

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JERRY LEWIS PARKER, JR.,

Defendant-Appellant.

UNPUBLISHED

May 11, 2006

No. 259827

Wayne Circuit Court

LC No. 02-011748-01

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and two counts of carrying a concealed weapon, MCL 750.227. Defendant was sentenced to one to four years' imprisonment for the felonious assault conviction, two years' imprisonment for the felony-firearm conviction, and one to five years' imprisonment for each of the two carrying a concealed weapon convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arose from defendant's unlawful use of a gun late one evening. According to defendant, a man, who was later identified as Frederick Johnson, followed defendant home causing defendant to become alarmed. Defendant then went into his house and concealed two handguns in his clothing. When defendant came out, Johnson was still outside and acting suspicious, so defendant fired one shot. Defendant asserts that he fired the shot into the ground because he was scared and thought that Johnson was reaching for a gun. However, Richard Chodorowski, an off-duty police officer who was observing the incident from his car, testified that he saw defendant shoot toward Johnson.

A claim of ineffective assistance of counsel is preserved for review to the extent that record evidence exists to support the claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). "Failure to move for a new trial or for a *Ginther* hearing ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Here, defendant did not move for a new trial or an evidentiary hearing, so review is limited to the facts apparent in the appellate record. *Id.* at 659. If review of the record does not support defendant's claim of ineffective assistance of counsel, he has effectively waived the issue. *Id.*

The determination of whether defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court must first review the facts and then determine de novo whether those facts constitute a violation of defendant's constitutional rights. *Id.*

For defendant to successfully claim that he received ineffective assistance of counsel, he bears the heavy burden of proving: (1) that trial counsel's performance fell below an objective standard of reasonableness under prevailing norms, and (2) that trial counsel's inadequate performance prejudiced the defense, thereby making the proceedings fundamentally unfair or unreliable. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to establish prejudice, defendant has to show that there is a reasonable probability that, but for trial counsel's error, the result of the proceedings would have been different. *Carbin, supra* at 600. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In addition, defendant bears the burden of proving the factual basis for his claim. *Id.*

First, defendant has the burden of proving that his trial counsel's performance was deficient. Defendant argues that his trial counsel erred by not calling defendant's girlfriend, Natisha Edge, to testify at trial. Generally, counsel's decision whether to call a witness is presumed to be a matter of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.*

Nonetheless, Michigan courts have held that a trial counsel's failure to call corroborating witnesses can constitute ineffective assistance of counsel. For example, in *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996), the court held that counsel's failure to call six supporting witnesses was ineffective assistance of counsel. The *Johnson* Court based its holding on the fact that four of the six witnesses could have testified that the defendant did not shoot the victim and on the fact that the trial attorney did not provide any explanation at the evidentiary hearing regarding why he did not call these witnesses at trial. *Id.* at 122-124. Thus, the defendant overcame the presumption of effective assistance and there was a reasonable probability that, but for counsel's errors, the result would have been different. *Id.* at 124.

Similarly, in *People v Bass (On Remand)*, 247 Mich App 385, 392; 636 NW2d 781 (2001), this Court found that counsel's failure to call two known supporting witnesses was ineffective assistance of counsel. The *Bass* Court reasoned that, because both witnesses could have corroborated the defendant's testimony that the defendant did not commit the crime and because trial counsel provided no strategic explanation at the evidentiary hearing for not calling these witnesses, the defendant was denied a fair trial. *Id.*

The facts of this case are distinguishable. Unlike the witnesses in *Johnson* and *Bass*, Edge's testimony was not clearly exculpatory. In fact, because a supplementary record was not created, there is nothing in the record to indicate what Edge's testimony would have been. At trial, defendant testified that Edge was standing outside behind him when he fired the shot.

However, defendant's brief on appeal states that Edge came outside "right after" or "immediately following" the shooting. In addition, defendant attached his own affidavit to his brief, which states that Edge came outside after defendant fired his gun. Thus, the record fails to establish that Edge would have been a corroborating witness who should have been called by trial counsel, and the presumption, that trial counsel's decision to not call Edge to testify was a matter of sound trial strategy, has not been rebutted.

Second, even if we were to agree with defendant's argument that his trial counsel erred by not calling Edge to testify, defendant fails to show that this error prejudiced his defense. The failure to call a witness will constitute ineffective assistance of counsel only when the failure 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; 465 NW2d 569 (1990).

Defendant was charged with felonious assault, felony-firearm, and two counts of carrying a concealed weapon. Because defendant testified that he concealed two guns in his clothing before returning outside to confront Johnson, Edge's testimony would have affected at best only the felonious assault and felony-firearm convictions. See MCL 750.227. "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.82(1). An assault occurs when there is either an attempt to commit a battery or an unlawful act that places another in reasonable fear of receiving an imminent battery. *Id.* at 506 n 2. The "elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *Id.* at 505; MCL 750.227b.

Here, trial counsel called defendant to the stand and allowed defendant to explain that he shot the gun at the ground and did not intend to cause Johnson to fear an imminent battery. Edge's proposed testimony would have been, at most, merely cumulative of defendant's testimony and would not have provided defendant with a substantial defense. Moreover, Chodorowski testified to seeing defendant shoot in the "general direction" of Johnson and defendant testified that he shot at the ground and that Johnson reacted to the shot by turning around, slipping, falling, and then running away from defendant. Thus, even if Edge had testified that she saw defendant shoot at the ground, this testimony, if believed, was not likely to have made a difference in the outcome of the trial. The felonious assault charge does not require defendant to have shot toward Johnson rather than at the ground; it simply requires that defendant, while using a dangerous weapon, intentionally caused Johnson to be in apprehension of an imminent battery. *Avant, supra* at 505. A jury could have reasonably inferred from the fact that defendant fired a gun at the ground that defendant both intended to place Johnson in fear and that Johnson could have reasonably feared an imminent battery, thus, satisfying the elements of felonious assault. Accordingly, defendant has not established that there is a reasonable probability that, but for trial counsel's failure to call Edge to testify, the outcome of the proceedings would have been different. *Id.* at 508. In conclusion, because defendant did not create a supplementary record and because a review of the record does not support defendant's

ineffective assistance of counsel claim, defendant has effectively waived this issue on appeal.
Sabin, supra at 659.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder