

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE ANTONIO PEREZ,

Defendant-Appellant.

UNPUBLISHED

April 26, 2012

No. 303305

Gratiot Circuit Court

LC No. 10-6107-FH

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of being a prisoner in possession of a weapon, MCL 800.283(4), and the court sentenced him as a fourth habitual offender, MCL 769.12, to serve four to ten years in prison, said term to run consecutive to his existing sentence. Defendant appeals, and, because his appellate issues lack merit, we affirm.

Defendant argues that the prosecutor did not present sufficient evidence to support his conviction. We disagree.

When reviewing a sufficiency challenge, “evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury’s finding that the defendant was guilty beyond a reasonable doubt.” *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). All conflicts in the evidence must be resolved in favor of the prosecution. *Id.* at 515. The issue of credibility is for the jury to decide, and this Court will not revisit credibility issues on appeal. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). In its analysis, this Court “is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 800.283(4) provides:

Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

Defendant concedes that the prosecutor presented sufficient evidence that he was a prisoner and that the weapon that was found could have been used to injure somebody. However, defendant

argues the prosecutor did not present sufficient evidence that he possessed the weapon or had it under his control.

As defendant acknowledges, there is no dispute that defendant was an inmate at the Mid-Michigan Correctional Facility and that a weapon that could be used to injure somebody was found in a trash can at the facility. But at trial, defendant testified that the weapon was not his, and that the correctional officer who found it was retaliating against him because of the actions of other inmates. However, defendant's assertion was rebutted by the officer who found the weapon. The officer testified that he saw defendant drop the weapon into the trash can after defendant was told that he would be searched.

Defendant argues that there was "reasonable doubt" about whether defendant committed the crime, because the officer who found the weapon never explained how defendant could throw the weapon into a trash can that had a lid. This argument is an attack on the credibility of the officer who found the weapon. Defendant maintains that it was not possible for him to put the weapon into the trash can, because of the lid, and therefore the officer who testified that he did so must have been lying or mistaken. Yet, having convicted defendant of being a prisoner in possession of a weapon, the jury necessarily determined that the officer was credible, defendant was not. This Court may not interfere with the jury's credibility determination. *Nowack*, 462 Mich at 400; *Milstead*, 250 Mich App at 404. A rational jury could conclude from the officer's testimony that defendant possessed the weapon or had it under his control, because the officer testified that defendant had it in his hand and attempted to hide it from the officer by putting it in the trash can. Viewed in a light most favorable to the prosecution, there is sufficient to support defendant's conviction.

In a standard 4 brief, defendant argues that he was denied his right to the effective assistance of counsel. We disagree.

A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the constitutional issue arising from an ineffective assistance of counsel claim is reviewed de novo. *Id.* Because defendant did not move for a new trial or evidentiary hearing, there are no factual findings and this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002), habeas corpus den sub nom *Rodriguez v Jones*, 625 F Supp 2d 552 (ED Mich, 2009).

To establish ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated defense counsel's conduct. *LeBlanc*, 465 Mich at 578.

Defendant argues that he was denied his right to the effective assistance of counsel when counsel: (1) did not call the inmate who, according to defendant, handed him a broken MP3

player, rather than a weapon, (2) did not seek fingerprint testing of the weapon found in the trash can, and (3) failed to properly cross-examine a correctional officer.

Defendant asserts that the inmate who allegedly handed him the MP3 player could have testified “exactly what it was that [he] had been handed, rather than leave the jury to ‘speculate’ as to what it was.” However, “[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy,” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008), and defense counsel could have believed that the inmate would not have provided favorable testimony. First, we note that defendant has provided no affidavit or anything else from the inmate to indicate that the inmate would have testified as defendant asserts. In any event, had the inmate testified as defendant asserts, trial counsel could have discounted this because the jury would recognize that the inmate had a motive to lie about the particular item he handed defendant, so as not to implicate himself in the crime. Counsel may have also believed that the inmate could not survive cross-examination on this issue or would appear incredible, and thus undermine defendant’s credibility, because defendant provided essentially the same testimony. Defendant cannot overcome the strong presumption that sound trial strategy motivated defense counsel’s conduct. *LeBlanc*, 465 Mich at 578.

Moreover, the failure to call witnesses constitutes ineffective assistance only if it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A “substantial defense” is one that “might have made a difference in the outcome of the trial.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich. 902 (1996). At best, the fellow inmate’s testimony that he handed defendant an MP3 player and not a weapon would have corroborated defendant’s testimony. However, as stated above, the jury would likely find such testimony of little weight because the inmate had motive to lie. We cannot say that the testimony, even if it would have been as defendant asserts, would have made a difference in the outcome of the trial. Thus, defendant’s argument on this issue must fail.

Defendant also avers that his counsel was ineffective because she did not seek fingerprint testing of the weapon.

At trial, defense counsel presented testimony that the police did not fingerprint the weapon. She used this to argue reasonable doubt in her closing, stating, “why didn’t anybody ever check that piece of knife or that piece of steel for fingerprints? That would have been real simple.” Counsel may have believed that fingerprint testing would have revealed defendant’s fingerprints, and that the best strategy was to forego testing in order to use the failure to conduct the tests to defendant’s advantage; i.e., to use the lack of physical evidence to attack the credibility of the officer who found the weapon and to argue reasonable doubt. Again, defendant cannot overcome the strong presumption that sound trial strategy motivated defense counsel’s conduct. *LeBlanc*, 465 Mich at 578.

Finally, defendant argues that counsel was ineffective when she did not cross-examine a correctional officer regarding a written statement he made to a department of corrections investigator. The statement contains his response to certain questions asked by the investigator. Defendant asserts that the statement was “in complete contrast with [the officer’s] trial

testimony,” but fails to explain how. It appears that defendant believes the statement contradicts the officer’s trial testimony because, in the statement, the officer did not reveal that he heard defendant ask another correctional officer if he would let the offense “go.” However, none of the questions asked by the investigator would have elicited this information from the officer, and the officer’s answers to the questions in the statement are identical to his trial testimony. Thus, any cross-examination in this area would likely have been ineffectual. Accordingly, defendant cannot show that that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad