

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK KENTRELL POSTON,

Defendant-Appellant.

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UNPUBLISHED

February 21, 2006

No. 256837

Oakland Circuit Court

LC No. 03-192022-FH

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant appeals as of right from jury convictions of felon in possession of a firearm, MCL 750.224f(2), and possession of a firearm during the commission of a felony, MCL 750.227b(1). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant seeks a new trial on the basis of ineffective assistance of counsel. He moved for a new trial below; however, because the trial court did not conduct an evidentiary hearing, review is limited to the facts on 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), *aff'd* 468 Mich 233 (2003) (citations omitted).]

First, defendant contends that trial counsel was ineffective for failing to obtain discovery materials. Counsel may be found to be ineffective due to lack of preparedness. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). However, the defendant "must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited" his case. *People v Bass*

(*On Rehearing*), 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998).

Assuming that counsel failed to conduct discovery,<sup>1</sup> defendant has not shown that counsel failed to discover information beneficial to the defense. Defendant asserts generally that counsel was not prepared to cross-examine the prosecution witnesses. The decisions whether and how to cross-examine witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). Ineffective assistance of counsel can take the form of a failure to cross-examine witnesses only if the failure deprives the defendant of a substantial defense. *Hopson, supra*. The record shows that counsel cross-examined the witnesses, and defendant has not shown that counsel failed to elicit any information beneficial to the defense during cross-examination. Defendant has not shown that counsel was ineffective in this regard.

Next, defendant contends that counsel was ineffective for failing to call witnesses to testify for the defense. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense.” *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). “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).

Defendant was the only witness to testify for the defense. While defendant submitted an affidavit describing the testimony he believes the witnesses would have offered, his representations are not sufficient to show “that these witnesses exist, or that their testimony would have benefited defendant had they been called. Thus, there are no errors apparent on the record. Therefore, defendant’s argument that he was denied ineffective assistance of trial counsel is without merit.” *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Further, the trial court found that trial counsel’s decision not to call the witnesses, who might have been perceived as biased, was a matter of sound trial strategy. Thus, defendant’s argument fails on this additional basis. *Rockey, supra*.

Finally, defendant contends that counsel was ineffective for failing to raise specific defenses to the charges. The decision to argue one defense over another is considered a matter of trial strategy. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Ineffective assistance of counsel can take the form of a failure to investigate and present a particular defense if the defense was substantial. *Kelly, supra*.

Defendant contends that counsel was ineffective for failing to argue and request an instruction on self-defense. He has not briefed the merits of his claim that the defense excuses a

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<sup>1</sup> Trial counsel stated in an affidavit that he had “received and reviewed all the discovery materials” and had them with him at trial. Further, the trial court found in its written opinion denying defendant’s new trial motion that there was no evidence that trial counsel lacked the police reports.

possessory weapons offense, nor has he cited any supporting case law or other authority. Therefore, the issue is deemed abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *People v Green*, 260 Mich App 392, 409-410; 677 NW2d 363 (2004).

Defendant also contends that counsel was ineffective for failing to argue and request an instruction on momentary innocent possession. While such a defense was recognized in *People v Coffey*, 153 Mich App 311, 315; 395 NW2d 250 (1986), under limited circumstances not present here, this Court has since held that the policy-based defense recognized in *Coffey, supra*, “no longer constitutes good law.” *People v Hernandez-Garcia*, 266 Mich App 416, 420; 701 NW2d 191 (2005).

Affirmed.

/s/ Patrick M. Meter  
/s/ William C. Whitbeck  
/s/ Bill Schuette