

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY RICHARD FIELDS, JR.,

Defendant-Appellant.

UNPUBLISHED

August 8, 2006

No. 262081

Wayne Circuit Court

LC No. 05-000348-01

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316, and arson, MCL 750.73. We affirm.

Defendant's accomplice, Clifford Young, testified against him in exchange for a plea agreement whereby he was charged as a juvenile rather than an adult. Young's testimony provided most of these relevant facts at trial. On August 3, 2004, defendant and Young entered a gun shop in Inkster, Michigan, with intent to steal weapons from the store. Defendant entered the shop through the front door and let Young in through the back door. Several other individuals waited outside in two cars, one of which Young had stolen that morning. Young made several trips out to the cars with weapons, and in between trips, while in the shop, saw defendant fighting with the gun shop owner, Clyde Alexander. Young saw defendant punch Alexander in the face, knocking him to the ground. Defendant then sprayed something onto a counter. Young then left the store.

That afternoon, a police detective and an ATF agent responded to a report that the gun shop was on fire. After the fire was extinguished, they found a body in the shop. The body was identified as Alexander. The autopsy report indicated he had been beaten, but was alive and bound at the left wrist when the fire started, and died from smoke inhalation and extensive burns.

Approximately 80 firearms were unaccounted for once inventory was taken. One of these weapons was recovered when an individual named Anthony Williams was arrested on August 4, 2004, for carrying a concealed weapon. Williams stated he had purchased this weapon from defendant.

About a month after the fire, Alexander's credit card was used at a gas station. A police officer and an ATF agent investigated and were able to obtain photographs from the station of

the person using the card and the vehicle he was driving. The officers were conducting surveillance at the gas station on September 17, 2004, when the vehicle returned. The officers determined that the vehicle was stolen and that the driver was the person who had used Alexander's credit card, although he did not have it with him on that day.

Against the weight of this evidence, all of which was presented at trial, defendant produced two alibi witnesses. However, their testimony was contradicted by that of other witnesses at trial. Defendant was subsequently convicted by jury.

On appeal, defendant argues that he was denied effective assistance of counsel. We disagree. An ineffective assistance of counsel claim involves both law and fact; we review the questions of law de novo and the findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant sought neither a *Ginther* hearing nor a new trial before the trial court, leaving this issue unpreserved; our review is therefore limited to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 95 (2002).

Criminal defendants are guaranteed the right to effective assistance of counsel by both the federal and state Constitutions. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove that prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Defendant first argues that defense counsel failed to adequately attack Clifford Young's credibility at trial. We disagree. We note first that the threshold is high, because it is presumed that defense counsel's decisions regarding what evidence to present or whether to call and question witnesses constitute trial strategy, which this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). And we add that the facts here come nowhere close to that threshold. Contrary to defendant's claim, the record indicates that defense counsel vigorously attacked Young's credibility at trial.¹ At one point during questioning, the exchange between defense counsel and Young became so intense that the trial court cautioned defense counsel not to argue with Young. We find that defense counsel's performance with respect to Young was objectively reasonable.

¹ Specifically, defense counsel initiated lines of questioning that elicited testimony from Young explaining that: (1) Young had contacted police to report his allegations regarding defendant in an effort to avoid a sentence in a maximum security prison, (2) Young was offered a deal to be charged as a juvenile to avoid a natural life sentence in exchange for his testimony at trial, and (3) Young had changed his story to police and lied about this incident on several occasions to get himself out of trouble.

Defendant also argues that defense counsel failed to adequately investigate or interview defendant's alibi witnesses. Again, we disagree. Although defense counsel's failure to reasonably investigate a case may constitute ineffective assistance, this Court must afford deference to counsel's strategic judgments. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Defendant is correct that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). However, here we cannot find that defense counsel acted unreasonably.

The record is devoid of any evidence related to defense counsel's out-of-court investigation of the alibi witnesses. For that reason, we find that defendant has failed to establish a factual predicate showing that defense counsel's investigation of the alibi witnesses was incomplete. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999):

defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel:

A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately.

We note also that defendant bases his argument on the fact that the alibi testimony of defendant's girlfriend, Alicia Hall, and her brother, Paul Hall, was rebutted. The witnesses testified that they remembered that defendant was with them on the morning of August 3, 2004 specifically because Paul had an eye doctor appointment that day. The eye doctor testified that Paul's appointment was on August 2. However, according to the only record evidence of investigation of the alibi witnesses², the first time these witnesses mentioned the eye appointment was when they testified at trial. While defense counsel might have been better served by not accepting the word of defendant and the alibi witnesses as to the truth of the alibi, we cannot say that counsel had a duty to actively investigate for witnesses who could disprove it.

We add that even if defendant could establish the factual predicate for this claim, he cannot meet the second prong of the test: "a reasonable probability that the outcome would have been different but for counsel's errors." *Grant, supra* at 486. Given Young's incriminating

² Defense counsel objected at trial to the presentation of the doctor as a rebuttal alibi witness because it had not been properly noticed by the prosecution. The prosecutor argued the witness should be allowed because the witnesses had failed to mention the doctor appointment in their pre-trial statements to the prosecutor's investigator. The court found that the notice statute did not preclude calling the witness, given the lack of disclosure about the appointment, until the alibi witnesses were on the stand, even though the witnesses had given statements to the investigator.

testimony that he saw defendant fighting with Alexander while Young and defendant were stealing guns from the gun shop, the gas station photographs showing defendant using Alexander's credit card after Alexander had died, and Detective Anthony Delgreco's discovery that the gun defendant sold to Anthony Williams was a gun unaccounted for during the police inventory of the gun shop, we find there is not a reasonable probability that any failure on the part of defense counsel to address Young's credibility or further investigate the alibi witnesses was outcome determinative. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Affirmed.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello