

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYATTA ABDUL AVERY,

Defendant-Appellant.

UNPUBLISHED

June 16, 2009

No. 282611

Wayne Circuit Court

LC No. 07-008223-FC

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a third habitual offender, MCL 769.11, to two to ten years in prison for the felon in possession conviction and two years in prison for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's first argument on appeal is that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to call Monique Tucker to testify as an alibi witness. We disagree. We review a trial court's factual findings regarding whether a defendant was denied the effective assistance of counsel for clear error, while reviewing its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which a court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id.*

At the *Ginther*¹ hearing, Tucker testified that she could have presented alibi testimony that defendant was playing monopoly with her during the time of the alleged incident. Furthermore, defendant's trial counsel acknowledged that he interviewed Tucker and was aware of the fact that she was willing to testify as an alibi witness. However, upon interviewing Tucker, who at the time was defendant's girlfriend, defendant's trial counsel made a strategic decision not to call Tucker as a witness because he believed that she was not credible, and given the inconsistencies in the prosecution's case, he felt that it was unnecessary to present Tucker's uncorroborated alibi testimony.

We conclude that the trial court did not commit clear error when it found that Tucker was not a credible witness, nor would she have been at trial. The record supports the court's finding, where Tucker had a relationship with defendant, her account was uncorroborated, and where Tucker still remembered that she played a monopoly game with defendant on October 19, 2006, at 2:00 a.m., not being aware that the date in question would be relevant until five months after it happened, but could not remember the date defendant was arrested. Given evidence of Tucker's lack of credibility, as well as the fact that Tucker had multiple taped jailhouse conversations with defendant that would have become an issue had Tucker been called as a witness, we conclude that it was sound trial strategy for counsel not to call Tucker as a witness and instead focus on the inconsistencies in the eyewitnesses' testimony. Furthermore, given valid concerns regarding Tucker's credibility, it follows that defendant was not deprived of a substantial defense by defense counsel's failure to present her as an alibi witness. Accordingly, defendant was not deprived of his right to the effective assistance of counsel, and thus, the trial court did not err when it denied defendant's motion for a new trial. *Toma, supra* at 302-303; *Dixon, supra* at 398.

Defendant's next argument on appeal is that, given the jury's inconsistent verdict of acquitting defendant of the murder charge against him but convicting him of felon in possession of a firearm and felony-firearm, the trial court erred when it denied defendant's motion to set aside the jury's verdict. Again, we disagree.

We initially find that the verdicts were not necessarily inconsistent, where the jury could have found that, based on the testimony of witness Maurice Saffold, defendant discharged a firearm unconnected to the shooting that resulted in the death of Jermaine McSween. Assuming an inconsistency, this Court has stated that inconsistent verdicts "might" require reversal when there is evidence, beyond the inconsistent verdict itself, "that the jury was confused, did not understand the instructions, or did not know what it was doing." *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). The general rule is that juries may render inconsistent verdicts. *Id.*, citing *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980) (verdict consistency is not necessary; jurors can choose what to believe and not to believe without any apparent logical basis; "the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility"). Here, defendant has offered nothing on appeal other than the verdict itself to demonstrate that the jury was confused or did not understand the instructions or what it was doing. Therefore, even if we

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

were to find that the jury's verdict was inconsistent, we would nonetheless conclude that the trial court did not err when it denied defendant's motion to set aside the jury's verdict.

Defendant's final argument on appeal is moot as the judgment of sentence has since been corrected to accurately reflect that defendant's felony-firearm sentence, like his felon in possession of a firearm sentence, are to run concurrently with his sentence in another case.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray