

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 29, 2014

v

DERRIEN JAMAL CUNNINGHAM,
Defendant-Appellant.

No. 313427
Wayne Circuit Court
LC No. 12-004635-FC

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his bench-trial convictions of assault with a dangerous weapon (felonious assault), MCL 750.82; two counts of possession of a firearm by a felon (felon-in-possession), MCL 750.224f; two counts of possession of a firearm during the commission of a felony (felony-firearm), third offense, MCL 750.227b; and carrying a concealed weapon (CCW), MCL 750.227.¹ The trial court sentenced him to five years' probation for the felonious-assault conviction, five years' probation for each felon-in-possession conviction, 10 years' imprisonment for each felony-firearm conviction, and 5 years' probation for the CCW conviction. We affirm.

Defendant argues that his trial counsel was ineffective for failing to properly investigate the case and for failing to call defendant's mother, Margaret Louise Jackson, as a witness. We disagree.

The trial court denied defendant's motion for a new trial, finding that his trial counsel was not ineffective. "A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs only when the trial court chooses an outcome falling outside [the] principled range of outcomes." *Id.* (internal citation and quotation marks omitted). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law."

¹ Defendant was also originally charged with armed robbery, MCL 750.529; and attempted unlawful imprisonment, MCL 750.92; MCL 750.349b. At the conclusion of the bench trial, defendant was found not guilty on these two charges.

People v LeBlanc, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court’s “findings of fact are reviewed for clear error” and questions of “constitutional law are reviewed by this Court de novo.” *Id.*

Both the United States and Michigan Constitutions provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. “There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel’s performance was sound trial strategy.” *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To establish a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel’s performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Moreover, “[b]ecause the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). In evaluating a claim of ineffective assistance of counsel, this Court “will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel’s competence.” *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

Defendant first argues that his trial counsel was ineffective for failing to sufficiently investigate his case. Defendant contends that if his trial counsel had properly investigated the case, he would have identified Gradell Andrew Mosley, defendant’s neighbor, as an eyewitness who could have offered testimony at trial or at the motion to suppress. Defendant contends that Mosley’s testimony would have contradicted the testimony of Detroit Police Sergeant Robert Avery and Detroit Police Officer Ryan Connor that they arrested defendant during a pursuit, after he refused to stop. This Court has held that “[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial’s outcome.” *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (internal citation and quotation marks omitted). Defendant fails to offer any factual proof to indicate that his counsel failed to investigate the case. In fact, his counsel stated that he interviewed defendant and his family—a fact that Jackson largely corroborated—but they failed to give him any information on Mosley until after the witness lists were required to be filed and after the evidentiary hearing.² Thus, defendant’s argument lacks a factual predicate. *Carbin*, 463 Mich at 601.

In addition, defendant cannot show that confidence in the trial’s outcome was undermined. *Russell*, 297 Mich App at 716. Mosley’s testimony at the hearing regarding defendant’s motion for a new trial indicated that he could have only testified regarding what he observed from across the street, around the time that he contacted defendant to warn him of the police presence outside defendant’s house. Mosley merely testified that he saw the police walk into defendant’s home; he stated that he “really didn’t see” defendant and he also stated that he

² Counsel stated at trial, on September 25, 2012, that he was informed about Mosley “[a]fter [the] evidentiary hearing”

did not see how the door was opened. Avery testified that he observed defendant walking down the sidewalk outside his house and believed that he was armed due to a bulge in the front of his pants. Connor testified that he followed defendant into his house after defendant refused to stop and after defendant reached toward the front of his pants; Connor testified that he arrested defendant on the stairway inside the house after hearing a “loud, metallic thud” that came from the basement area. Connor then recovered a gun in the basement. Because Avery and Connor offered specific, credible testimony and Mosley was neither able to give testimony regarding the April 28, 2012, robbery nor pertinent details of the April 30, 2012, police raid, defendant cannot demonstrate that his counsel’s failure to identify Mosley as a witness was outcome-determinative.

Next, defendant argues that his trial counsel was ineffective for failing to call Jackson as a witness. Jackson indicated that she could have testified that she did not hear her dog bark before 5:00 a.m.³ on the morning of April 28, 2012, and it would have barked if defendant came inside the house; defendant contends that this could have proven that defendant did not participate in the armed robbery and then return home during the early morning hours of April 28. This Court has held that “[d]ecisions regarding whether to call or question witnesses are presumed to be matters of trial strategy.” *Russell*, 297 Mich App at 716. Trial counsel’s failure to call witnesses “only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.* (internal citation and quotation marks omitted). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (internal citation and quotation marks omitted).

Defendant simply cannot overcome the presumption of effective assistance. Jackson was not able to testify regarding the April 30, 2012, police raid, because she was not home, and she admitted that she was asleep around 4:00 a.m. to 5:00 a.m. on April 28, 2012, at the time of the robbery and defendant’s apparent return home. Because Jackson was asleep at the time, she may not have heard the dog barking, if it barked at all. Jackson could only testify that Anna Bailey, defendant’s girlfriend, called defendant’s house telephone and she heard defendant on the telephone with Bailey. However, the telephone call apparently occurred at approximately 5:00 a.m. on April 28, 2012, twenty minutes after the robbery had occurred, at a location close to defendant’s house.⁴ Thus, Jackson would not have been able to offer significant testimony regarding the incidents that could have substantially assisted defendant’s defense. Defendant has failed to establish that Jackson’s testimony would have made a difference in the outcome of the trial, especially in light of the strong evidence of defendant’s guilt. *Chapo*, 283 Mich App at 371. Because defendant’s trial counsel was not ineffective, the trial court did not abuse its discretion by denying defendant’s motion for a new trial.

³ Jackson stated that the dog did bark at the time of a 5:00 a.m. telephone call from defendant’s girlfriend.

⁴ As noted, Jackson admitted that the dog barked at the time of the telephone call.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto