

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MALANIE LASHAWN WARE,

Defendant-Appellant.

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UNPUBLISHED

June 14, 2007

No. 270441

Wayne Circuit Court

LC No. 05-012382-01

Before: Fitzgerald, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial conviction of voluntary manslaughter, MCL 750.321. She was originally charged with second-degree murder, MCL 750.317. Defendant was sentenced, as an habitual offender, fourth offense, MCL 769.12, to 10 to 15 years in prison. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that she was denied effective assistance of counsel. We disagree. In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*<sup>1</sup> hearing before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Where the defendant fails to preserve the issue, appellate review is limited to mistakes apparent on the record. *Id.* If the record does not contain sufficient detail to support the defendant’s ineffective assistance claim, then she has effectively waived the issue. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In general, this Court reviews a trial court’s findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In this case, however, defendant failed to move for a *Ginther* hearing, so our review is limited to mistakes apparent on the record. We review questions of constitutional law de novo. *Id.*

Defendant argues that she was denied effective assistance of counsel at trial because her attorney failed to investigate and call a particular witness. Defendant claims this witness was present in the motel room at the time defendant allegedly assaulted the victim and that the victim returned to the motel two hours after the alleged assault to purchase drugs from the witness.

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant argues that the witness would have testified about the critical issue of the victim's condition when the victim returned to the motel. She argues that the witness's testimony would have contradicted and undermined the testimony of the prosecution's key witness and that, as a result, the outcome of the trial would likely have been different. We disagree.

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). In order to overcome the presumption, the defendant must show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Id.* The defendant must show that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficiency was so prejudicial that she was deprived of a fair trial in that there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. *LeBlanc*, *supra* at 582-583; *McGhee*, *supra* at 625.

Defendant has not established that the performance of her trial counsel was deficient. She claims her trial attorney failed to investigate the prospective witness. Failure to make a reasonable investigation can constitute ineffective assistance of counsel, *McGhee*, *supra* at 625, but the record reveals that the attorney made a significant effort to locate the witness. In fact, defendant, her family, her attorney, and an investigator appointed by the court, all tried to locate the witness and other people who were in the motel room at the time of the incident. This proved difficult because defendant did not know where these people lived or their real names, and even the full names listed in the discovery packet turned out not to be real. At sentencing, defense counsel stated:

When the police interrogated or questioned all of the occupants of the room, they ended up with names that were virtually useless in tracking those people down. This Court gave us an order and we hired an investigator. And in addition to the investigator's efforts, I did my own [sic]. We tried in vein [sic] to locate real people that were associated with those names.

Defendant also testified that she had the witness's telephone number in her cellular telephone, but the police had the telephone. It is not clear whether defendant's trial attorney or the investigator attempted to obtain the telephone. This Court's review of defendant's ineffective assistance claim, however, is limited to mistakes apparent on the record, *Cox*, *supra* at 453. In light of trial counsel's statements on the record about his efforts to locate the witness, his performance was reasonable.

Even if defendant's attorney had simply chosen not to call the witness, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which this court will not revisit with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *Id.* A defense is substantial if it might have made a difference in the outcome of the trial. *People v Bass*, 223 Mich App 241, 252; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Defendant has not shown a reasonable probability that the outcome of the trial would have been different if the witness had testified. *McGhee*, *supra* at 625; *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Defendant argues that the witness would have

testified that the victim was not seriously injured when she left the motel and that the only injury the victim received at the hands of defendant was a bloody nose. However, nothing on the record indicates that the witness would have testified in this manner. Speculation that the witness's testimony would have been favorable to defendant is insufficient; defendant must show a reasonable probability that the result would have been different if the witness had testified. *Avant, supra* at 508. Moreover, even if it is true that the witness's account would have contradicted the account given by the prosecution's key witness, the trial testimony was already full of questions and contradictions, and the court believed the prosecution witness. It found his testimony "absolutely credible," noting, "the testimony that he gave is really ultimately what is going to convict the defendant." Under the circumstances, it is not at all clear that another conflicting account of the incident would have changed the outcome of the trial.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Peter D. O'Connell