

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY QUINN PLAIR,

Defendant-Appellant.

UNPUBLISHED

February 21, 2006

No. 257517

Wayne Circuit Court

LC No. 03-013272-01

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

After defendant's first trial ended in a mistrial because the jury was unable to reach a verdict, defendant was convicted at a second jury trial of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of 108 months to 15 years for the assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that trial counsel was ineffective for failing to call two alibi witnesses, Antoine Woods and Austin Woods, Jr. Following a *Ginther*¹ hearing, the trial court determined that defense counsel reasonably elected against calling the Woods brothers as a matter of trial strategy. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish ineffective assistance of counsel, a defendant must show that counsel's performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). This Court does not second guess matters of trial strategy, such as which witnesses to call. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of

¹ *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973).

a substantial defense. A substantial defense is one which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

At the *Ginther* hearing, defense counsel explained that he decided not to call the Woods brothers as a matter of trial strategy. Contrary to what defendant argues, counsel's failure to call the Woods brothers did not deprive defendant of a substantial alibi defense. Defense counsel presented that defense through the testimony of Patricia Woods and Austin Woods, Sr., both of whom testified that defendant was at the Woods' residence on the day of the shooting and never left the house. Defense counsel explained why he believed these witnesses would be more credible, and their testimony more reliable because both were on the home's main floor from where they could see the only exit routes. Defense counsel chose not to call the younger Woods brothers because he believed they would not present well to a jury and was concerned about the potential for greater conflicting testimony. The trial court had the opportunity to observe the Woods brothers testify at the *Ginther* hearing and found that they were not very credible. In particular, the trial court found that Antoine did not present himself well on the stand. A trial court properly may evaluate credibility when deciding a motion for a new trial, and deference should be accorded its opinion. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

Additionally, the testimony at the *Ginther* hearing demonstrated that defense counsel's concern about the potential for greater conflicting testimony was well-founded. Antoine testified that the boys were in the basement the entire day, and Austin, Sr., and Patricia testified at trial that only Patricia left the house that evening, whereas Austin, Jr., testified that he left around 8:45 p.m. Austin, Sr., also testified at trial that he cooked dinner that night, as he usually did when he visited, but Austin, Jr., testified that they always ate out, that the house never had any groceries, and that the boys did not eat the entire day because they had no money. Patricia Woods testified at trial that they went to the police station to offer defendant's mother moral support, whereas Antoine testified that Patricia told him that they might go down to the station to make a statement. Defendant has not overcome the presumption that defense counsel's decision not to call the Woods brothers was a matter of sound trial strategy. Defendant was not denied the effective assistance of counsel.

Next, defendant argues that the testimony of Maurice Wincher was improperly admitted as rebuttal evidence. Because defendant did not object to Wincher's rebuttal testimony at trial, we review this issue for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Wincher testified that he saw defendant and the complaining witness together on several occasions. Relying on *People v Losey*, 413 Mich 346; 320 NW2d 49 (1982), defendant asserts that Wincher's testimony allowed the prosecution to impermissibly split its proofs between its case-in-chief and rebuttal. We disagree. Although the Court in *Losey*, *supra* at 351, stated that a "prosecutor may not divide the evidence on which the people propose to rest their case, saving some for rebuttal[.]" the Court later explained in *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996):

Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. The question whether rebuttal is proper depends on what proofs the

defendant introduced and not on merely what the defendant testified about on cross-examination.

Contrary to the dissent's insinuation, the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [Internal quotations and citations omitted.]

In *Figures*, the Court clarified the general rule announced in *Losey*. As explained in *Figures*, rebuttal evidence is proper if it is relevant and responsive to the defendant's proofs. The mere fact that the prosecutor could have presented Wincher's testimony in her case-in-chief did not foreclose the admission of the testimony in rebuttal.

Defendant argues that *Figures* is distinguishable from this case because (1) he did not open the door regarding the alleged relationship between the complaining witness and himself because it was not a new issue, and (2) Wincher's testimony did not respond to defendant's alibi defense. We disagree. In *Figures*, the defendant was found guilty of breaking and entering an occupied dwelling with the intent to commit felonious assault on his ex-wife. *Figures, supra* at 394. Although the main question in the case was whether the defendant intended to commit a felony when he entered his ex-wife's house, *id.* at 395, the Court found that rebuttal evidence regarding the state of their relationship was proper because the defendant "opened the door to the presentation of further evidence bearing on the actual state of their relationship." *Id.* at 399-400.

In this case, the complaining witness testified that he and defendant were lovers. Defendant, on direct examination, denied knowing or associating with the complaining witness. The defense also presented Cedric Clinkscales, who denied that he, the complaining witness, defendant, and Wincher went to an auto parts store together. Wincher's testimony directly responded to and contradicted defendant's evidence. Although Wincher's testimony did not relate to defendant's alibi defense, defendant also presented evidence in support of his claim that the complaining witness's testimony regarding the existence of a relationship with defendant was not credible and Wincher's rebuttal testimony was proper because it responded to this latter evidence. Because Wincher's testimony was proper rebuttal testimony, defense counsel was not ineffective for not objecting to its admission. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003) (trial counsel is not required to make a futile objection). Further, the trial court's failure to sua sponte exclude the evidence was not plain error.

Lastly, defendant challenges several remarks made by the prosecutor in her rebuttal closing argument. Defendant argues that the remarks improperly attacked defense counsel and accused counsel of intentionally misleading the jury. Because defendant did not object to the prosecutor's remarks at trial, we review this issue for plain error affecting defendant's substantial rights. See *Carines, supra*.

"[A] prosecuting attorney may not personally attack defense counsel." *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Further, a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*,

245 Mich App 572, 592-593; 629 NW2d 411 (2001). But we must consider the prosecutor's remarks in context with defense counsel's comments, and an otherwise improper remark does not require reversal if it is responsive to defense counsel's arguments. *Id.*

Here, viewed in context, the prosecutor's remarks did not personally attack defense counsel. Rather, the prosecutor was responding to defense counsel's arguments, arguing that they were not supported by the evidence. Because the prosecutor's remarks were not improper, defense counsel was not ineffective for failing to object to the remarks. See *Riley, supra*.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Henry William Saad