

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DENNIS CARTER,

Defendant-Appellant.

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UNPUBLISHED

April 26, 2002

No. 229266

Ionia Circuit Court

LC No. 99-011495-FH

Before: Gage, P.J., and Griffin and Buth\*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of assault of a prison employee, MCL 750.197c, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, an inmate, was charged as a result of an incident in which he bit the thumb of a corrections officer while being removed from an observation cell. The prosecution asserted that defendant began flailing and resisting, and that he intentionally bit the officer. Defendant asserted he was not resisting, and that he bit the officer by accident when she applied a pressure point. The first trial ended in a hung jury. Prior to the second trial, defense counsel requested the prosecution's assistance in securing the presence of corrections officer Chip Fockler as a witness. The prosecution endorsed Fockler as a *res gestae* witness, but did not subpoena him.

On the morning of trial the prosecutor tried unsuccessfully to reach Fockler by telephone. Defense counsel requested the trial court declare Fockler to be unavailable and to allow his testimony from the first trial to be read into the record. Over the prosecution's objection, the trial court agreed to that procedure. Fockler's testimony indicated that he assisted in removing defendant from the cell, and that defendant was not flailing his arms or legs. He did not observe defendant bite the officer. The jury found defendant guilty as charged.

Defendant moved to vacate his conviction and for a new trial on the ground he was deprived of the effective assistance of counsel at trial. At a *Ginther*<sup>1</sup> hearing, trial counsel

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

\* Circuit judge, sitting on the Court of Appeals by assignment.

testified the reading of Fockler's testimony from the first trial hampered the defense of the case because the jury was unable to observe the witness, any testimony given by Eugene Green, the inmate in the adjoining cell, would have been cumulative to Fockler's testimony, and that the circumstances of the case did not warrant the calling of an expert witness on pressure points or a forensic examination. The jury foreman at defendant's first trial testified that as a juror he would prefer to have a witness testify live rather than have testimony read into the record. He submitted an affidavit in which he stated that in his opinion, Fockler's testimony was a primary reason his jury could not reach a verdict. Green testified he observed the incident between defendant and the corrections officers, and that defendant did not begin flailing until the officer applied a pressure point. The trial court denied defendant's motion, finding defense counsel's consent to the declaration that Fockler was unavailable waived an argument the prosecution did not exercise due diligence in attempting to secure Fockler's presence at trial, and counsel's remaining actions constituted reasonable trial strategy.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's performance resulted in prejudice. To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that counsel rendered ineffective assistance at trial. He asserts that counsel erred by: (1) agreeing to the reading of Fockler's testimony from the first trial into the record instead of seeking a mistrial when the prosecution did not produce Fockler; (2) failing to identify and call Green as a defense witness; and (3) failing to seek a forensic examination. We disagree in each instance.

The trial court found the prosecution did not exercise due diligence in attempting to produce Fockler, and granted defense counsel's request to have Fockler's testimony read into the record. Contrary to defendant's assertion, he was not automatically entitled to a mistrial. The determination of the appropriate remedy for the prosecution's lack of due diligence was within the discretion of the trial court. See *People v Rode*, 196 Mich App 58, 68; 492 NW2d 483 (1992), rev'd on other grds 447 Mich 325; 524 NW2d 682 (1994). Fockler's testimony in the first trial was favorable to defendant in that it supported defendant's assertion he was not flailing prior to the application of a pressure point. Counsel's decision to have Fockler's testimony read constituted trial strategy that we will not second-guess. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant's assertion that had Fockler testified live the second jury would have reached a different result is speculative. Defendant has not established prejudice in that he has not shown that had counsel not taken the action of which he complains the result of the proceedings would have been different. *Toma, supra*.

The failure to call a witness or to present other evidence constitutes ineffective assistance only when it deprives the defendant of a substantial defense. A substantial defense is one that might have made a difference in the outcome of a trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), modified 453 Mich 902; 554 NW2d 899 (1996). Defendant's theory was that he did not begin to flail until the officer applied a pressure point. Fockler, a

defense witness, gave testimony consistent with defendant's theory. Any testimony given by Green would have been cumulative to Fockler's testimony. Counsel's failure to discover and call Green did not deprive defendant of a substantial defense. *Id.* Furthermore, counsel indicated she determined the facts did not warrant a forensic examination. Defendant has made no showing that he was incompetent at the time of the incident. Counsel's actions constituted trial strategy that we will not second-guess. *Rice, supra.* Defendant has not demonstrated that counsel's actions resulted in prejudice. *Toma, supra.*

Defendant also argues the trial court erred in allowing Fockler's testimony from the first trial to be read into the record absent a showing he was unavailable. MRE 804(a)(5); *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Defense counsel requested the trial court declare Fockler to be unavailable and allow his testimony to be read. Defendant has waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Affirmed.

/s/ Hilda R. Gage  
/s/ Richard Allen Griffin  
/s/ George S. Buth