

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WILLIAM LINDELL,

Defendant-Appellant.

UNPUBLISHED

January 23, 1998

No. 179471

Ingham Circuit Court

LC No. 94-067351-FH

Before: MacKenzie, P.J., and Holbrook, Jr., and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of uttering and publishing, MCL 750.249; MSA 28.446, and subsequently pleaded guilty as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to serve an enhanced prison term of five to twenty-five years. He appeals by right and we affirm.

Defendant first argues that he was denied effective assistance of counsel at trial. To establish such a claim, the defendant has the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the outcome of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). In applying this test, we indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Mitchell*, supra at 156.

Here, defendant has failed to establish that trial counsel committed any errors so objectively unreasonable that they deprived defendant of a fair trial. Defendant first submits that counsel's failure to call witnesses proposed by defendant constituted ineffective assistance of counsel. Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). Counsel's failure to call witnesses is presumed to be trial strategy. *Mitchell*, supra at 163. At a hearing on defendant's first motion for a new trial, counsel testified that defendant did not provide him with addresses of the proposed witnesses,

only sketchy information regarding where they lived or spent their time. Nonetheless, counsel stated that he searched for the witnesses and left notes at the various locations mentioned by defendant, but still could not secure any of the witnesses to testify. Counsel further testified that he did not believe any of defendant's witnesses could offer testimony helpful to defendant because none of the testimony defendant alleged these witnesses would provide would establish that defendant never had an opportunity to steal Smith's checks, and some of the testimony related to events occurring after the date of defendant's charged offenses and therefore was irrelevant. Defendant testified to the contrary, but the trial court specifically found that defendant lacked credibility. Accordingly, we conclude that the trial court correctly determined that counsel's failure to call the proposed witnesses did not deprive defendant of a substantial defense, and thus did not constitute ineffective assistance of counsel.

Defendant also failed to establish that counsel's failure to call defendant to testify constituted ineffective assistance of counsel. Counsel testified that he did not want defendant to take the witness stand because he believed, based on Smith's inconsistent testimony, that reasonable doubt existed regarding whether defendant intended to defraud Smith, and he also believed that impeachment of defendant with his prior convictions would damage his case. Counsel thus reached the strategic conclusion that defendant should not testify. Accordingly, because defendant has not overcome the presumption that counsel's strategic decisions were sound, *Mitchell, supra* at 145, we conclude that the trial court properly found that defendant was not denied effective assistance of counsel on this basis.

Defendant also failed to show that counsel's failure to object to leading questions by the prosecutor, hearsay statements, and unresponsive answers constituted ineffective assistance of counsel. Counsel testified that his failure to object at every opportunity was based on his belief that numerous objections might have prevented the jury from properly hearing and understanding the case or created hostility toward defendant if the jurors began to feel that counsel was misleading them or preventing them from hearing particular information, and that raising an objection sometimes has the effect of highlighting certain objectionable evidence. Counsel thus refrained from objecting as a matter of trial strategy. *Mitchell, supra*. Accordingly, the trial court correctly held that counsel was not ineffective on this basis.

Defendant also failed to establish that counsel was ineffective in failing to object to the prosecutor's introduction of evidence regarding defendant's January 31, 1994, presentation of another of Smith's checks that defendant had filled out to cash. Counsel testified that, as a matter of trial strategy, he refrained from objecting to this testimony because he believed that the specific testimony regarding this uncharged other act would help defendant in casting doubt on the prosecution's case. At the same time defendant was confronted about this check, two other people in the bank also possessed checks drawn on Smith's account, and defendant had told bank officials when they confronted him that Smith had authorized him to write the January 31, 1994, check. Counsel thought that some of this testimony would support the defense theory that Smith often authorized defendant to write checks drawn on Smith's account. Accordingly, the trial court correctly ruled that counsel's decision not to object to the testimony constituted reasonable trial strategy, and therefore counsel was not ineffective on this basis.

Defendant next argues that the trial court abused its discretion by refusing to permit counsel to withdraw and to appoint new counsel after the attorney-client relationship between counsel and defendant had broken down. We disagree. An indigent defendant is not entitled to the counsel of his choice. Rather, he is entitled only to representation by counsel who performs at least as well as a lawyer with ordinary training and skill in the criminal law. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Bradley*, 54 Mich App 89, 95; 220 NW2d 305 (1974). The decision to order substitution of counsel is within the sound discretion of the trial court, upon a showing of good cause and that the substitution will not disrupt the judicial process. See *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Here, defendant's arguments in support of substitute counsel were found by the trial court to be inadequate, and, as discussed above, we have found no error in that determination. Thus, defendant has not established prejudice because of the trial court's refusal to order substitute counsel. See *People v Gendron*, 144 Mich App 509, 523; 376 NW2d 143 (1985). In addition, substitution of counsel on the day of trial would have significantly disrupted the judicial process by requiring an adjournment in order to permit new counsel to become familiar with the case. *People v Johnson*, 144 Mich App 125, 135; 373 NW2d 263 (1985). Accordingly, we find no abuse of discretion by the trial court in refusing to order substitution of counsel.

Finally, defendant alleges that the trial court failed to follow the proper sentencing procedure as established by the 1994 amendment to the habitual offender statute. Defendant's appeal brief states: "The statute has been procedurally amended relative to convictions occurring after May 1, 1994, to eliminate the conviction process." This is inaccurate; 1994 PA 110 expressly provides that the amendment "shall apply to prosecutions for criminal offenses *committed* on or after [May 1, 1994]." Thus, because defendant committed these offenses in January 1994, the trial court properly imposed a single, enhanced sentence, in accordance with the pre-amendment statute.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Henry William Saad