

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY FOX,

Defendant-Appellant.

---

UNPUBLISHED

March 2, 2006

No. 258260

Wayne Circuit Court

LC No. 04-005772-02

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

At the conclusion of a bench trial, defendant was convicted of second-degree murder, MCL 750.317, carrying a weapon with unlawful intent, MCL 750.226, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to thirty to fifty years on the murder conviction, to two to five years on both the carrying a weapon and felon in possession convictions, and to the mandatory consecutive two years in prison on the felony-firearm conviction. Defendant appeals as of right. We affirm.

On June 10, 2002, there was a shooting at Lou's Body Shop that resulted in the death of an innocent bystander. Evidence collected and analyzed by the Detroit Police Department showed that there were seventeen 9 mm spent bullet casings found outside the back of the body shop indicating that the 9 mm gun was fired from the back and outside of the body shop, aiming toward the interior. The evidence technician also found six 40-caliber spent casings inside the body shop indicating that the shooter of that weapon was shooting from the inside, aiming toward the outside. An analysis by a firearms examiner determined that all of the 9 mm casings were fired from a single weapon. Similarly, that firearms examiner's analysis determined that the six 40-caliber casings were all fired from a single weapon.

The size of the bullet recovered from the victim's head indicated that the single bullet that killed him was smaller than a 40-caliber bullet. The trial court determined in its factual findings that a bullet from the 9 mm weapon killed the victim.

Testimony at trial came from many witnesses, including three men who were located inside the garage when the shooting incident began. Two of those witnesses were called by the prosecution, and one was called at defendant's request.

The witnesses testified that defendant entered the body shop from the rear entrance. They also testified that shooting took place between defendant and Calvin Ross, who had been sitting in the car with the three witnesses. The witnesses were not consistent as to who fired the first shot. The two witnesses called by the prosecution stated at trial that defendant fired first, while the witness requested by defendant testified that defendant fired his weapon after Ross fired first. Ross did not testify.

In a post-conviction motion, defendant claimed ineffective assistance of trial counsel due to counsel's failure to call a witness, Lawrence Richards, who purportedly would have testified that defendant did not fire any weapon. The trial court denied defendant's claim of ineffective assistance of counsel because it found that defense trial counsel used sound trial strategy when it did not call a witness whose testimony would have conflicted with the testimony of another witness requested by defendant.

On appeal, defendant claims he was denied the effective assistance of trial counsel due to counsel's failure to call Mr. Richards. Defendant also submitted a supplemental brief that was accepted by this Court based on Administrative Order 2004-6, Standard 4. Defendant's supplemental brief made additional claims of ineffective assistance of counsel, as well as claims of prosecutorial misconduct.

Properly preserved claims of ineffective assistance of counsel involve a mixed question of law and fact. This Court reviews the trial court's factual findings for clear error, and the trial court's constitutional determinations are reviewed de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). When claims of ineffective assistance of counsel are not properly preserved, this Court's review is "limited to errors apparent on the record." *Id.* Unpreserved claims of prosecutorial misconduct are reviewed by this Court for plain error. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was so deficient that it did not function as an attorney as guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense to the point where he was deprived of a fair trial and reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also show "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.*

An attorney's decision of whether to call a witness is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). There is a strong presumption that counsel used sound trial strategy. *Matuszak, supra*, 58. This Court will not substitute its judgment for that of counsel when it comes to matters of trial strategy. *Id.* Additionally, this Court will not use the benefit of hindsight to assess trial counsel's competence. *Id.*

In this case, the evidence showed that two weapons were used in the shooting at the body shop, a 9 mm weapon and a 40-caliber weapon. The shooter of the 9 mm weapon was shooting from the back of the body shop toward the interior. The shooter of the 40-caliber weapon was shooting from the inside of the shop toward the outside. The witnesses, including the witness requested by defendant, all of whom were present in the body shop when the shooting began, all stated that defendant discharged his gun from the back of the shop toward the front and that Ross was the other shooter who stayed near one of the cars located in the front of the body shop.

If defense trial counsel had called Richards and if he had testified that defendant did not shoot at all, as suggested by defendant's post-trial counsel, such testimony would have been contradictory to the other witness presented by defendant's trial counsel. Because the presentation of witnesses is considered trial strategy and there is a strong presumption that counsel's performance at trial was sound, defendant's trial counsel did not deprive defendant of a fair trial when he presented only one of two possibly contradictory witnesses.

The claims of ineffective assistance of counsel raised in defendant's supplemental brief were not properly preserved before the trial court. Their review is therefore "limited to errors apparent on the record." *Matuszak, supra*, 48.

Defendant asserts that his trial counsel failed to conduct any investigation, failed to call witnesses, failed to review prior statements in preparation for cross examinations, and stated in his closing arguments that defendant was inside shooting despite defendant telling counsel that he had no weapon at all.

Defendant's blanket assertions that defense trial counsel should have investigated the case further and called more witnesses, without factual support as to what such investigation and witnesses would have provided, does not rise to a level sufficient to support a claim of ineffective assistance of counsel. Further, defendant's suggestions that trial counsel should have done something to prevent or alter the plea agreement of another party who was represented by separate counsel is without merit.

Defendant's pro se claims of prosecutorial misconduct were also not preserved at trial. Such claims are reviewed for plain error. *Matuszak, supra*, 48. Defendant's claims include allegations of forum and judge shopping, violation of a court order in having defendant arrested on May 20, 2004, and violation of confrontation rights when Ross did not testify at trial and defendant was not able to question Ross concerning his confession.

There is no evidence in the lower court record to show plain error or any inference of support that the prosecutor engaged in unlawful forum shopping, that the prosecutor prevented defendant from questioning co-defendant Ross in this matter, or that the prosecutor violated defendant's constitutional rights.

Affirmed.

/s/ Stephen L. Borrello  
/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald