

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP TREMAINE NORRIS,

Defendant-Appellant.

UNPUBLISHED

May 14, 2009

No. 283289

Wayne Circuit Court

LC No. 07-008723-01

Before: Wilder, P.J., and Meter and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 11 to 18 years for the assault conviction and two to five years for the felon-in-possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the April 18, 2007, shooting of Dwayne Goings. Goings testified that he was waiting in his car outside a party when defendant and another man approached him with a gun. Goings tried to drive off, but several gunshots were fired and Goings received two bullet wounds. Goings identified defendant as the shooter. Another witness, Ronald Johnson, testified that he had known defendant for approximately two years. After hearing gunshots, he looked out the side door of his house and saw defendant running down the street with a gun.

I. Effective Assistance of Counsel.

Defendant argues that he was denied the effective assistance of counsel, thereby requiring a new trial. We disagree.

Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*¹ hearing, our review is limited to mistakes apparent from the record. *People v Williams*,

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, defendant has the burden of showing that counsel made an error so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that counsel’s deficient performance so prejudiced defendant as to deprive him of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, defendant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel’s error. *People v Dendel*, 481 Mich 114, 125, 132; 748 NW2d 859 (2008). Defendant bears the burden of demonstrating both deficient performance and prejudice and, therefore, necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first argues that his mother and his girlfriend were both prohibited from testifying at trial because they were present during the testimony at the preliminary examination, and that defense counsel was ineffective for failing to make sure they left the courtroom after he moved to sequester witnesses at the preliminary examination, and for failing to move to allow their testimony at trial notwithstanding the alleged violation of the sequestration order. The record does not support this argument. Although the record discloses that defense counsel moved to sequester witnesses at the preliminary examination, there is no indication in the record that defendant’s girlfriend or mother were present during testimony, that defense counsel desired to offer their testimony at trial in support of an alibi defense, that the prosecutor opposed any testimony by these witnesses, or that the trial court prohibited either witness from testifying at trial. Thus, defendant has not established the factual predicate for his claim.

Furthermore, decisions about whether to call or question a witness are matters of trial strategy. *People v Rockety*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), nor will it assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has not overcome the presumption that counsel’s decision not to call defendant’s mother and girlfriend as alibi witnesses was a matter of sound trial strategy, especially where counsel was able to present defendant’s alibi defense through two other witnesses.

Defendant also argues that counsel was ineffective for not filing a pretrial motion challenging Goings’s pretrial identification of defendant in a photographic array while at the hospital. Defendant presents no argument in support of this issue, however, and fails to explain what basis existed for challenging the identification procedure. Absent a cognizable basis for successfully challenging the photographic identification, there is no basis for concluding that counsel was ineffective in this regard. Counsel is not required to make futile motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

We also find no merit to defendant’s argument that counsel was ineffective for failing to impeach witnesses with inconsistencies between their trial testimony and prior statements, or to establish their alleged bias against defendant. The record discloses that counsel cross-examined both Goings and Johnson about inconsistencies between their trial testimony and their prior police statements and preliminary examination testimony. Counsel elicited that defendant’s

actual appearance differed from Goings's description of the shooter, and that there were differences in Goings's account of the offense in his police statement compared to his testimony at trial. Counsel similarly elicited that there were inconsistencies between Johnson's description to the police and defendant's actual appearance. Counsel also elicited that Johnson admittedly did not like defendant because of prior incidents between them. Although defendant argues that counsel should have elicited testimony explaining the basis for his prior disagreements with Johnson, defendant has failed to overcome the presumption that counsel wanted to avoid disclosing those reasons as a matter of trial strategy, such as to avoid portraying defendant in a bad light. Counsel's success in eliciting Johnson's admitted dislike of defendant was enough, by itself, to enable counsel to argue that Johnson was biased.

Further, defendant has not shown that defense counsel was ineffective for failing to call an expert witness on eyewitness identification, especially considering that counsel was able to challenge the identification testimony through cross-examination. Moreover, because one of the witnesses, Johnson, testified that he was familiar with defendant and had known him for two years, there is no reasonable probability that the outcome of trial would have been different had a defense expert testified. *Darden, supra* at 132.

Lastly, as defendant concedes, the record does not support defendant's claim that counsel was ineffective because he did not give defendant an opportunity to testify at trial. Indeed, defendant stated in a posttrial letter that counsel advised him not to testify after defendant informed counsel that he was under a lot of stress, thus suggesting that defendant was not called to testify as a matter of strategy. Moreover, defendant presented an alibi defense at trial and was able to present that defense without his testimony, because two other alibi witnesses had already testified.

For these reasons, we reject defendant's argument that he was deprived of the effective assistance of counsel at trial.

II. Defendant's Standard 4 Brief

Defendant raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, neither of which has merit.

He first argues that his right to due process was violated because the police failed to preserve exculpatory evidence, that evidence being fingerprint evidence from Goings's car and a party store videotape. Because defendant did not raise this issue below, it is unpreserved and our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). There being no record support for defendant's claim that the challenged evidence ever existed, we reject this claim of error.

At trial, Goings testified that defendant reached for the door handle of his car as he drove away and agreed that defendant "probably" touched it, but Goings did not recall whether he mentioned that to the police. Investigator Fisher testified that he did not ask that the car be examined for fingerprints because he "had nothing to indicate that anybody ever touched the vehicle." A police evidence technician testified that the car was in police custody, but he was never asked to check it for fingerprints. Similarly, there is no indication in the record that a party

store videotape of the offense existed. Indeed, defendant states in his brief that the police failed to even determine whether the store had a videotape.

Although the government must provide a defendant with existing exculpatory evidence in its possession, it is not required to develop evidence that does not exist. *People v Anstey*, 476 Mich 436, 460-461; 719 NW2d 579 (2006); *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). Because the record indicates that Goings's vehicle was never examined for fingerprints, and there is no evidence of a videotape of the offense, defendant has not established a plain error affecting his substantial rights.

Finally, defendant argues that there was insufficient evidence to support his conviction of assault with intent to commit murder because the evidence failed to establish his identity as the person who committed the offense, or to show that the perpetrator acted with the requisite intent to kill. We disagree.

In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the charged crimes were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of assault with intent to commit murder are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). "The intent to kill may be proven by inference from any facts in evidence." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

In this case, Goings identified defendant as the person who shot at him, and Johnson identified defendant as the person he observed fleeing the area while armed with a gun. This testimony was sufficient to establish defendant's identity as the person who committed the charged offense. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of the witnesses' testimony was for the trier of fact to resolve, and this Court will not resolve it anew. *Id.* Furthermore, Goings's testimony that defendant fired shots at his car and that Goings was shot twice in the abdomen was sufficient to support an inference that defendant acted with an intent to kill. Thus, the evidence was sufficient to support defendant's conviction for assault with intent to commit murder.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood