

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 24, 2013

v

DANIEL DEAN,

Defendant-Appellant.

No. 308500
Wayne Circuit Court
LC No. 11-007944-FH

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b(1). For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

During a verbal altercation with Nathan Campbell, defendant lifted up his shirt to expose a holstered gun. Campbell was standing on his porch and defendant approached him from the street in front of Campbell's house. As defendant moved toward him, Campbell picked up a nearby stick, which was approximately three feet long and 1 to 1-1/2 inches in diameter. Campbell and defendant walked toward each other, but Campbell stopped at the bottom step of his porch, and the record reflects that Campbell never raised the stick from his side. Nonetheless, defendant took out his gun and intentionally shot Campbell in his upper thigh. Defendant then taunted Campbell and told him to get back in his house. Defendant later turned himself in to the police and claimed that he shot Campbell in self-defense. At trial, defendant testified that Campbell charged at him and it appeared as though Campbell was going to swing the stick at him. No other witnesses testified on defendant's behalf to verify defendant's story.

After his conviction, defendant moved for a new trial on the ground of ineffective assistance of counsel. The trial court ordered a *Ginther*¹ hearing to address defendant's contentions of ineffective assistance of counsel and, following the hearing, the court made its

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

findings and denied defendant's motion. Defendant appeals, and maintains that his trial attorney was ineffective.

II. DISCUSSION

“Defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error.” *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that defense counsel should have called his three sons as witnesses because they saw the altercation. “Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense.” *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). All three of defendant's sons participated in investigative subpoenas and stated that Campbell was the aggressor, that he approached defendant with a stick in a manner that suggested he was about to swing, but that he never raised the stick as if to strike. If the children testified similarly at trial, it would have been consistent with defendant's testimony to some extent, but it would also have reminded the jury, to defendant's detriment, that Campbell never raised or swung the stick at defendant before defendant shot him with a gun. Accordingly, defendant cannot “overcome a strong presumption that counsel's actions were the product of sound trial strategy.” *People v Brown*, 294 Mich App 377, 388; 811 NW2d 531 (2011) (internal citation omitted). It was reasonable for defense counsel to avoid presenting three additional statements that Campbell never raised the stick—testimony from defendant's own sons which would have diminished the credibility of his self-defense theory—particularly in light of the testimony of each prosecution witness who testified to the same fact. A lowered stick does not in any way suggest that defendant could have had “an honest and reasonable belief that [his] life was in imminent danger or that there was a threat of serious bodily harm,” as required for a claim of self-defense. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995) (internal citation omitted). Accordingly, defendant has not shown that counsel's performance was objectively unreasonable.

Defendant contends that trial counsel should have obtained Campbell's medical records from the day of the altercation because they would have shown that Campbell had marijuana in his system. Defendant maintains that the evidence could have been used to impeach Campbell's testimony that did not use any drugs on the day of the crime. However, the trial transcript shows that Campbell only testified that he had not ingested any alcohol that day. Therefore, defendant has not established the factual predicate for his claim that the medical records would have provided grounds to impeach Campbell's testimony. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also asserts that the mere knowledge of Campbell's marijuana use would have convinced the jury of defendant's innocence. However, once again, defendant cannot overcome the strong presumption that trial counsel acted pursuant to a sound trial strategy. *Brown*, 294 Mich App at 388. At the *Ginther* hearing, defense counsel testified that he wanted Campbell to appear alert, angry, and aggressive, and he believed that the evidence would serve to undermine

such a portrayal. Defense counsel's actions were part of a sound trial strategy, and we will not second-guess that strategy on appeal. See *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant further claims that his attorney should have presented character evidence in his favor. At the *Ginther* hearing, defense counsel testified that he purposely avoided character evidence because he wanted the jury to focus on the actions of Campbell, rather than on defendant's character. Further, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey*, 237 Mich App at 76. Trial counsel's strategy was to suggest that Campbell charged off the steps with the intent to swing a stick at defendant and, again, we will not second-guess that strategy on appeal. *Barnett*, 163 Mich App at 338.²

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen

² Defendant also claims that the combination of alleged errors by counsel requires reversal of his conviction. As discussed, defendant is not entitled to a new trial because he has failed to demonstrate that counsel provided ineffective assistance at trial.