

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAMILLA MARIE DENISON,

Defendant-Appellant.

UNPUBLISHED
February 26, 2008

No. 270415
Oakland Circuit Court
LC No. 2004-194560-FH

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from her jury convictions of felonious assault, MCL 750.82, and breaking and entering of a dwelling without the owners' permission, MCL 750.115.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arose out of an altercation with her former boyfriend, John Arsen. Arsen ended their relationship when he discovered that defendant was seeing other men. Defendant attempted unsuccessfully to persuade Arsen to reconsider this decision. Arsen testified that defendant entered his locked medical office on the evening of the assault without his consent. She was armed with a tire iron. Defendant told him that this "could have all been avoided" if he had been nicer to her. She struck him multiple times on the legs, hip, wrist, and torso with the iron. He managed to grab the tire iron, and she kned him in the groin. Arsen called 911 while still struggling for control of the tire iron. He gained possession of the tire iron, and defendant fled in her car.

Defendant countered with testimony that Arsen attacked her after she went to his office to seek a partial reconciliation with him. She contended that Arsen became angry when she told him that she intended to date other men. She claimed that he had assaulted her twice prior to this incident. On the night of the incident she stopped at Arsen's office, ostensibly to discuss a partial reconciliation. She was worried that he would still be angry with her, so she took the tire iron out of her car for protection. She entered the office, which was unlocked, and startled Arsen. She set the tire iron on the desk. Arsen began to yell at her. When she told him she

¹ Defendant was acquitted of breaking and entering, MCL 750.110, and assault with intent to commit great bodily harm, MCL 750.84.

wanted to talk, he pushed her and told her to leave. He then grabbed her hands and pushed her up against the wall. He then took hold of the tire iron, and the two struggled for the iron while Arsen called 911. Arsen wound up on top of her, with the iron pressed to her throat. She bit his hand. Defendant thought that Arsen would kill her, but he backed off. He then chased her out of the office with the tire iron. She claimed that she then fled the scene to get away from him.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If 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 defendant’s ineffective assistance claim, then he has effectively waived the issue.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review is limited to mistakes apparent on the record. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

“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 this presumption, defendant must first 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.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.*

Defendant first argues that counsel rendered ineffective assistance by failing to call an expert witness. She complains that trial counsel failed to call defendant’s doctor, David Hollett, as an expert witness to testify to defendant’s limited use of her left arm as a result of a herniated disk. We disagree.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses only constitutes ineffective assistance if it deprives defendant of a substantial defense. *Dixon, supra.* “A defense is substantial if it might have made a difference in the outcome of the trial.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac’d in part on other grds 453 Mich 902 (1996).

Arsen claimed that defendant used her left arm when striking him. Dr. Hollett’s affidavit indicates that defendant had a 40 percent reduction in strength in her left arm due to a herniated disk. Defendant claims that this information would have refuted Arsen’s version of events because defendant could not have acted in the manner that he alleged. However, defendant cannot show that such testimony, if true, would have made a difference in light of the other evidence presented at trial. While this evidence might have caused the jury to question whether

defendant used her left arm during the attack rather than her dominant right one, it likely would not have changed the jury's determination that defendant assaulted Arsen with the tire iron. At trial, defendant did not claim to have any weakness in her arms that prevented her from engaging in a struggle with Arsen. She testified that she was able to "[hold] the tire iron off [her] neck" while Arsen was supposedly on top of her. Arsen also testified that the blows struck by defendant were only of "medium" strength. Moreover, other evidence supported Arsen's story that defendant struck him with the tire iron. The investigating officer stated that Arsen had red swelling on his legs, his wrist, his thumb, and on his side. Photographs of Arsen's injuries taken at the scene were shown to the jury. Arsen also showed the jury the scarring left from the injury to his leg. Under the circumstances, we find that defendant cannot show that trial counsel's decision not to call Dr. Hollett on her behalf deprived her of a substantial defense.

Defendant next claims that trial counsel should have called three of her friends who would have testified that she was acting abnormally just before the incident, ostensibly due to the fact that she was under the influence of several medications to combat depression. Defendant appears to argue that these witnesses could have helped explain to the jury that defendant was not thinking clearly when she took the tire iron into Arsen's office. We disagree.

Defendant admits that counsel "tried to explain this activity by eliciting testimony from various witnesses regarding Dr. Arsen's prior abusive behavior" in support of her trial testimony that she brought the tire iron with her for protection. This strategy matched defendant's testimony, as well as her statements to police. Counsel and defendant also attempted to portray defendant as in a good mood and "happy" when she entered Arsen's office to support her assertion that she wanted to smooth things over with Arsen rather than to harm him. Yet defendant now argues that, because this strategy was unsuccessful, counsel should have pursued the alternative strategy suggested on appeal. Trial counsel deliberately chose not to do so, however, and objected strongly when the prosecutor's questioning seemed to suggest that defendant's medication might have interfered with her behavior. The decision to choose between two separate possible trial strategies is not objectively unreasonable. We will not substitute our judgment for that of counsel regarding matters of trial strategy, and will not evaluate strategy with the benefit of hindsight. *Rockey, supra* at 76-77. Moreover, the fact that the strategy chosen by defense counsel did not succeed does not mandate a conclusion that its use constituted ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). We find that defendant has not established that counsel was ineffective in deciding not to pursue the alternative strategy.

Defendant next argues that trial counsel was ineffective when he failed to object to inadmissible character evidence, and when he offered other inadmissible character evidence, which in turn allowed the prosecutor to introduce more such evidence. Defendant claims that all of this evidence was inadmissible under MRE 404(b)(1) or MRE 403. We disagree.

Under 404(b)(1), evidence of other crimes, wrongs or acts are not admissible to prove a person's character to show that they acted in conformance with that character evidence. MRE 403 precludes admission of evidence whose probative value is substantially outweighed by the danger of unfair prejudice.

The evidence presented at trial, which at times admittedly more mirrored a contentious divorce proceeding rather than a criminal trial, concerned the couple's quite stormy relationship.

Defendant contends that this evidence permitted the prosecution “to paint a picture of [her] as selfish, dishonest, mentally unstable and promiscuous”. However, counsel’s decision to elicit this type of information or allow it to be introduced without objection was clearly part of a conscious strategy to paint Arsen as the source of conflict in the relationship, and to further defendant’s defense that Arsen was the initial aggressor here; a position defense counsel argued vigorously during closing arguments. Counsel used Arsen’s allegations about defendant’s affairs, in combination with defense testimony about Arsen’s controlling and abusive behavior, to seriously undercut Arsen’s veracity. By allowing this area of questioning, counsel was able to get Arsen to admit that he spied on defendant through her windows, surreptitiously searched her email accounts, and broke into her home. This information, at a minimum, established that Arsen was not an innocent victim. It may be that defendant was found guilty of lesser included offenses on both counts precisely because counsel was able to discredit Arsen in this manner. Nevertheless, we conclude that, even though counsel’s strategy did not succeed completely, its use was not ineffective assistance. *Stewart (On Remand), supra* at 42. We will not second guess counsel’s trial strategy on this point.

Defendant next argues that counsel acted ineffectively when he introduced evidence of defendant’s pretrial tether status. She maintains that this evidence was highly prejudicial, and that no sound trial strategy existed for offering such evidence. We disagree.

This evidence was introduced specifically to explain why defendant did not or could not immediately seek medical assistance for her alleged injuries, and was designed to rebut the prosecution’s assertions that defendant was lying about her role as the victim in the altercation. The evidence was also introduced to provide further evidence of Arsen’s animosity toward defendant and his willingness to lie, even to the court, about her violating her tether status, in order to hurt her. Again, defendant challenges a legitimate trial strategy.

Defendant next argues that counsel was ineffective when he failed to object to inadmissible opinion testimony by Sharon DeMeritt, a one-time mutual friend of Arsen and defendant. Ms. DeMeritt and her husband, Paul DeMeritt, testified for the defense. Sharon testified that she initially believed Arsen’s story, but then changed her mind because Arsen kept changing his version of what had occurred. On cross-examination, the prosecution asked Ms. DeMeritt if it was her opinion that defendant did not assault Arsen. She replied that “something happened” and “that it’s been blown out of proportion for what it is.” Defense counsel did not challenge the introduction of this testimony. Instead, on redirect examination, he asked Ms. DeMeritt whether, when she testified that defendant assaulted Arsen, she thought that Arsen also assaulted defendant, and Ms. DeMeritt replied that she did. She then testified that she thought that Arsen had grabbed defendant first. She did not believe that defendant approached Arsen with the tire iron and started swinging at him. She testified that defendant had never changed her story about what had occurred.

Defendant now maintains that trial counsel was ineffective for failing to object to this question and answer during cross-examination because it was improper for a witness to express an opinion on the defendant’s guilt. See *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). However, it is clear from this exchange that counsel deliberately introduced this evidence because Ms. DeMeritt believed defendant to be mostly, if not wholly, innocent. Defendant cannot show deficient performance in light of this trial strategy. *Rockey, supra* at 76-

77. Nor can she show prejudicial effect, since Ms. DeMeritt's testimony was prejudicial to the prosecution rather than to defendant.

Defendant also complains that the prosecution was able to question the DeMeritts regarding a letter they wrote to the trial court requesting leniency in sentencing for defendant after she had initially entered a guilty plea.² The letter stated that, "aside from this one incident [defendant] has been a model citizen", that defendant had "repeatedly apologized for her part in the altercation", and that this was "a singular aberration" in defendant's life. Counsel did not object to the introduction of the letter, but instead asked Ms. DeMeritt whether the letter constituted an "admission" that she thought defendant "went in their (sic) with a crow bar, went in the door and smashed him with a crow bar and contrived all the rest of the story?" Ms. DeMeritt replied that it did not. She reiterated her belief in defendant's innocence during redirect examination. Defense counsel also questioned Mr. DeMeritt about the letter, and received his opinion that the letter was written as a general character letter, not as an opinion of defendant's guilt. Like his wife, Mr. DeMeritt testified that he thought that Arsen was not telling the truth about the circumstances of the alleged assault.

Defendant maintains that trial counsel should have immediately objected to the introduction of this letter under MRE 410, as inadmissible evidence of prior plea negotiations. Defense counsel later acknowledged that he considered objecting, but decided not to do so, for fear of tainting the jury. He also claimed that the prosecutor never revealed the existence of this letter to him. He objected to any further mention of this letter by the prosecutor, but the trial court overruled his objection after determining that the letter did not mention plea or sentencing.

Even were we to find that the introduction of this letter was erroneous, defendant has not shown that the outcome of the trial likely would have been different but for counsel's error. Counsel's follow up with each witness fully explained the DeMeritts' letter, and was favorable to defendant. We conclude that this questioning removed any prejudice that may have accompanied the initial introduction of the information.

Finally, defendant argues that her counsel was ineffective because he exhibited a lack of understanding of the rules of evidence. She first claims that counsel erred where he erroneously attempted to impeach Dr. Arsen's testimony about whether he had improperly obtained defendant's phone records when he attempted to have defendant read a portion of the preliminary examination testimony without laying a proper foundation. She also maintains that counsel again erred when he failed to provide a proper foundation for the admission of a police videotape concerning an initial written statement defendant had allegedly provided at the time of her arrest. We disagree.

Notwithstanding any mishandling on counsel's part, the police videotape was in fact admitted. Defendant cannot establish prejudice. As to the impeachment evidence, the trial court

² This was defendant's second trial. Her first trial ended when she struck a plea bargain on the second day of trial. She later moved to withdraw her no contest plea prior to sentencing, and the trial court granted the motion.

stated that, if defense counsel wanted to use the preliminary examination testimony, he would have to recall Arsen and question him about it. The trial court indicated that if defendant wanted to recall Arsen the court would issue an order to that effect, and counsel indicated that he would prepare one. It does not appear that counsel thought this issue was important enough to pursue, because Arsen was not recalled to testify. On appeal, defendant does not indicate how she might have been prejudiced by counsel's actions, nor is any prejudice apparent, given the wealth of information concerning Arsen's other peccadilloes that was introduced at trial. We thus find that defendant has failed to meet her burden of establishing prejudice from any error concerning the admission of this impeachment evidence.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Alton T. Davis