

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MCMULLEN,

Defendant-Appellant.

UNPUBLISHED

August 2, 2005

No. 253122

Wayne Circuit Court

LC No. 03-009269-01

Before: Borrello, P.J. and Bandstra and Kelly, JJ.

MEMORANDUM.

Defendant appeals as of right his jury convictions of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, one count of burning a dwelling house, MCL 750.72, and one count of possession of an incendiary device, MCL 750.211a. We affirm.

At trial, Lisa Norton identified defendant as the person who threw an incendiary device through a window in the living room of her home. She stated that from her vantage point in the kitchen she could see into the living room and out the living room window. She saw defendant walk past the home twice. The second time, he threw an object through the living room window causing a fire.

Defendant argues that defense counsel rendered ineffective assistance by failing to provide the jury with photographs of the home and to cross-examine Norton aggressively regarding her identification of defendant as the perpetrator. We disagree. Defendant did not seek an evidentiary hearing on the issue of ineffective assistance; therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish ineffective assistance of counsel, a defendant must show that counsel made errors so serious that he was not performing as the “counsel” guaranteed by the federal and state constitutions. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel’s deficient performance must also have resulted in prejudice. *Id.* at 600. 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. *Id.* Counsel is presumed to have afforded effective assistance. Defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defense counsel questioned Norton regarding her ability to observe defendant from her position in the house, but she continued to identify defendant as the perpetrator of the offenses. Defense counsel's decision as to the aggressiveness with which to approach his questioning of Norton was a matter of trial strategy. We do not substitute our judgment for that of defense counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The credibility of the witnesses, including Norton, was for the jury to determine. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Defendant's assertion that had the jurors been able to observe photographs of the house they would have found Norton's testimony to be less than credible is unsubstantiated. Therefore, defendant has not overcome the presumption that defense counsel rendered effective assistance. *Rockey, supra*.

Affirmed.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly