

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES E. ENGLE,

Defendant-Appellant.

UNPUBLISHED

May 30, 1997

No. 190614

Oakland Circuit Court

LC No. 95-138316

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, and pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to one year in prison and two years' probation. In addition, defendant was ordered to pay \$600 in costs and \$455 in restitution. Defendant now appeals as of right. We affirm the conviction, but vacate the order to pay restitution.

I

Defendant first argues that the trial court erred in denying his motion for a new trial on the ground that his conviction was against the great weight of the evidence. The decision to grant a new trial is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *People v Legrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994). The standard for reviewing an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

A new trial may be granted when the verdict is against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). A verdict may be vacated only when it does not find reasonable support in the evidence, but is more likely attributed to causes outside the record, such as passion, prejudice, sympathy, or some extraneous influence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Defendant argues that his conviction was against the great weight of the evidence because the only eyewitnesses to the event, Georgia Zion and Brent Hillier, were not credible. The trial court may evaluate credibility in deciding a motion for new trial. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). However, a grant of new trial based upon the credibility of the witnesses must be made with great caution and under a presumption against usurping the function of the jury. *Herbert, supra* at 477; *People v Bart (On Remand)*, 220 Mich App 1, 11; 558 NW2d 449 (1996). As this Court has recently stated,

[W]hen sitting as a thirteenth juror, the hurdle a judge must clear to overrule a jury, is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation. [*Id.* at 13.]

After carefully reviewing the record, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.¹ Defendant did not present any witnesses or evidence. Defendant attempted to impeach the credibility of Hillier and Zion by suggesting that there had been a long-standing feud between them and defendant. However, both witnesses denied the existence of a feud. Defendant offers no reason why the jury's finding regarding credibility should be overruled. The evidence, when considered in its entirety, does not clearly weigh in defendant's favor. Accordingly, we find no error requiring reversal.

II

Defendant next claims that his conviction should be reversed because several of the prosecutor's comments denied him a fair trial. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

We have reviewed the comments cited by defendant and conclude that in each case a timely curative instruction would have eliminated any prejudice. Accordingly, defendant is not entitled to relief.

III

Defendant next argues that the trial court abused its discretion by ordering him to pay \$455 in restitution because it was a loss for which Hillier had already been compensated. We agree.

A sentencing court's authority to order restitution derives from MCL 780.766(2); MSA 28.1287(766)(2), which gives a sentencing court discretion to order restitution to any victim of the defendant's course of conduct that gives rise to the conviction, in addition to or in lieu of any

other penalty authorized or required by law. *People v Schluter*, 204 Mich App 60, 63; 514 NW2d 489 (1994). Restitution is not a substitute for civil damages, but encompasses only those losses that are easily ascertained and are a direct result of a defendant's criminal conduct. *People v White*, 212 Mich App 298, 316; 536 NW2d 876 (1995).

In this case, the trial court ordered defendant to pay Hillier \$455 for income that he lost as a result of testifying at trial. This Court has stated that the amount of restitution should be based upon the evidence. See *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995). The Court based its determination of the amount of restitution on Hillier's estimate that he lost 13 hours of work at \$35 per hour while he was testifying at defendant's trial. However, Hillier testified that he was a self-employed independent contractor who was paid by the work accomplished rather than by the hour. Thus, there is no evidence on the record to support defendant's claim that he was entitled to \$35 per hour, or that he was not otherwise able to perform and get paid for the work he would have done while testifying. Further, it is questionable whether the statute contemplates the award of lost income based solely on the victim's participation in defendant's criminal proceedings, as the causal connection between the defendant's criminal activity and the victim's loss is remote. We therefore vacate the trial court's order of restitution.

IV

In his final issue, defendant asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

Defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to subpoena a tape of Zion's 911 call and did not call as witnesses neighbors of Zion and Hillier who told the police that they did not hear gunshots on the day of the alleged assault. Because there was no *Ginther*² hearing, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

The decision whether to call a witness is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Ineffective assistance of counsel can take the form of failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense. A defense is substantial if it might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). In the present case, defendant neither identified the witnesses he claims should have been called nor indicated the substance of their testimony.

Furthermore, a police officer testified that the neighbors told him that they did not hear any gunshots. Hillier lived in a rural area where the nearest neighbor lived 750 to 1000 feet away. On this record, we do not believe that trial counsel's failure to call Hillier's neighbors as witnesses deprived him of a substantial defense.

Similarly, defendant has not overcome the presumption that trial counsel's failure to subpoena the 911 tapes was sound trial strategy. There is nothing in the record that supports defendant's claim that the tapes may have been exculpatory to him. Accordingly, defendant has not demonstrated that he was prejudiced by counsel's failure to subpoena the tapes.

Affirmed in part and vacated in part.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

¹ Defendant argues that the trial court erroneously applied the standard for determining whether there was sufficient evidence to support the conviction. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Because the trial court did not specifically state which standard it applied, it is unclear whether the trial court erred. However, even if the trial court did utilize the wrong standard, the evidence does not clearly weigh in defendant's favor. Where the trial court reaches the right result for the wrong reason, this Court will not reverse. *People v Brake*, 208 Mich App 233, 242 n 2; 527 NW2d 56 (1995).

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).