

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CENACA BRANDON WILLIS,

Defendant-Appellant.

UNPUBLISHED

December 11, 2008

No. 278073

Wayne Circuit Court

LC No. 06-012922-01

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of murdering 19-year-old Zaheed Price, who was shot to death while sitting in the front passenger seat of a vehicle at 15478 Pinehurst in Detroit.

On appeal, defendant first argues that defense counsel was ineffective for failing to pursue an alibi defense at trial. We disagree. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court’s findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.* To establish ineffective assistance of counsel, “a defendant must show that 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, 302-303; 521 NW2d 797 (1994).

Defense counsel originally filed a notice of alibi that listed three alibi witnesses. Shortly before trial, the prosecutor produced three CDs of defendant’s recorded telephone conversations from the jail. The recordings contained conversations with several different persons, including the alibi witnesses, during which defendant asked the persons to testify that he was at his mother’s house at the time of the shooting. The prosecutor announced that she intended to present some of the recorded conversations to rebut or impeach defendant’s proposed alibi

evidence. Defendant ultimately did not present an alibi defense and the recorded conversations were not introduced.

At a *Ginther*¹ hearing, defense counsel testified that defendant had not told him about the recorded conversations. Counsel explained that he was able to listen to several of the conversations before trial, and that, while he believed they were equivocal, he also believed that they could be construed as solicitations to commit perjury and he did not want them played for the jury. Accordingly, he decided not to pursue the alibi defense at trial.

“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).

Defendant argues that defense counsel was ineffective because he did not listen to all of the conversations before deciding not to pursue the alibi defense. However, defense counsel heard enough of the conversations to know that they could be construed as solicitation to commit perjury and would likely be damaging in the eyes of the jury. Defendant has not demonstrated anything about any additional conversations that would render counsel’s opinion unsound.

Nor was counsel ineffective for deciding to abandon the alibi defense. Apart from the damaging impact the recorded conversations would have had on any alibi defense, as trial developed two prosecution witnesses recanted their previous statements identifying defendant as the shooter, and defense counsel was able to present a witness, Jeremy May, who testified that he observed the shooter, but it was not defendant. This testimony enabled counsel to present a defense without pursuing the questionable, and possibly damaging, alibi defense. Counsel’s decision not to pursue the alibi defense was a classic matter of trial strategy which, under the circumstances, was not objectively unreasonable. Although counsel testified at the *Ginther* hearing that, in hindsight, he may have made the wrong decision, this Court does not review counsel’s decision with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). In addition, the mere fact that a strategy does not work does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Furthermore, the trial court found that the outcome of defendant’s trial would not have been different had the alibi witnesses testified. Considering the impact that defendant’s taped telephone conversations would have had on the credibility of any alibi defense had it been

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

presented, this finding is not clearly erroneous. Thus, defendant has not demonstrated that he was prejudiced by counsel's failure to call the alibi witnesses.

For these reasons, defendant has failed to establish that he was denied the effective assistance of counsel.

Defendant next argues that defense witness Jeremy May was improperly impeached at trial with evidence of his prior convictions, the nature of which were not identified. Because defendant did not object to this impeachment testimony at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000).

On direct examination, defense counsel elicited that May had previously been convicted of "certain felonies" and was presently incarcerated. The nature of May's prior convictions were not identified. On cross-examination by the prosecutor, May explained that he had a prior conviction for operating a chop shop, and had been convicted of two or three felony offenses involving theft or dishonesty.

As defendant correctly observes, "[i]t is the nature, rather than the fact, of a prior felony conviction which the jury is to use in its evaluation." *People v McBride*, 413 Mich 341, 344; 319 NW2d 535 (1982), quoting *People v VanDorsten*, 409 Mich 942; 298 NW2d 421 (1980). Here, however, unlike in *McBride*, the parties were not foreclosed from inquiring into the nature of May's prior convictions. Further, the jury was not left to speculate on the nature of May's prior convictions. It was informed that he had a prior conviction for operating a chop shop and that he had two or three felony convictions for crimes involving theft or dishonesty. Defendant does not dispute that May's prior convictions qualified for admission for impeachment purposes under MRE 609. Under these circumstances, any error in the manner of impeachment did not affect defendant's substantial rights.

Defendant further argues that defense counsel was ineffective for first eliciting that May had prior convictions without identifying the offenses involved, and for failing to object to the prosecutor's cross-examination, which similarly failed to reveal the nature of the convictions. At the *Ginther* hearing, defense counsel indicated that he did not inquire further into the nature of May's convictions because he wanted to avoid placing more emphasis on the prior convictions. Thus, counsel's decision was a matter of trial strategy, and that strategy was not objectively unsound. This Court will not second-guess counsel's decision. Further, as previously indicated, May did testify that his prior convictions were for offenses involving theft or dishonesty, and indicated that one conviction was for operating a chop shop. In light of this testimony, there is no reasonable probability that the outcome of defendant's trial would have been different if May's prior convictions had been identified with greater specificity. Thus, defendant was not prejudiced by counsel's alleged error. For these reasons, defendant has failed to establish a claim of ineffective assistance of counsel.

Defendant also argues that the prosecutor's conduct denied him a fair trial. This Court generally reviews claims of prosecutorial misconduct case by case, examining the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Here, however, defendant did not

object to the prosecutor's conduct at trial. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *Id.*, citing *Carines, supra* at 763.

Defendant argues that the prosecutor improperly shifted the burden of proof by commenting on the lack of an explanation for defendant's presence at his uncle's house after the shooting, the presence of a particle of gunshot residue on defendant's hand, and defendant's return to the crime scene for "unknown reasons." A prosecutor may not shift the burden of proof by commenting on a defendant's failure to testify or present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Viewed in context, the prosecutor's remarks were not a comment on defendant's failure to testify or present evidence. Instead, she was arguing that defendant's presence at his uncle's house, the residue particle on his hand, and his appearance at the crime scene was all inculpatory. Accordingly, there was no plain error. Furthermore, to the extent that the remarks could be interpreted as implicating the burden of proof, the trial court instructed the jury that defendant was presumed innocent, that the prosecution had the burden of proving each element of the charged crimes beyond a reasonable doubt, and that "defendant is not required to prove his innocence or do anything." These instructions were sufficient to protect defendant's substantial rights. *Carines, supra*.

We also reject defendant's argument that the prosecutor improperly vouched for the credibility of a prosecution witness. The prosecutor did not suggest that she had any special knowledge that the witness was testifying truthfully, but rather properly commented from the evidence why the witness was worthy of belief. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Finally, because the prosecutor's remarks were not improper, defense counsel was not ineffective for failing to object.

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher