

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
November 14, 2013

v

JOSEPH WILLIAMS,

Defendant-Appellant.

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No. 307183  
Wayne Circuit Court  
LC No. 11-005142-FC

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during a felony (felony firearm), MCL 750.227b. Defendant was sentenced to serve two to 10 years' imprisonment for the assault conviction and two years for the felony firearm conviction. Because we conclude that defendant has not demonstrated ineffective assistance of counsel or any error in the scoring of his sentencing guidelines, we affirm.

Defendant's convictions stem from an incident where defendant shot the victim, Emanuel Brown, in the leg and in the back of the neck. Defendant maintains that the shooting was in self-defense. According to defendant, Brown started a fight with him, and when Brown reached for a gun that was tucked in his waistband defendant grabbed Brown's right arm before Brown could raise the gun, causing the gun to fire and hit Brown in the leg. Defendant maintained that Brown then dropped the gun and ran, and that defendant picked up the gun and shot Brown in the neck because he believed Brown was heading for his truck to get another gun. Defendant claimed that he did not know how to shoot a gun, and was not actually aiming for Brown's head.

Brown testified to a different version of the events. According to Brown, defendant kept trying to rummage through Brown's truck and Brown repeatedly asked defendant to stop. When Brown asked defendant to stay away from his truck for a third time defendant pulled out a gun and immediately shot Brown in the leg and then in the back of the neck when Brown was on the ground. Defendant then stood over Brown while Brown was on the ground holding his gun, but eventually walked away and left the scene. The incident occurred at the home of Shalonda Nichols, who witnessed the incident and also testified at trial. Nichols testified to hearing Brown ask defendant not to lean on his truck. She also testified that while she did not see what

happened when the first shot was fired, she watched defendant point and shoot Brown as he was running away and also observed defendant stand over Brown with the gun.

On appeal, defendant first argues that he was denied effective assistance of trial counsel because defense counsel failed to object to testimony regarding a telephone call received by Brown wherein the caller threatened him and attempted to bribe him not to testify. Specifically, Brown testified that he received a telephone call from someone who was obviously trying to disguise his voice and who threatened him by stating “I’m going to kill you, this isn’t over.” Brown also testified that the caller offered him money not to testify. He acknowledged that he would recognize defendant’s voice if it was not disguised, and stated that he was not sure if the caller was defendant. No other evidence regarding the threatening telephone call was admitted. Brown also testified that he had not talked to any of the other witnesses to the shooting since the incident, and noted that “everybody, I guess, relocated or they [sic] is in fear for their life as well.” Defense counsel did not object to any of this testimony.

Defendant did not request an evidentiary hearing in the lower court under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); therefore, our review is limited to mistakes apparent on the record, *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel’s performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). To show sufficient prejudice, the defendant must establish a reasonable probability that the outcome of the proceeding would have been different had the attorney not erred. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A defendant’s threat against a witness is admissible to demonstrate consciousness of guilt, *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); however, the prosecution must offer evidence that the threat or bribe was made by the defendant, at the defendant’s instigation, or at least with his knowledge, *People v Long*, 144 Mich 585, 585-586; 108 NW 91 (1906); *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982).

In the present case, Brown admitted he did not know who made the call because the voice was disguised. There was no other evidence admitted to suggest that the threat or bribe was made by defendant, at defendant’s instigation, or with defendant’s knowledge. While there is a strong presumption that defense counsel’s performance constituted sound trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), there is no legitimate strategic reason for failing to object to testimony implying that defendant made threats and bribes to deter unfavorable testimony. Thus, defense counsel’s failure to object to this clearly inadmissible evidence fell below an objective standard of reasonableness. However, defendant has failed to demonstrate that the admission of the testimony affected the outcome of the proceedings because the prosecutor did not mention the threatening telephone call in her opening or closing argument, and never implied that defendant threatened Brown or any other witness. Moreover, defendant, Brown, and Nichols all testified to the shooting incident, and the evidence overwhelmingly supported the jury verdict finding defendant guilty of assault with intent to do great bodily harm. Accordingly, defendant has not demonstrated that counsel’s error prejudiced his case.

Defendant also argues that he was denied effective assistance of counsel because defense counsel failed to object to the prosecution's efforts to secure two witnesses or request a missing witness instruction. Specifically, defendant argues that defense counsel should have questioned the due diligence of the prosecution's efforts to locate the witnesses and that defense counsel should have requested the missing witness instruction. Defendant maintains that if defense counsel had raised an objection to the prosecution's purported showing of due diligence, the trial court would have ruled that the efforts were insufficient and would have granted a request for the missing witness instruction. Further, defendant maintains that because this case involved a credibility contest between defendant and the victim, not having the missing witness instruction severely prejudiced his defense.

Under MCL 767.40a, the prosecutor does not have a duty to produce *res gestae* witnesses; however, the prosecutor must advise the defense of all *res gestae* witnesses he intends to call and provide reasonable assistance in locating witnesses if the defendant requests it. *People v Burwick*, 450 Mich 281, 297; 537 NW2d 813 (1995). The prosecution may delete names from the witness list for good cause or by stipulation of the parties. MCL 767.40a(4); *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). A prosecutor must exercise due diligence to produce all endorsed witnesses and, if there was no due diligence, a missing witness instruction should be given. *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004).

In this case, the prosecutor informed the trial court and the defense that three endorsed witnesses could not be located by the police at the beginning of the trial prior to the selection of the jury.<sup>1</sup> Defense counsel did not object or ask for the missing witness instruction and the trial court did not issue any ruling. During cross-examination of the special operations officer that responded to the scene, defendant's attorney briefly questioned the officer about his efforts to locate the two missing witnesses.

Initially, we note that defendant's argument assumes that, if an objection had been raised, the prosecution would have been unable to either demonstrate due diligence or locate the witnesses within a reasonable amount of time; thus, entitling defendant to the missing witness instruction. Also, in his brief on appeal, defendant specifically notes that in this case defense counsel's ineffectiveness is "plain on the record, and there is no need for a remand to expand the record." However, on the record before us, there is no basis on which to conclude that the prosecution would have failed to demonstrate due diligence or produce the missing witnesses in a reasonable amount of time. To the contrary, one witness was located and testified and the brief questioning by defense counsel about the other missing witnesses strongly suggests that meaningful efforts had been made to locate them. Thus, defendant's assumptions are unfounded.

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<sup>1</sup> The three witnesses named by the prosecutor were Jarome Gibson, Antoine Stokes, and Sholanda Nichols. However, Nichols was located during trial and called as a prosecution witness.

Moreover, there is no evidence, and defendant makes no offer of proof, to demonstrate that defendant wanted the missing witnesses to testify. In fact, Nichols' testimony corroborated much of the victim's testimony. Under these circumstances, it is more probable to conclude that defense counsel's failure to object to the missing witnesses was a strategic choice to prevent the production of witnesses whose testimony would have been damaging to defendant. Decisions whether to call witnesses are presumed to be trial strategy and do not constitute ineffective assistance unless they deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Accordingly, on the record before us, we conclude that defendant has failed to demonstrate ineffective assistance of counsel.

Defendant also argues that the trial court erred by scoring 25 points under offense variable three (OV 3) for a "life threatening or permanent incapacitating injury" rather than 10 points for an injury requiring medical treatment, MCL 777.33.

We review for clear error the trial court's factual determinations, which must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

Specifically, defendant argues that the trial court erroneously found the wound life-threatening based on its location without analyzing the specific wound. The court distinguished the gunshot wound based on its location—in the neck—from other gunshot wounds that might not be life-threatening. It was not alleged that the bullet merely grazed the victim; he testified that it was removed from his neck. Moreover, Brown had to undergo surgery and was required to remain in the hospital to recover. He was also required to participate in rehabilitation services. Brown also testified that his walking was altered, he had less strength, he had permanent nerve damage and he could no longer work. Accordingly, we conclude that the facts were sufficient to establish a life-threatening or permanent incapacitating injury for purposes of scoring OV 3.

Defendant also argues that finding Brown suffered a life-threatening or permanent incapacitating injury was inconsistent with the jury verdict of not guilty of assault with intent to murder. Assuming that OV 3 must be scored consistently with the jury's verdict, which is not stated in MCL 777.33, it would not be inconsistent to find that defendant lacked the intent to murder but nonetheless inflicted a life-threatening or permanent incapacitating injury. Thus, the trial court did not err by scoring 25 points under OV3.

Affirmed.

/s/ Donald S. Owens  
/s/ Kathleen Jansen  
/s/ Joel P. Hoekstra