

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FEDERICO VEGA-PUGA,
a/k/a FREDERICO VEGA-PUGA,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 172765

Van Buren Circuit Court

LC No. 93-008521-FC

Before: MacKenzie, P.J., and Holbrook, Jr., and T. P. Pickard*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and sentenced to life imprisonment. We remand.

I

Defendant, a Spanish-speaking Mexican immigrant, was arrested for murdering his great-uncle and was questioned by a Michigan State Police officer with the assistance of a Spanish-speaking United States Border Patrol agent. Defendant confessed to the crime after approximately five hours. The interrogation was videotaped, but the videotape was never made part of the lower court record. Rather, at trial, the prosecution presented evidence of defendant's confession through the testimony of the border patrol agent. Defendant contends that he told the agent that the victim wielded a machete during the altercation that resulted in the victim's death – a circumstance suggesting manslaughter as a possible verdict. The agent testified that defendant never mentioned that the victim had a weapon. Defense counsel did not challenge the veracity of the agent's testimony.

On appeal, defendant first argues that he was denied a fair trial because the border patrol agent gave false testimony regarding the substance of defendant's confession. The admission of false evidence in a criminal trial before a jury is grounds for reversal and a new trial, *People v Anderson*, 44 Mich

* Circuit judge, sitting on the Court of Appeals by assignment.

App 222, 229; 205 NW2d 81 (1972). In this case, however, because there is no record of defendant's actual confession before this Court, we are unable to determine whether his confession differed from the version testified to by the border patrol agent, or whether the agent's testimony was false. We therefore decline to reverse on this ground.

Defendant also argues that the trial court erred in admitting defendant's confession at trial. The voluntariness of a confession is a question for the trial court. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). We review the trial court's determination by examining the entire record and independently determining whether defendant's confession was voluntarily given. *Id.* However, we defer to the trial court's superior ability to view the evidence and the witnesses and will not disturb the trial court's findings unless clearly erroneous. *Id.* A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *People v Kvam*, 160 Mich App 189, 196; 408 NW2d 71 (1987).

Defendant contends that the trial court erred in finding that he was read his *Miranda* rights before questioning began [*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)]. The trial court's conclusion that defendant was read his *Miranda* rights turned on the credibility of the witnesses. Giving great deference to a trial court's assessment of the witnesses' credibility, *Marshall*, *supra* at 587, we are not left with a definite and firm conviction that the trial court clearly erred in finding that defendant was informed of his *Miranda* rights. *Kvam*, *supra* at 196. Defendant also contends that the trial court erred in finding that defendant knowingly, voluntarily, and intelligently waived his rights before confessing; however, after reviewing the record, we are not definitely and firmly convinced that the trial court erred in finding that defendant voluntarily confessed. *Id.*

Defendant next claims he was denied the effective assistance of trial counsel at trial. When reviewing a claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Moreover, effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Thus, defendant carries the burden of establishing a prima facie case of ineffective assistance of counsel. *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Stanaway*, *supra* at 687-688.

Defendant contends that trial counsel was ineffective in failing to adequately challenge and expose the involuntariness of his confession. Defendant primarily argues that the most coercive aspects of his interrogation are only apparent upon viewing the videotape of his confession. Again, however, the videotape was never made part of the record in this case; thus, we cannot review any claims which are dependent upon a review of the videotape.

II

Following defendant's conviction, this Court remanded the case to allow defendant to move for a new trial based on ineffective assistance of counsel. Defendant's appellate counsel failed to subpoena trial counsel to testify at the motion hearing, believing that the burden of disproving defendant's allegations ineffective assistance fell on the prosecution. Appellate counsel, however, was prepared to present an interpreter's expert testimony that defendant's videotaped confession differed from the version testified to at trial by the border patrol agent. The trial court denied the motion without allowing defendant to call his expert witness.

Defendant argues that the trial court, at the hearing conducted pursuant to this Court's order of remand, erred in refusing to admit or hear any evidence that defendant was denied the effective assistance of counsel. We review a trial court's decision to admit or exclude evidence for abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

At the hearing, the trial judge indicated his belief that defendant received effective assistance of counsel notwithstanding anything the expert witness had to say. Moreover, the court found that defendant would have been convicted of the offense charged even without the evidence of his confession and thus, assuming defendant could establish that trial counsel ineffectively represented him in not challenging the veracity of the agent's testimony, the inadequate representation did not affect the outcome of the trial.

Although we find that the trial court did not abuse its discretion in taking only an offer of proof as to the expert's testimony, we disagree with the court's conclusion that defendant's allegations concerning counsel's representation, if true, would not have affected the outcome of the trial. Our review of the record leads us to conclude that if defendant did in fact state in his confession that the victim possessed a weapon, then trial counsel's failure to present this evidence to the jury creates a reasonable probability that the outcome of the trial was affected by trial counsel's ineffective representation. *Stanaway*, *supra* at 687-688. Had such evidence been presented, the jury could have convicted defendant of the lesser offense of voluntary manslaughter, rather than first-degree murder.

As indicated above, defendant's appellate counsel failed to subpoena trial counsel for the hearing on remand, and hence failed to establish ineffective assistance of counsel at the hearing. Without having called trial counsel at the motion hearing to account for his performance, defendant could not overcome the presumption of adequate assistance of counsel. *Id.* Under these circumstances, we conclude that appellate counsel's failure to present trial counsel at the motion hearing amounted to ineffective assistance of appellate counsel. *People v Lyons*, 442 Mich 895; 502 NW2d 41 (1995). While the decision whether to call a witness is a matter of trial strategy, ineffective assistance of counsel exists when the failure to call the witness might have affected the outcome of the proceeding. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). In this case, appellate counsel's failure to call trial counsel at the motion hearing might have affected the outcome of the proceeding.

We again remand this case to the trial court for another hearing, to be held within twenty-eight days of the release of this opinion, to determine whether defendant was denied the effective assistance of counsel at trial. If the court finds that, during his videotaped confession, defendant did in fact assert that the victim wielded a weapon, and if the court also finds that trial counsel's reasons for not challenging the veracity of the agent's contrary testimony are unacceptable, then defendant is entitled to a new trial.

Remanded. We retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Timothy P. Pickard