

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

DANIEL BRATHER COLEMAN,

Defendant-Appellant.

No. 305480
Wayne Circuit Court
LC No. 10-000372-FH

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of marijuana, MCL 333.7403(2)(d); and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to one year of probation for possession of marijuana and two years' imprisonment for felony-firearm. Defendant appeals as of right. We affirm.

Defendant argues that his trial counsel was ineffective for failing to establish where he actually lived or the level of his involvement at the address where the marijuana and firearms were found. Defendant contends his wife should have been called to testify at trial that defendant did not live at a house where 280 marijuana plants and 21 firearms were found, despite evidence to the contrary. Also, he claims he could prove his cousin lived at the property, which was a rental property. Defendant failed to make a testimonial record of this issue before the trial court and this issue is unpreserved. *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003). This Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 675; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Here, while defendant claims that his wife would have testified that he was living with her and not at the searched residence, there is no evidence in the record as to what defendant's wife would have testified to if called. Further, the record does not support that counsel was made aware of what defendant's wife could testify to and the record does not support that defendant could prove his cousin lived at the property or that it was a rental. Defendant has

failed to meet his burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Moreover, the failure to call witnesses generally constitutes ineffective assistance of counsel only if it “deprives the defendant of a substantial defense.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), quoting *People v Hoyt*, 185 Mich App 531, 538; 462 NW2d 793 (1990). Nothing in the record supports that defendant was denied a substantial defense. In this case, while defense counsel did not call any witnesses, defense counsel argued to the jury that the prosecutor failed to provide sufficient evidence of defendant’s guilt because there was insufficient evidence that defendant lived at the searched residence. Counsel relied on the minimal evidence provided by the prosecution and the inferences to be drawn from it. The provided defense was substantial because it was 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). On this record, defense counsel’s representation did not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Defendant has not demonstrated that his counsel was ineffective.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder