

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID RAYCHARD ANTWINE,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 259860

Wayne Circuit Court

LC No. 04-006518-01

Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a bench trial, of assault with intent to rob while armed, MCL 750.89, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b(1). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his convictions of assault with intent to rob and felonious assault violate the constitutional prohibition against double jeopardy. Defendant did not raise this issue of alleged constitutional error below and therefore it is unpreserved on appeal. *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004). Accordingly, we review the issue for plain error affecting defendant’s substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004); *People v Barber*, 255 Mich App 288, 291; 659 NW2d 674 (2003).

There is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the two offenses share common elements or one constitutes a lesser offense of the other. *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). The evidence in this case showed that defendant pointed his gun at the victim and announced a robbery. When the victim resisted, defendant fought with him and urged an accomplice to take the victim’s money while he was down. That completed the assault with intent to rob offense. After the accomplice intervened and forced the victim to let go of defendant’s gun, defendant pointed the gun at the victim and shot him, thus committing a felonious assault. Under these circumstances, defendant has not shown that his dual convictions were plain error. See *People v McRaft*, 102 Mich App 204, 214-215; 301 NW2d 852 (1980), and *People v Bryan*, 92 Mich App 208; 284 NW2d 765 (1979).

Defendant next argues that the trial court improperly denied his motion for a new trial on the ground that he was denied either his right to counsel or his right to the effective assistance of

counsel. The trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion, but its factual findings are reviewed for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

A criminal defendant is entitled to the assistance of counsel during all critical stages of the criminal proceedings. *People v Kurylczyk*, 443 Mich 289, 296; 505 NW2d 528 (1993). "Critical stages of the proceedings are stages 'where counsel's absence may harm the defendant's right to a fair trial,'" *People v James Green*, 260 Mich App 392, 399; 677 NW2d 363 (2004), quoting *People v Burhans*, 166 Mich App 758, 764; 421 NW2d 285 (1988), and include the trial stage, *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004). "If the defendant either was denied counsel or denied the effective assistance of counsel, he is entitled to relief." *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996).

The record shows that defendant was represented by counsel at all times, but his trial attorney's license was suspended, effective the second (and last) day of trial. This claim is not governed by *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), because defendant was afforded counsel at trial and, although counsel was suspended on the second day of trial, he was still an attorney, *Pubrat*, *supra* at 594-595, and the record demonstrates that he clearly functioned as such by zealously defending defendant at trial. Finally, there is no claim that counsel was totally unprepared for trial. The suspension, by itself, does not constitute a denial of the right to counsel or ineffective assistance of counsel. *Id.* at 594-596. Therefore, defendant must show that counsel failed to provide adequate representation under the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Cronin*, *supra* at 659 n 26; *Pubrat*, *supra* at 600-601.

Defendant claims that counsel was ineffective for failing to call Dante Charles to testify for the defense. Although defendant raised this issue below, the trial court did not conduct an evidentiary hearing. Therefore, review is limited to the facts of record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record shows that the proposed witness, who may have had some role in the crime, did exist. However, the record is silent regarding what testimony he would have offered if called. Therefore, defendant has not shown that Charles's testimony would have benefited the defense to the extent that the outcome of the trial would have been different. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Furthermore, it is not apparent that the outcome of the trial would have been different had Charles testified that defendant did not own or wear a gray hooded sweatshirt, because the sweatshirt was not the only basis for the victim's identification of defendant as the

assailant or for the court's finding that defendant was the person responsible for committing the crimes charged. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Christopher M. Murray