

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL PHILLIP KNOX,

Defendant-Appellant.

UNPUBLISHED
November 25, 2003

No. 242748
Lapeer Circuit Court
LC No. 01-007130-FH

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assault with a dangerous weapon, MCL 750.82. Defendant was sentenced as a third habitual offender, MCL 769.11, to 24 to 96 months' imprisonment. We affirm.

Defendant first alleges ineffective assistance of counsel because his trial counsel failed to present certain witnesses' testimony. "Because [defendant] failed to move for a new trial or an evidentiary hearing with regard to his claim, review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant has the burden of showing that his "counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 52 NW2d 797 (1994). Further, the defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Defendant has failed to overcome this presumption.

Defendant argues that defense counsel's failure to call his girlfriend to testify amounted to ineffective assistance of counsel because her preliminary examination testimony favored defendant. The failure to call a particular witness at trial is presumed a matter of trial strategy, and "this Court will not substitute its judgment for that of counsel in a matter of trial strategy." *Avant, supra* at 508. The girlfriend's preliminary examination testimony was internally contradictory and it differed from her statement to police on the night of defendant's crime. Defense counsel could have reasonably concluded that the girlfriend's testimony would be unfavorable to defendant or that the prosecutor would seriously discredit the testimony by confronting the girlfriend with her prior inconsistent statements. Therefore, defense counsel's decision not to call defendant's girlfriend was clearly a matter of trial strategy.

We also reject defendant's argument that defense counsel should have called defendant's brother to testify at trial. While the brother was present on the night of the assault, he had four felony convictions, two domestic violence convictions, he was recently released from prison, and he fled from the scene on the night of the incident. Again, defense counsel's decision not to call this witness was clearly a matter of sound trial strategy.

Defendant also contends that defense counsel's failure to call various other witnesses amounted to ineffective assistance of counsel. As noted, this Court will not substitute its judgment for trial counsel's in matters of trial strategy. *Avant, supra* at 508. That a trial strategy was unsuccessful does not make its use ineffective assistance of counsel. *In re CR*, 250 Mich App 185, 199; 646 NW2d 506 (2002). Defendant failed to develop a record indicating the substance of these witnesses' testimony. Because there is nothing on the record to show otherwise, defendant has not met his burden in proving ineffective assistance of counsel.

Defendant next argues that the trial court gave the jury an inadequate and erroneous reasonable doubt instruction. Defendant failed to object to the jury instructions at trial; therefore, the issue is unpreserved, and review by this Court is for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Jury instructions are reviewed in their entirety to determine whether error occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

"To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecution and what constituted a reasonable doubt." *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Instructions that differ from the standard set forth in the Michigan Criminal Jury Instructions are, standing alone, not enough to warrant reversal because the CJIs do not have the official sanction of the Supreme Court and their use is not required. *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985). Here, read in their entirety, the trial court's instructions on the standard of proof were correct.

The trial court gave a full reasonable doubt instruction before the trial began, which included the admonition that a reasonable doubt was "a fair and honest doubt" and that such a doubt "can grow out of the evidence or lack of evidence." Before the jury began its deliberations, the trial court gave a correct, but somewhat briefer, definition of reasonable doubt. However, the trial court also instructed the jury to consider all of the instructions given throughout the trial. Taken as a whole, the jury instructions sufficiently protected defendant's rights and fairly presented the issues to be tried. Therefore, defendant has failed to demonstrate plain error.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad