

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL NORMAN WOOD,

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 235120

Oakland Circuit Court

LC No. 00-175643-FH

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with felonious assault in connection with an incident in which it was alleged that he pointed a shotgun at Carlos Zamora. At the preliminary examination, Zamora testified that after he engaged in a verbal dispute with defendant, defendant entered Zamora's home, retrieved a shotgun, and pointed the shotgun at him. The trial court found that the evidence established that defendant assaulted Zamora with a dangerous weapon, specifically a shotgun, and bound defendant over on the charge of felonious assault.

At a pretrial conference the prosecution stated, on the record, that it intended to file a motion to amend the information to add a charge of felony-firearm. The trial court granted the subsequent motion, finding that the evidence produced at the preliminary examination established that defendant used a shotgun to commit felonious assault.

The jury found defendant guilty as charged. The trial court sentenced defendant to ninety days to four years' imprisonment for felonious assault, and to a consecutive two-year term for the felony-firearm conviction. Defendant received credit for thirteen days served in jail. The minimum term for the conviction of felonious assault was within the applicable statutory sentencing guidelines.

Defendant claimed an appeal to this Court. In addition, defendant filed a motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), on the issue of whether he was deprived of the effective assistance of counsel at trial. Defendant alleged that trial counsel rendered ineffective assistance by failing to adequately

prepare for trial by interviewing res gestae witnesses, failing to call witnesses to establish that he did not have firearms in his home, failing to emphasize inconsistencies in the testimony during closing argument, and failing to properly advise him regarding the status of the case so that he could make an informed decision as to whether to accept an offer to plead nolo contendere to felonious assault in exchange for dismissal of the charge of felony-firearm, or proceed with trial.

At an evidentiary hearing, on remand, defendant's appointed trial counsel testified that he communicated the proffered plea to defendant on several occasions, but that defendant chose to go to trial. Counsel stated that he did not interview two prosecution witnesses because their statements were clear and because defendant consistently maintained that he did not know them. Counsel noted that when defendant later acknowledged that the witnesses were his neighbors he questioned the witnesses regarding their potential prejudice toward defendant. Counsel explained that he did not call defendant's family members to testify that defendant had removed all firearms from his home because the information that no firearms were found in the home was put before the jury in the prosecution's case. Counsel maintained that defendant insisted on testifying.

Defendant testified that he and counsel did not discuss the possibility of entering a plea. Defendant contended that counsel told him that no plea bargain was available, but that he would have accepted a plea had he been advised that one was available. Defendant stated that counsel told him that he had to testify, and denied that he recalled telling counsel that he insisted on testifying.

The trial court found that defendant was not denied the effective assistance of counsel at trial. The trial court found that counsel's failure to interview the prosecution witnesses was not unreasonable under the circumstances, and that counsel's decision to not call certain witnesses was sound trial strategy. The trial court determined that counsel's testimony on the issue of whether defendant was advised of the existence of a proffered plea bargain was more credible than that offered by defendant. The trial court found that counsel gave the most effective closing argument possible under the circumstances. The trial court concluded that defendant had not overcome the presumption that his trial counsel provided effective assistance.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Carbin, supra*, 463 Mich 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that he was denied the effective assistance of counsel at trial. Specifically, defendant argues that counsel rendered ineffective assistance by failing to advise him of the availability of a plea, failing to properly prepare for trial by interviewing witnesses such as the Morgans, failing to move to suppress statements relied on by the police, failing to

call witnesses to testify that he had no firearms in his home, and failing to object to the filing of an amended information.

We disagree and affirm defendant's convictions.¹ The decision as to what evidence to present is a matter of trial strategy. We do not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The failure to interview a witness, in and of itself, does not constitute inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). The failure to call witnesses or to present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). Counsel's decision to not interview the prosecution witnesses and to not call defendant's family members to testify constituted trial strategy, and did not deprive defendant of a substantial defense. *Rice, supra; Caballero, supra; Hyland, supra*. The trial court found that counsel's testimony regarding the availability of a plea was more credible than that given by defendant. We defer to the trial court's opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). Defendant has not shown that counsel's performance resulted in prejudice, *Carbin, supra*, and has not overcome the presumption that counsel rendered effective assistance at trial. *Rockey, supra*.

An information may be amended before, during, or after trial to cure a defect, imperfection, or omission in form or substance, including a variation between the information and the proofs, as long as the defendant is not prejudiced by the amendment. MCL 767.76; MCR 6.112(H). An amendment may add a new charge. *People v Fortson*, 202 Mich App 13, 15; 507 NW2d 763 (1993). However, an amendment should be disallowed if it causes unacceptable prejudice to the defendant due to unfair surprise, inadequate notice, or inadequate opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant argues that he was denied due process because he did not receive a preliminary examination or an arraignment on the added charge of felony-firearm. MCR 6.110; MCR 6.113. We disagree. The evidence produced at the preliminary examination would have supported a bindover on the charge of felony-firearm. At the pretrial conference the prosecution announced that it would move to amend the information to add a charge of felony-firearm. The trial court granted the subsequent motion over defendant's objection. Trial did not commence for three months after the trial court granted the motion. We conclude that under the circumstances defendant was not unfairly surprised by the amendment or deprived of ample time to prepare to defend against the new charge. *Fortson, supra*, 202 Mich App 16-17. Defendant

¹ Defendant's arguments that trial counsel rendered ineffective assistance by failing to move to suppress statements relied on by the police and by failing to object to the filing of the amended information were not raised in the evidentiary hearing on remand. Therefore, as to those allegations, our review is limited to the facts on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Defendant states no basis for his contention that the statements should have been suppressed, and has failed to overcome the presumption that counsel rendered effective assistance in this area. *Rockey, supra*. Furthermore, as is discussed below, the filing of an amended information did not result in prejudice to defendant.

has cited no authority to support his assertion that he was entitled to a second preliminary examination or arraignment under the circumstances. Accordingly, we decline to give further consideration to defendant's argument. *People v Milstead*, 250 Mich App 391, 404 n 4; 648 NW2d 648 (2002).

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood