

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHLANIS CORTEZ ERVIN,

Defendant-Appellant.

UNPUBLISHED

August 23, 2007

No. 268199

Berrien Circuit Court

LC No. 2002-404013-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317, and sentenced to 24 to 60 years' imprisonment. He appeals as of right. We affirm.

This case arises from the July 11, 2002 shooting death of Rick Jackson at 871 Pavone, in the City of Benton Harbor. Defendant does not dispute that he fired the shot that killed Jackson, but contends that he lacked the requisite intent for second-degree murder, testifying that he only meant to scare a group of people, including individuals that had earlier threatened defendant's brother, that were gathered on the front porch at that address.

Defendant was first convicted of second-degree murder and possession of a firearm during the commission of a felony, MCL 750.227b, in April 2003. However, this Court reversed defendant's second-degree murder conviction because of instructional error, and remanded for entry of a conviction of involuntary manslaughter and resentencing, or for retrial at the discretion of the prosecutor. *People v Ervin*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2004 (Docket No. 249826). On remand, the prosecutor elected to retry defendant and, following a second jury trial, defendant was again convicted of second-degree murder.

Defendant asserts that he received ineffective assistance of counsel at his second trial. We disagree. Defendant raised this issue in motions for a new trial and an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). And, in denying the motions, the trial court ruled on the issue. However, because no evidentiary hearing was held, our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness

and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 146. Effective assistance of counsel is presumed and defendant must overcome "a strong presumption that counsel's assistance constituted sound trial strategy." *Id.*

Defendant contends that his trial counsel was ineffective for failing to effectively cross-examine ten prosecution witnesses who testified differently at his second trial than they did at his first. Defense counsel's failure to cross-examine witnesses only constitutes ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). 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). Decisions about what evidence to present, whether to question a witness, and which questions to ask a witness are presumed to be matters of trial strategy. *Dixon, supra* at 398. "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

We find that defense counsel was not ineffective for failing to cross-examine the witnesses about the alleged inconsistencies in their testimony. In reaching our conclusion, we note that there was no dispute that defendant fired the bullet that killed Jackson. The primary issue for the jury was defendant's intent. Almost all of the alleged testimonial inconsistencies highlighted by defendant on appeal either are completely unrelated to this issue or do not present actual inconsistencies, but rather merely different degrees of specificity or detail. Counsel cannot be deemed ineffective for failing to emphasize irrelevant or non-existent inconsistencies to the jury. *Dixon, supra* at 398; *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (stating that counsel is not required to advocate a meritless position). Additionally, among those witnesses whose testimony can be seen as inconsistent on matters unrelated to defendant's intent, drawing the jury's attention to some of these inconsistencies would have generated sympathy for the victim or undermined defendant's theory of accident. Therefore, defendant cannot establish that counsel's failure to cross-examine the witnesses about those particular inconsistencies was anything but sound trial strategy. *Dixon, supra* at 398.

The only purported inconsistency highlighted by defendant that is arguably related to the issue of his intent relates to medical examiner Robert Clark's testimony concerning whether the nature of the wound suffered by Jackson indicated that the bullet ricocheted before striking him. At defendant's first trial, Clark testified that, given the shape of the Jackson's entrance wound, the bullet that killed Jackson "most certainly" could have ricocheted before hitting him. At the second trial, Clark testified that the bullet that stuck Jackson was a "glancing blow" and did not strike Jackson "straight in," and that while it was possible that the bullet had ricocheted, he had no way of knowing whether the bullet hit another surface before it struck Jackson and therefore, he had "nothing to say about it." The possibility that the bullet ricocheted before hitting Jackson was relevant to the issue of defendant's intent when firing the gun; if the bullet ricocheted, that could be viewed as supporting defendant's assertion that he did not shoot directly at the people on the porch at 871 Pavone. While defense counsel did not specifically cross-examine Clark

about this difference in his testimony, counsel did elicit testimony from Clark acknowledging the possibility of a ricochet, placing the issue squarely before the jury. Decisions about what questions to ask a witness are presumed to be matters of trial strategy. *Dixon, supra* at 398. Moreover, given that Clark acknowledged the possibility of a ricochet, and in light of evidence presented indicating that defendant fired in the direction of the porch at 871 Pavone and not into the ceiling at 877 Pavone as he claimed, defendant cannot establish that counsel's failure to point out the inconsistency in Clark's testimony was outcome-determinative. *Henry, supra* at 146; *Kelly, supra* at 526.

Defendant also contends that his trial counsel was inadequately prepared for trial and failed to present a defense. We disagree. When claiming ineffective assistance of counsel due to counsel's unpreparedness, the defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). The day before defendant's trial commenced, counsel informed the trial court that he was "ready to try the case." He stated that, in preparation for trial, he reviewed the transcripts of defendant's first trial, the pertinent police reports, and the prosecution's evidence and exhibits. Further, the record indicates that counsel did, in fact, request the transcripts of defendant's preliminary examination and copies of police reports a month before trial. The record does not support that defense counsel was unprepared. Moreover, we find no merit to the claim that counsel failed to present a defense at trial. Counsel focused the jury's attention on defendant's claim of accident and defendant has failed to suggest another plausible defense which counsel could have presented. Therefore, we cannot conclude that defendant was prejudiced by defense counsel's performance. See *id.* Defendant has failed to overcome the presumption of effective assistance of counsel.

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen