

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EARL DRAIN,

Defendant-Appellant.

UNPUBLISHED

September 18, 2007

No. 271059

Wayne Circuit Court

LC No. 05-012450-01

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 28 to 62½ years in prison for the second-degree murder conviction, three years, four months to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues trial counsel provided ineffective assistance. We disagree. A claim of ineffective assistance of counsel is a mixed question of fact and law, with the findings of fact reviewed for clear error and the questions of law reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant requested an evidentiary hearing, which was denied. Appellate review is thus limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

The right to effective assistance of counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). For an ineffective assistance of counsel claim, a defendant must show that “counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004) (citations omitted). The defendant must also show that, but for counsel’s unprofessional errors, it is reasonably probable the trial outcome would have been different. *Id.* at 663-664. Decisions regarding which witnesses to call are generally matters of trial strategy; in such matters, this Court will not substitute its judgment for that of counsel. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Counsel’s failure to interview witnesses constitutes deficient performance only if it caused counsel to ignore evidence that would have benefited the defendant substantially. *Id.*;

People v Caballero, 184 Mich App 636, 642; 459 NW2d 80 (1990). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Solmonson, supra* at 663, citing *LeBlanc, supra* at 578.

To support his claim, defendant submits an affidavit from his wife, in which his wife asserts she told defense counsel about a security guard who witnessed the event. In his brief, defendant said the guard told defendant’s wife that defendant was being attacked when the victim was shot. Defendant’s wife also requested that defense counsel subpoena another witness who allegedly gave a statement to the police supporting defendant’s account that he was being attacked by several young men. Defense counsel purportedly did not interview either potential witness. Defendant argues that counsel’s failure to interview these witnesses and call them at trial constitutes ineffective assistance, as their testimony would have bolstered defendant’s self-defense claim or perhaps allowed the jury to decide the shooting was voluntary manslaughter.

The affidavit offers no support for a claim of self-defense, which requires that a defendant honestly and reasonably believed his life was in imminent danger or that he was threatened with serious bodily harm. *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002). For a defendant to lawfully use deadly force in self-defense, he must have either been the victim of a sudden and violent attack, been unable to retreat safely, been unable to use nondeadly force to protect himself, or reasonably believed his attacker was about to use a deadly weapon. *People v Riddle*, 467 Mich 116, 119-120; 649 NW2d 30 (2002).

The affidavit does not claim the additional witnesses would testify to any of those matters. At most, the affidavit suggests one witness might testify there was a struggle, and there was already testimony on the record on that point. Defendant does not explain how additional testimony probably would have changed the outcome of the trial. See *Solmonson, supra* at 663-664. Defendant’s own statement indicated he did not see the victim with a weapon. Defendant’s statement never asserted that defendant honestly and reasonably believed his life was in imminent danger or that he felt threatened with serious bodily harm. Thus, even if the purported witnesses corroborated defendant’s statement, defendant still could not justify shooting an unarmed victim as self-defense. The decision not to interview the witnesses was a decision regarding trial strategy, which we will not second-guess. See *Dixon, supra*. We conclude that defendant failed to show that counsel’s assistance was ineffective.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto