

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 17, 2015

v

ROBERT ALLEN JONES,
Defendant-Appellant.

No. 322965
Wayne Circuit Court
LC No. 13-011499-FH

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of assault with intent to commit great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 38 months to 10 years' imprisonment for the conviction. We affirm.

This case arises from an incident in which defendant stabbed his friend, Michael Doud, in the eye, neck, nose, hands, and back with a fork as the two men fought after Doud refused defendant's request for a bag of loose change to purchase crack cocaine. Defendant's sole argument on appeal is that he was denied the effective assistance of counsel when defense counsel failed to subpoena John Fountain as a witness, who defendant maintains would have corroborated his testimony. We disagree.

The defendant must move for a new trial or an evidentiary hearing in the trial court in order to preserve a claim for ineffective assistance of counsel. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Defendant did not move for a new trial or an evidentiary hearing. Therefore, the issue is not preserved. See *id.*

This Court's review of an unpreserved ineffective assistance of counsel issue is based upon the appellate record. *Sabin (On Second Remand)*, 242 Mich App at 658-659. An ineffective assistance of counsel claim is a mixed question of law and fact. *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). "This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *Id.*

To prevail on a claim of ineffective assistance, "a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy" and show that counsel's performance was "below an objective standard of reasonableness." *People v Douglas*,

496 Mich 557, 585; 852 NW2d 587 (2014) (citations and quotation marks omitted). Defendant must also show that, but for counsel's deficient performance, there is a reasonable probability that defendant's trial would have had a different outcome. *Id.* at 586. The decision to retain a witness is presumed to be a matter of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Failing to call a witness does not constitute ineffective assistance of counsel unless it deprives the defendant of a substantial defense that would have affected the outcome of the trial. *Id.*; *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). When a defendant "merely speculate[s]" that a witness could have provided favorable testimony, he fails to show that calling the witness would have led to a different trial outcome. See *Payne*, 285 Mich App at 190.

Defendant argues that Fountain would have testified in his favor. However, other than defendant's arguments in his brief, there is no showing that Fountain's testimony would have benefited defendant. Defendant has not offered an affidavit by himself or Fountain as to what Fountain would have said at trial. Defendant and Doud both testified that Fountain was in his bedroom when the fight began in Fountain's kitchen, that he came into the kitchen to tell them to leave, and that the remainder of the fight occurred outside Fountain's house. Neither witness testified that Fountain saw the fight, aside from the brief period when he emerged from his bedroom to tell them to get out of the house. It is not clear that Fountain's testimony would have been in defendant's favor or even that his testimony would have shed any further light on how contact initiated between defendant and Doud. Therefore, defendant has not shown that he was deprived of a substantial defense or that calling Fountain as a witness would have altered the outcome of the trial court proceedings. See *Douglas*, 496 Mich at 586; *Payne*, 285 Mich App at 190. Thus, there are no errors apparent on the record. See *Sabin (On Second Remand)*, 242 Mich App at 659. Defendant's argument that he was denied effective assistance of counsel fails. See *Payne*, 285 Mich App at 190.

Defendant also argues that defense counsel's failure to procure Fountain as a witness deprived him of his Due Process Clause and Confrontation Clause rights. Because defendant failed to sufficiently develop and explain the basis for his Due Process Clause and Confrontation Clause arguments, they are abandoned. See *People v Lopez*, 305 Mich App 686, 694; 854 NW2d 205 (2014) (noting that, "failure to properly argue the merits of the issue results in it being abandoned"). In addition, these claims are not applicable in the context of defendant's argument that he received ineffective assistance of counsel. The Confrontation Clause guarantees the right to cross-examine the witnesses who testify against the defendant. US Const, Am VI; *People v Gaines*, 306 Mich App 289, 315; 856 NW2d 222 (2014). Defense counsel cross-examined both of the prosecution's witnesses, so no Confrontation Clause issues exist here. See *Gaines*, 306 Mich App at 315-316. To support his due-process claim, defendant cites cases in which the verdict was based on false evidence that the prosecutor failed to correct. US Const, Am XIV; *Napue v Illinois*, 360 US 264, 271; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). There is no reason to believe any false evidence was presented in defendant's case. See *Napue*, 360 US at 271.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray