim's presence as a tenant in their home, resulting in defendant's request to the victim to move out of

the residence. Over the next several days defendant and the victim engaged in a series of escalating arguments culminating with the victim being shot on defendant's front porch. Defendant argues that the evidence does not support the trial court's conclusion that defendant shot the victim entering the house following defendant's retrieval of a gun from within the home. Instead, defendant contends the evidence showed that the victim was shot during a struggle in which defendant already had the gun in his possession. In appeals challenging the sufficiency of the evidence, questions of witnesses' credibility are left to the trier of fact, not the reviewing court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Contrary to defendant's assertion that the gun discharged during a physical struggle with the victim, a forensics expert testified that gunpowder residue tests performed on the victim's clothing showed that the shooting was not at close range. Further, a police officer testified that the position of the spent shell casing and live round retrieved from the crime scene indicated that the gun used to shoot the victim was discharged from the area of defendant's front door when fired. This physical evidence was consistent with the initial statement made by defendant's fiancée to police that defendant had asked her to retrieve his gun from inside the home during defendant's argument with the victim. Thus, sufficient evidence existed for the trial court to find defendant guilty of voluntary manslaughter and reject defendant's contention that the shooting was accidental.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot