STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARON LEE HARRELL,

Defendant-Appellant.

UNPUBLISHED
September 16, 2021

No. 352834
Wayne Circuit Court
LC No. 19-006218-01-FC

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317,[1] felon in possession of a firearm (felon-in-possession), MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 30 to 45 years' imprisonment for the second-degree murder conviction, two to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for each of the felony-firearm convictions. On appeal, defendant argues that the trial court erred by denying his request for a new appointed attorney; there was insufficient evidence to sustain convictions; the jury instructions were deficient and trial counsel was ineffective for failing to request an alibi instruction; and he was entitled to credit for time served. We affirm.

I. BACKGROUND

This case arises out of a shooting at a barbershop on June 1, 2013, in Detroit, Michigan. Antonio Hendrix was on his cellular telephone while standing outside of the barbershop. Defendant and two other men walked up to Hendrix and an argument ensued. One of the three men knocked the phone out of Hendrix's hands and Hendrix was pushed to the ground. Hendrix got up and ran into the barbershop. Defendant, who was armed with a 9-millimeter firearm,

[1] Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a), but the jury found him guilty of the lesser-included offense of second-degree murder.

followed. Hendrix barricaded himself in the barbershop's storage room. Defendant attempted to kick the door down before firing four shots through it. Two of the shots struck Hendrix—one in the hip and one in the chest. Defendant then fled the barbershop and walked away with the two other men. Responding police officers transported Hendrix to the hospital, but he died the next day from his wounds.

Five years later, defendant was arrested for carrying a concealed weapon. Thereafter, the weapon, a Ruger P98 handgun, was determined to be the same firearm that fired the bullets that killed Hendrix.

In the interim, deoxyribonucleic acid (DNA) collected from underneath Hendrix's right-hand fingernails during his autopsy was determined to be consistent with defendant's DNA. The police also interviewed a witness who identified defendant as the person who had followed Hendrix into the barbershop.

When the police interviewed defendant, they told him that they were there to discuss an incident that happened in June 2013 near a barbershop. Without being told of a specific date, defendant stated he had an alibi. Moreover, the hotel that defendant identified as being the location of the family party was 4.3 miles from the barbershop. Defendant had no explanation for how his DNA got under Hendrix's fingernails.

During trial, defendant testified that he was at a family birthday party during the shooting and, therefore, could not have been the perpetrator of the crimes. Although defendant earlier sold marijuana to Hendrix that day, he did not kill him and only obtained the firearm weeks before he was arrested. As for his DNA, defendant now thought it was transferred onto Hendrix when the two exchanged a handshake. Defendant demonstrated that handshake for the jury.

The jury convicted defendant of second-degree murder, felon-in-possession, and felony-firearm. This appeal follows.

II. DISCUSSION

A. SUBSTITUTION OF COUNSEL

Defendant first argues the trial court should have granted his request to have a new attorney appointed because there was a breakdown in the attorney-client relationship. We disagree.

"The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion." *People v Buie*, 298 Mich App 50, 67; 825 NW2d 361 (2012) (quotation marks and citation omitted). An abuse of discretion occurs if the trial court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (quotation marks and citation omitted).

Defendant's assertion that the trial court abused its discretion by failing to grant his request to have a new attorney appointed fails for several reasons. First, defendant was unable to articulate to the trial court a legitimate reason why there was a breakdown in the attorney-client relationship.

And second, defendant mischaracterizes the record when he asserts the trial court never inquired into his reasons for wanting a new attorney.

"A defendant is only entitled to a substitution of appointed counsel when discharge of the first attorney is for 'good cause' and does not disrupt the judicial process." *Buie*, 298 Mich App at 67 (quotation marks and citation omitted). This Court considers a number of factors when reviewing a trial court's decision to deny a defendant's request for a new appointed defense attorney:

> (1) [W]hether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003) (quotation marks and citation omitted).]

Defendant undoubtedly asserted a constitutional right when he asked to have a new attorney appointed. "[T]he Sixth Amendment guarantees a defendant's right to counsel." *Buie*, 298 Mich App at 67. But criminal defendants are not "entitled to have the attorney of [their] choice appointed simply by requesting that the attorney originally appointed be replaced." *People v McFall*, 309 Mich App 377, 382; 873 NW2d 112 (2015) (quotation marks and citation omitted). "A mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause. Likewise, a defendant's general unhappiness with counsel's representation is insufficient." *Strickland*, 293 Mich App at 398.

Despite asserting his constitutional right to counsel, defendant was never able to articulate a legitimate reason why he was entitled to a new attorney. At the pretrial hearing on October 25, 2019, defendant's trial counsel approached the bench and had an off-the-record discussion with the prosecution and trial court regarding her reasons for wanting to withdraw. The subsequent on-the-record statements from the trial court implied that counsel's reasons were related to defendant's inability or unwillingness to cooperate with her regarding an alibi defense.[2] The trial court informed defendant that "[t]here is no concept that can help you known as ineffective assistance of client. If you don't want to cooperate with your lawyer, that is going to be your problem." See *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001) ("A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel.").

At a subsequent pretrial hearing on December 2, 2019, a week before trial was scheduled to begin, defendant made his first request to have a new attorney appointed. When asked by the trial court his reasons for wanting a new attorney, defendant responded: "I would like to discharge

[2] The court ordered an investigator to assist the defense, and, at a later hearing, counsel reported that defendant provided the names of four or five potential alibi witnesses. Only two witnesses responded and neither had any recollection.

her services, because she is not in my best interest as far as media, as far as this case. Also, I have not been—filed no motions, I have asked." Defendant explained that he wanted a "*Wade*[3] [h]earing," adding it was an "evidentiary hearing, *Brady*[4] material, things that I've been asking for, [and a] *Frank*'s[5] [h]earing, things like that." Defendant continued: "I been in and out of the [l]aw [l]ibrary, so, I've been getting things as far as my case and I asked for these motions."

Defendant never explained to the trial court, and does not identify for this Court, what defendant specifically wanted to challenge through the pretrial motions he identified.[6] When the trial court explained to defendant that attorneys need to have reasons to file motions, and that perhaps trial counsel did not file a motion because she had no reason to, defendant replied that he understood. See *Traylor*, 245 Mich App at 463 ("Defense counsel need not file frivolous motions.").[7]

During trial, defendant also sought appointment of a new attorney because trial counsel did not give an opening statement or cross-examine the first four witnesses. Again, the trial court explained to defendant that this was normal trial strategy employed by experienced defense attorneys. In other words, defendant never demonstrated good cause to have a new attorney appointed. See *Buie*, 298 Mich App at 67.

For the remaining factors, defendant was not negligent in asserting his right, nor does it appear that defendant's request for new counsel was merely a tactic to delay trial. Finally, defendant has not demonstrated that he was prejudiced by proceeding to trial with trial counsel. Although defendant asserted that he wanted counsel to file pretrial motions, there is no indication that any motions would have affected the outcome of trial. Similarly, there is not a reasonable probability that the outcome would have changed had trial counsel given an opening statement and cross-examined the first four witnesses.[8]

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[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[4] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[5] *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

[6] The prosecutor questioned the necessity of holding a *Wade* hearing, noting that the witness's identification was video-recorded and did not reveal any "suggestiveness."

[7] Purportedly, defendant's family was in contact with current appellate counsel; however, until he actually received his requested retainer, he had indicated he would not appear at trial.

[8] We agree with the trial court's statement concerning trial counsel's reservation of her opening statement and lack of cross-examination:

> [N]one of the other witnesses said anything that was particularly incriminating. So I think actually your lawyer is right [for] not bothering to cross-examin[e] witnesses when there's no point to be made by cross-examining them, and she reserved her opening statement which is a strategy decision which some lawyers make sometimes and so there it is.

Defendant asserts the trial court abused its discretion by failing to inquire into defendant's reasons for wanting a new attorney. In doing so, defendant ignores the December 2, 2019 hearing, in which he was asked by the trial court to give his reasons. Defendant did so, as detailed above. In addition, the trial court explained to defendant in some detail:

> So, you know, unless you can give me a specific thing that you should have—she should have done that she didn't do, but if she had done it, it would have been outcome determinantive [sic]; in other words, it would have helped yourself or put this case on a different light, I have no reason to dismiss her. [Trial counsel] does a lot of this kind of work. She is well known in this building, represents a lot of [d]efendants and it would really be unfair to you, frankly, if I dismissed her one week before the trial, because I'm not moving this trial date.
>
> Now, if you know—if you or your family want to go out and hire a lawyer, that would really be at your risk, because that lawyer would have to be ready to try your case on Monday, the 9th of December, and any other lawyer that I even appoint[] to the case would have to be ready to try the case[. Your c]ase has been adjourned at least twice and it's getting some age on it, and I'm sure, you want it over. We all want it over with. We need to, you know, try this case and get it over with.
>
> So, you and I and [trial counsel] and [the prosecutor] are just stuck with each other right now and I can't find a single objective thing wrong with anything [trial counsel] has done in this case.

Defendant's reliance on *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972), is unavailing. In that case, our Supreme Court concluded the trial court abused its discretion when it denied the defendant's motion for a continuance and his attorney's motion to withdraw. *Id*. at 578. Unlike this case, where defendant is unable to articulate a legitimate reason for substitution of counsel, the Court in *Williams* specifically found there was good cause for the defendant's request:

> The reason that defendant wished to have new counsel was because of an irreconcilable difference of opinion with his counsel on whether to call certain alibi witnesses. This was a bona fide dispute and not a delaying tactic. The disagreement had only occurred the day before trial and thus defendant was not guilty of negligence in informing the court of his desire for different counsel. [*Id*. at 576.]

In sum, defendant's claim that he is entitled to a new trial because the trial court abused its discretion when it denied his request for a new attorney is without merit. The trial court's remarks from the October 25, 2019 hearing indicate that, at least at that point, trial counsel's request to withdraw was based on defendant's refusal to cooperate, which cannot be the basis for good cause to substitute attorneys. Further, defendant's proffered reasons for requesting new counsel, namely to file pretrial motions, present an opening statement, and cross-examine the first four witnesses, do not amount to good cause. Thus, the trial court did not abuse its discretion by denying defendant's request for a new appointed attorney.

B. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues the evidence presented at trial was insufficient to support his convictions. We disagree.

"Claims of insufficient evidence are reviewed de novo." *People v Kloosterman*, 296 Mich App 636, 639; 823 NW2d 134 (2012). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). "[T]he question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). "All conflicts in the evidence must be resolved in favor of the prosecution and [this Court] will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). "To evaluate the sufficiency of the evidence, we must review the evidence in the context of the elements of the charged crimes." *People v Bosca*, 310 Mich App 1, 17; 871 NW2d 307 (2015).

Defendant only argues that there was insufficient evidence that he was the perpetrator of the crimes; he does not challenge the other elements of his convictions. "Identity is an essential element of every crime." *People v Fairey*, 325 Mich App 645, 649; 928 NW2d 705 (2018).

Although no witness testified at trial that defendant was seen pulling the trigger of the gun that shot and killed Hendrix, the physical and circumstantial evidence against defendant was sufficient to identify him as the shooter and, therefore, convict him of second-degree murder and the other firearm offenses. See *Bailey*, 330 Mich App at 46 ("Direct and circumstantial evidence, including reasonable inferences arising from the use of circumstantial evidence, may provide sufficient proof to meet the elements of a crime."). The eyewitness identified defendant as one of the three men who approached Hendrix outside of the barbershop. The eyewitness also testified that he saw defendant follow Hendrix into the barbershop with a gun. The witness further testified that after the gunshots, he saw defendant leave the barbershop, remove his shirt, and cross the street to a parking lot.

The physical evidence also identified defendant as the shooter. The autopsy revealed foreign DNA underneath Hendrix's fingernails. That DNA was later determined to be—with a great degree of certainty—from defendant. Despite defendant's testimony that he did not have a physical altercation with Hendrix and that his DNA got under Hendrix's fingernails from shaking hands, "[t]he prosecution need not negate every reasonable theory of innocence; it need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant." *People v Kenny*, 332 Mich App 394, 403; 956 NW2d 562 (2020). The jury gave greater weight to the witness's testimony that defendant had a physical altercation with Hendrix, which could reasonably explain the presence of defendant's DNA under Hendrix's fingernails, than defendant's testimony that the DNA was transferred via shaking hands in the manner defendant demonstrated for the jury. "A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses." *Id*.

Further, defendant was arrested five years after the shooting with a Ruger P89. Subsequent ballistic testing established that the Ruger was the same gun used to kill Hendrix. In addition to defendant's testimony that he was at a family birthday party, not the barbershop, he also testified that he purchased the gun from a friend "weeks prior to the arrest." Accordingly, defendant asserted that not only was he not present for the shooting, but he was not even in possession of the Ruger when Hendrix was killed. Again, the jury weighed the conflicting evidence and credibility of the witnesses, and this Court must defer to that assessment. *Id*. Viewed in the light most favorable to the prosecution, there was sufficient direct and circumstantial evidence that defendant was the individual who shot and killed Hendrix. Thus, there was sufficient evidence to sustain defendant's second-degree murder and associated firearm convictions.

C. JURY INSTRUCTIONS

Defendant also argues that the jury instructions were incomplete because there was no instruction on the lesser included offense of voluntary manslaughter and no instruction on defendant's alibi defense. We disagree.

"[J]ury instructions that involve questions of law are . . . reviewed de novo." *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005). Regarding the voluntary manslaughter instruction, the "trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation marks and citation omitted). An abuse of discretion occurs if the outcome the trial court selects falls outside the permissible principled range of outcomes. *Babcock*, 469 Mich at 269, 274.

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Armstrong*, 305 Mich App 230, 239; 851 NW2d 856 (2014) (quotation marks and citation omitted). "It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). "Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence." *Id*. at 162-163. "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

We begin with trial court's denial of defendant's request for a voluntary manslaughter instruction. "Manslaughter is a necessarily included lesser offense of murder." *People v Pennington*, 323 Mich App 452, 464; 917 NW2d 720 (2018) (quotation marks and citation omitted). The elements of voluntary manslaughter are:

> (1) defendant killed [someone] in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions. [*People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009).]

"The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason; that is, adequate provocation is that which would cause the reasonable person to lose control." *Id*. (quotation marks and citation omitted).

The witness to the incident testified that defendant and two other men walked up to Hendrix. An argument and physical altercation ensued: "They seem to be in a heated discussion about some particular thing. I don't know what they were discussing." The witness added: "[It] [l]ooked [like] there was an argument. I looked and somebody slapped the phone out of [Hendrix's] hand—out of his hand and they began, they was fighting, they started fighting[.]" The witness never testified that he saw Hendrix provoke defendant; instead, the evidence demonstrated, if anything, that defendant and the other two men approaching Hendrix were the aggressors in the situation. Because this evidence did not support the element of adequate provocation, the trial court did not abuse its discretion when it denied defendant's request for a voluntary manslaughter instruction. See *Cornell*, 466 Mich at 357; *Roper*, 286 Mich App at 87.

Moreover, defendant's own testimony did not provide a factual basis supporting the giving of a voluntary manslaughter instruction. At trial, defendant testified he was not present at the barbershop at the time of the shooting. Instead, defendant asserted that he was attending a family birthday party when the shooting occurred. Defendant explained that his DNA was underneath Hendrix's fingernails because the two had encountered each other earlier in the day and shook hands. Defendant denied any altercation between himself and Hendrix:

> Well, at the time I didn't know the deceased by his government name but I have known him throughout the neighborhood. Anything as far as a handshake can [contute] [sic] to DNA at that point. But there was no altercation between me and the deceased at the time. DNA as far as that, no.

In short, there was no evidence to support defendant's contention on appeal that there was evidence of adequate provocation from Hendrix.

Neither *Maher v People*, 10 Mich 212 (1862), nor *People v Pouncey*, 437 Mich 382; 471 NW2d 346 (1991), two cases relied on by defendant, change this result. In *Maher*, 10 Mich at 221-222, our Supreme Court set forth a test for determining whether there was adequate provocation to sustain a manslaughter conviction:

> As a general rule, the court, after informing the jury to what extent the passions must be aroused and reason obscured to render the homicide manslaughter, should inform them that the provocation must be one, the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find such provocation from the facts proved, and should further find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter.

Contrary to defendant's assertions, *Maher* did not relax the standard so far as to include any assertion of provocation. *Maher* still requires there be actual evidence of the provocation: "[T]he provocation must be one, the tendency of which would be to produce such a degree of excitement

and disturbance in the minds of ordinary men[.]" *Id*. In this case, there was no adequate provocation to warrant a voluntary manslaughter instruction.

Similarly, *Pouncey* does not aid defendant. While defendant is correct that our Supreme Court focused, at least partially, on the defendant's state of mind when assessing whether voluntary manslaughter was an appropriate instruction, the Court nevertheless continued its focus on objective evidence of provocation, including that "the provocation must be adequate, namely, that which would cause the reasonable person to lose control." *Pouncey*, 437 Mich at 389. In addition, it is in the trial court's discretion to determine if there was adequate provocation as a matter of law: "When, as a matter of law, no reasonable jury could find that the provocation was adequate, the judge may exclude evidence of the provocation." *Id*. at 390. Moreover, if a defendant has a sufficient "cooling-off period," a defendant is unable to establish the necessary "heat of passion" element. *Id*. at 392 (determining that there was an adequate "cooling-off period" when the defendant walked into a house after an exchange of insults between himself and the victim). In this case, Hendrix ran into the barbershop and closed himself in a room. Defendant elected to follow Hendrix into the building and shoot through the closed door. As such, the time between Hendrix removing himself from the outdoor altercation, entering the barbershop and closing himself away, and defendant's decision to follow Hendrix and reinitiate or continue the initial assault was arguably sufficient to preclude establishment of the "heat of passion" element.

There was no evidence presented at trial to support a voluntary manslaughter instruction because there was no evidence that Hendrix provoked defendant. The eyewitness never saw Hendrix with a gun and no weapon was found on Hendrix by investigators. Indeed, defendant denied there being any physical altercation with Hendrix that would lead to defendant being provoked. Further, sufficient time occurred between the assault by defendant and defendant electing to follow Hendrix into the barbershop for a "cooling-off" period to preclude establishment of the heat of passion element for voluntary manslaughter. Thus, the trial court did not abuse its discretion when it denied defendant's request for a voluntary manslaughter instruction. See *id*. at 392.

We turn next to defendant's argument that the trial court should have sua sponte instructed the jury regarding defendant's alibi defense. Defendant waived this argument because trial counsel approved the instructions given by the trial court. Waiver is "the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (quotation marks and citations omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted). When trial counsel expresses satisfaction with a trial court's jury instructions, the defendant waives the issue of whether the instructions were erroneous. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Nonetheless, we will review the issue because it is necessary to resolve defendant's claim of ineffective assistance of counsel. *People v Eisen*, 296 Mich App 326, 329-330; 820 NW2d 229 (2012).

Even if not waived, defendant is not entitled to relief. The "failure to give an [u]nrequested alibi instruction is not reversible error so long as the court gives a proper instruction on the elements of the offense and on the requirement that the prosecution prove each element beyond a reasonable doubt." *People v Burden*, 395 Mich 462, 467, 469-471; 236 NW2d 505 (1975)

(KAVANAGH, C.J.); *id*. at 469-471 (WILLIAMS, J., concurring in the result); *id*. at 471 (LINDEMER, J., separately concurring in the result because "appellate reversal is barred by MCL 768.29[9] . . . ."); *People v Duff*, 165 Mich App 530, 541-542; 419 NW2d 600 (1987). The trial court did so here. Moreover, the trial court instructed the jury on the issue of identification of defendant as the perpetrator:

> One of the issues in this case is the identification of the [d]efendant as the person who committed the crimes he is charged with. The prosecutor must prove beyond a reasonable doubt that the crimes were committed and that the [d]efendant was the person who committed them.
>
> In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted, and the witness's state of mind at the time.
>
> Also think about the circumstances at the time of the identification. Such as how much time had passed since the crime, how sure the witness was about the identification and the witness's state of mind at the identification.
>
> You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification because then it may be more reliable. However, you may use the identification testimony alone to convict the [d]efendant as long as you believe the testimony and you believe that it proves beyond a reasonable doubt that the [d]efendant was the person who committed the crime.

On the basis of this instruction, if the jury believed defendant's testimony that he was not at the barbershop but rather at a family birthday party, the jury would not have convicted defendant of second-degree murder, felon-in-possession, and felony-firearm. Defendant has not articulated what about his proposed jury instruction would have made a difference in the proceedings.[10] Thus, the trial court did not reversibly err when it did not separately give an unrequested alibi instruction.

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[9] In pertinent part, MCL 768.29 reads: "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused."

[10] The jury instruction for lack of presence or alibi provides:

> (1) You have heard evidence that the defendant could not have committed the alleged crime because [he / she] was somewhere else when the crime was committed.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

In conjunction with defendant's argument concerning the alibi jury instruction, defendant argues that trial counsel rendered ineffective assistance by failing to request such an instruction. We disagree.

"A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id*. To preserve the issue of whether counsel rendered ineffective assistance, the defendant must move for a new trial or a *Ginther*[11] hearing in the trial court or move for remand on appeal. *Id*. When a claim of ineffective assistance of counsel is unpreserved, this Court's "review is limited to mistakes apparent on the record." *Id*.

"To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise." *Petri*, 279 Mich App at 410.

This Court "will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Moreover, trial counsel has "wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *Id*.

Even if trial counsel's decision not to seek an alibi instruction was objectively unreasonable, defendant cannot show that her failure to do so changed the outcome of the trial. As explained, the trial court instructed the jury that the prosecution was required to prove beyond a reasonable doubt that defendant was "the person who committed the crimes he is charged with." The alibi jury instruction essentially provides the exact same instruction. M Crim JI 7.4 ("The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed."). Had the jury believed defendant's testimony that he was at a family birthday party, he would not have been convicted. Thus, there was no reasonable probability that trial counsel's failure to request an alibi instruction affected the outcome of the proceedings. See *Uphaus*, 278 Mich App at 185.

> (2) The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed. The defendant does not have to prove [he / she] was somewhere else.
>
> (3) If, after carefully considering all the evidence, you have a reasonable doubt about whether the defendant was actually present when the alleged crime was committed, you must find [him / her] not guilty. [M Crim JI 7.4.]

[11] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

E. JAIL CREDIT

In his final issue on appeal, defendant argues the trial court erred when it denied his request to be given credit for time served while awaiting trial. We disagree.

"Whether a defendant is entitled to credit for time served in jail before sentencing is a question of law that we review de novo." *People v Armisted*, 295 Mich App 32, 49; 811 NW2d 47 (2011). MCL 769.11b, provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

In *People v Raisbeck*, 312 Mich App 759; 882 NW2d 161 (2015), this Court addressed a similar scenario. In *Raisbeck*, the defendant served 360 days in jail for a prior false pretenses conviction. *Id*. at 765. While serving that sentence, the defendant was also awaiting trial for racketeering, for which she was ultimately convicted. *Id*. Like defendant here, the defendant in *Raisbeck* argued she was entitled to credit for the time she was incarcerated prior to her racketeering conviction. *Id*. at 766. This Court disagreed, stating: "The time [the defendant] spent in jail was time served on her previous false pretenses convictions, not time served for the offense of which she was convicted in this case." *Id*. at 767. Thus, the defendant "was not entitled to sentence credit." *Id*.

Here, defendant was incarcerated on a concealed weapons charge at the time he was charged with the four crimes at issue in this appeal. Thus, as in *Raisbeck*, the time defendant was serving while awaiting his murder trial was served on his concealed weapons charge, not "the offense of which he is convicted." MCL 769.11b. Accordingly, defendant was not entitled to jail credit.

Affirmed.

/s/ Michelle M. Rick
/s/ Amy Ronayne Krause
/s/ Anica Letica