

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS LORENZO WALLACE,

Defendant-Appellant.

UNPUBLISHED

June 5, 2007

No. 267724

Wayne Circuit Court

LC No. 05-004390-01

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, assault with intent to murder, MCL 750.83, 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 to life in prison for his first-degree premeditated murder conviction, 23 to 50 years in prison for his assault with intent to murder conviction, five years in prison for his felony-firearm conviction, and two to five years in prison for his felon in possession of a firearm conviction. We affirm.

Defendant argues that he was denied the effective assistance of counsel. We disagree. Claims of ineffective assistance of counsel involve a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because an evidentiary hearing was not held, this Court's review is limited to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant argues that trial counsel was ineffective because she provided erroneous advice that affected his decision not to testify in this case. However, defendant failed to present an affidavit describing trial counsel's advice and failed to allege the content of testimony he would provide at trial. Thus, defendant has failed to establish a factual predicate supporting his claim. *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999).

Regardless, to succeed in his claim, "defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687;

521 NW2d 557 (1994). Defendant has failed to meet this burden. Here, trial counsel presented an alibi witness who testified that defendant was not involved in the shootings. Assuming defendant would have testified consistent with this witness's testimony, counsel's alleged advice against testifying was likely a strategic decision to avoid impeachment given defendant's 13 prior convictions involving crimes of theft, dishonesty or false statement. See *People v Layher*, 464 Mich 756, 770-771, 631 NW2d 281 (2001) (noting that a witness may be impeached under MRE 609 with evidence of crimes involving dishonesty or false statement or containing an element of theft).

Defendant contends that counsel's advice was erroneous because not all of his convictions involved crimes of dishonesty, theft, or false statement. However, "even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Notwithstanding, given Mario Jackson's strong and consistent identification testimony, defendant has failed to show "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Effinger, supra* at 69.

Defendant also argues that, because his trial counsel's advice was erroneous, the waiver of his right to testify was not made knowingly. However, the only law defendant cites supporting this assertion applies to cases in which the defendants pleaded guilty or nolo contendere to the charges against them due to the erroneous advice of counsel. It is not for this Court to provide defendant with arguments and authority to sustain his position. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Therefore, we conclude that defendant has abandoned this argument on appeal.

Defendant next argues that counsel's failure to call Dominique Carter, his girlfriend, as an alibi witness denied him the effective assistance of counsel. Defendant notes that Carter would have testified that defendant was at her house during the shootings and that she kept a diary with an entry from the day of the shootings. However, defendant has failed to support this claim with an affidavit from Carter. Thus, defendant has failed to establish a factual predicate supporting his claim. *Hoag, supra* at 6-7.

Notwithstanding this failure, defendant's claim is without merit. "[T]he 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). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990). Here, assuming Carter would testify consistently with defendant's argument, this testimony would have been cumulative to Lisa Henderson's testimony that defendant was at the house at the time of the shootings. Furthermore, in light of the strong identification evidence by the surviving victim of the shooting, defendant cannot demonstrate that the failure to call this witness was outcome determinative. Jackson consistently named defendant as the perpetrator, both at the scene immediately after the shooting and at the hospital. In addition, when shown a picture of defendant, Jackson unequivocally identified defendant as the perpetrator. Thus, defendant has

failed to show that the failure to call an additional alibi witness deprived him of a substantial defense.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra