

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2012

v

EDWARD ALLAN PROCTOR,

Defendant-Appellant.

No. 305964
Kent Circuit Court
LC No. 11-01091-FH

Before: Wilder, P.J., and O’Connell and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of inciting or procuring one to commit perjury, MCL 750.425, and two counts of bribing, intimidating, or interfering with a witness, MCL 750.122. Defendant was sentenced to 60 months of probation and 120 hours of community service. We affirm.

I. BASIC FACTS

This case arises from defendant’s repeated attempts to coerce his girlfriend, Tammy Dutkiewicz, to recant her story that defendant physically abused her and to drop the domestic violence charges against defendant. Tammy and defendant have been in a romantic relationship, on and off, for about 20 years and have two children together. While incarcerated for the domestic violence charges, defendant called Tammy and asked her to drop the charges. Defendant told Tammy “to tell them that it was a boating accident or that we had rough sex.” Tammy recalled that defendant called “a couple times a week, few times a week” and that “there was probably over a hundred times” defendant called her while he was incarcerated. Defendant also sent Tammy a handwritten letter to be typed out and signed by Tammy. The letter was written to appear as if written by Tammy. In the letter, “Tammy” explained that she wished to drop the charges against defendant because the allegations of domestic violence were untrue and that “Tammy” had lied about the underlying incident as a way to retaliate against defendant for being romantically involved with other women. After receiving the letter, Tammy took the letter to defendant’s friend, John Corris, to have him type the letter as defendant requested. Tammy also testified regarding defendant’s attempt to bribe her. Throughout the trial, the jury listened to the recorded phone conversations where defendant aggressively and angrily asked Tammy to “tell the truth about a jet ski accident,” yelled at Tammy for her failure to have the charges dropped, and spoke with John about the letter. Shortly after jury deliberations began, the jury

found defendant guilty of one count of inciting or procuring perjury in a court proceeding and guilty of two counts of bribing, intimidating, or interfering with a witness.

II. PROCEDURAL HISTORY

Defendant was originally charged as follows:

COUNT 1

PERJURY- INCITING OR PROCURING, COURT PROCEEDING

did endeavor or incite or procure TAMMY DUTKIEWICZ to commit the crime of perjury as a witness in the case of PEOPLE V EDWARD PROCTOR, said case being DOMESTIC VIOLENCE before the 17TH CIRCUIT Court for the COUNTY OF KENT; contrary to MCL 750.425 [750.425-B]
FELONY: 5 Years

COUNT 2

WITNESSES – BRIBING/INTIMIDATING/INTERFERING

willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for an official proceeding; contrary to MCL 750.122(7)(a). [750.1227A]
FELONY: 4 Years and/or \$5,000.00

During defendant's preliminary examination, the district court reviewed the language of MCL 750.122, which provides in relevant part:

1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:

(a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

(b) To influence any individual's testimony at a present or future official proceeding.

(c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

* * *

(3) A person shall not do any of the following by threat or intimidation:

(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

(b) Influence or attempt to influence testimony at a present or future official proceeding.

(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

* * *

(6) A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.

The district court concluded that subsection (6), which was the language incorporated in count two, was inapplicable but found that subsection (1) and (3) did apply and therefore, held:

So I bind over today on the charges on the Complaint, Count 1. On the amended charges of Count 2, which is amended to read, 750.122(1), and Count 3 is added, after conclusion of testimony, 750.122(3). And I don't think (6) quite applies, so I'll just do those two. So, now it's a three Count complaint bind over on those three counts.

After the preliminary examination, the information was amended, but instead of amending the information as ordered by the district court, counts two and three incorporated the language from subsection (6), not subsection (1) and (3) as amended by the district court. It read:

COUNT 1: PERJURY- INCITING OR PROCURING, COURT PROCEEDING
did endeavor or incite or procure TAMMY DUTKIEWICZ to commit the crime of perjury as a witness in the case of PEOPLE VS. EDWARD PROCTOR, said case being DOMESTIC VIOLENCE before the 17TH CIRCUIT Court for the KENT COUNTY; contrary to MCL 750.425 [750.425-B]
FELONY: 5 Years

COUNT 2: WITNESSES – BRIBING/INTIMIDATING/INTERFERING
willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for an official proceeding; contrary to MCL 750.122(7)(a). [750.1227A]
FELONY: 4 Years and/or \$5,000.00

COUNT 3: WITNESSES – BRIBING/INTIMIDATING/INTERFERING
willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for an official proceeding; contrary to MCL 750.122(7)(a). [750.1227A]

FELONY: 4 Years and/or \$5,000.00

At the beginning of trial, the trial court read the information as amended, including the language from MCL 750.122(6). During trial and closing arguments, the prosecution and defendant referenced the language of MCL 750.122(6) when discussing the charges against defendant. At the close of proofs, defendant raised the issue of the amended information and the incorrect amendments and moved for a directed verdict. The trial court concluded that the amendments did not present surprise or cause confusion regarding the charges against defendant and therefore, denied defendant's motion for a directed verdict.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

1. FAILURE TO OBJECT TO PROCEDURAL IRREGULARITY

Defendant first argues that he was deprived of his right to the effective assistance of counsel because defense counsel failed to observe legal discrepancies between the information as amended by district court and the information upon which defendant was ultimately convicted. We disagree. An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *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 de novo. *Id.*

Both the United States and Michigan Constitutions guarantee the right to the effective assistance of counsel. US Const Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient and that such deficiencies prejudiced defendant's case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel performed deficiently if his performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999). To establish prejudice, a defendant must show that a reasonable probability exists that, but for counsel's error, the outcome of the proceedings would have been different. *Carbin*, 463 Mich at 600. This Court presumes that a defendant received effective assistance of counsel and places a heavy burden on the defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defense counsel is afforded wide latitude on matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and this Court will not substitute its judgment for that of defense counsel, review the record with the added benefit of hindsight on such matters, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), or second-guess defense counsel's judgment on matters of trial strategy. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). The failure to call a witness or present other evidence only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212

Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). “A defense is substantial if it might have made a difference in the outcome of the trial.” *Hyland*, 212 Mich App at 710.

Defense counsel’s failure to raise the issue concerning the errors in the information was a sound strategic decision. Defense counsel harbored the error as a procedural tactic to potentially benefit defendant later in the trial. While noticing the errors shortly after the preliminary examination, defense counsel waited until the end of proofs to raise the issue before the trial court. At the *Ginther*¹ hearing, defense counsel testified that, had he raised the issue at the commencement of trial, the trial court would have simply amended the information. As will be discussed below, defense counsel was correct in his belief that a trial court “may amend an information at any time before, during, or after trial.” *People v Goecke*, 457 Mich 442, 459; 579 NW2d 868 (1998). While the trial court ultimately rejected defense counsel’s arguments regarding the information and denied defendant’s motion for a directed verdict, “[a] particular strategy does not constitute ineffective assistance of counsel simply because it does not work.” *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

2. FAILURE TO CALL WITNESS

Defendant next argues that defense counsel was ineffective for failing to call a witness at trial. We disagree. Defense counsel adequately explained that his decision to refrain from calling, defendant’s son, Edward Jr., was a matter of trial strategy considering that Edward Jr.’s testimony would be more harmful than helpful. At the *Ginther* hearing, Edward Jr. provided testimony that may have undermined Tammy’s statement regarding the letter but also provided testimony that may have been damaging to defendant. As predicted by defense counsel, Edward Jr.’s testimony highlighted the aggressive nature of the relationship between defendant and Tammy. Specifically, Edward Jr. testified that he had witnessed Tammy’s and defendant’s “fights” and heard Tammy say that defendant had assaulted her. Although Edward Jr. may have testified in a manner that harmed Tammy’s credibility, because his testimony was also harmful to defendant, defense counsel’s decision not to call Edward Jr. as a witness was a sound strategic decision. Thus, defendant has failed to overcome the presumption that defense counsel’s decision fell within reasonable trial strategy. *Rockey*, 237 Mich App at 76.

Further, defendant has failed to establish that the failure to call Edward Jr. deprived him of a substantial defense. Again, Edward Jr.’s testimony may have supported a finding that defendant did not write the letter but John’s testimony, the individual who typed out the handwritten letter for Tammy to sign, and the admission of taped telephone conversations that occurred between defendant and Tammy and defendant and John, supported the prosecution’s theory that defendant had in fact written the letter, not Tammy. Thus, while Edward Jr.’s testimony would have placed Tammy’s testimony regarding the author of the letters into question, such testimony would not have made a difference at trial, especially considering the ample evidence admitted against defendant. Because defendant was not deprived of a substantial defense, defense counsel was not ineffective for failing to call Edward Jr. as a witness. *Dixon*,

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

263 Mich App at 398; *Hyland*, 212 Mich App at 710. Accordingly, defendant cannot establish that he was deprived of the effective assistance of counsel. *Carbin*, 463 Mich at 599-600.

IV. DUE PROCESS

Defendant argues that he was deprived of his constitutional due process right to notice of the charges against him because the trial court permitted the prosecution to try defendant on charges that were originally dismissed by the district court and that were not formally added to the information.² We disagree. Due to defendant's failure to preserve raise his due process claim below, this Court reviews for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To establish plain error, defendant must show that: (1) an error occurred; (2) the error was plain; and, (3) the plain error affected substantial rights." *Id.* at 763.

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence." *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). "A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "[T]he constitutional notice requirement is not some abstract legal technicality requiring reversal in the absence of a perfectly drafted information. Instead, it is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him." *Id.* at 601. "Whether an accused is accorded due process depends on the facts of each case." *People v McGee*, 258 Mich App 683, 700; 672 NW2d 191 (2003). "An information may be amended at any time before, during, or after trial to cure any *defect, imperfection, or omission in form or substance*, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001)(emphasis added), citing MCL 767.76. Specifically, MCL 767.76 provides:

No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court

² Defendant also argues that the trial court lacked jurisdiction over defendant because of the errors in the amended information. We disagree. "The circuit court gains jurisdiction over a defendant charged with a criminal offense triable in circuit court upon the filing of a return by the examining magistrate showing that the defendant waived preliminary examination, or that a preliminary examination was had and the defendant was properly bound over for trial." *People v Farmilo*, 137 Mich App 378, 380; 358 NW2d 350 (1984). "The circuit court does not lose jurisdiction, where a void or improper information in [sic] filed." *In re Elliott*, 315 Mich 662, 675; 24 NW2d 528 (1946). While the information listed the incorrect subsection, the trial court had jurisdiction over defendant as he was properly bound over for violating MCL 750.122.

may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury.

Thus, “the only legal obstacle to amending the information to reinstitute an erroneously dismissed charge is that amendment would unduly prejudice the defendant because of ‘unfair surprise, inadequate notice, or insufficient opportunity to defend.’” *Goecke*, 457 Mich at 462, quoting *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant has not established unfair surprise, inadequate notice, insufficient opportunity to defend, or prejudice as a result of the amendment of the information. During the preliminary examination the district court amended the information to add one count of MCL 750.122(1)(bribery of a witness) and one count of MCL 7501.22(3)(threats or intimidation of a witness), and dismissed the charge of MCL 750.122(6)(interference with a witness), concluding that this subsection did not apply to the facts at hand. After the preliminary examination, defendant received a copy of the amended information. As defense counsel testified at the *Ginther* hearing, he noticed that the amended information contained two counts of MCL 750.122(6), which he was aware did not reflect the charges that defendant was actually bound over on. While noticing these errors, defendant failed to take action. Moreover, throughout the trial, the trial court, the prosecution, and defense counsel incorporated the language from MCL 750.122(6) when discussing the charges against defendant. Thus, it is clear from the record that defendant had notice of the charges against him but decided that it would be more beneficial to ignore the errors in the information until it could be used to his advantage later in trial. Defendant cannot now claim that he was deprived of notice by the trial court approving of the amendments. Further, defendant has failed to establish how he was prejudiced by having to defend against MCL 750.122(6) as the proofs required to establish MCL 750.122(6), overlap with the proofs that would be required to establish MCL 750.122(1) and (3). Because the amendments did not prejudice defendant or unfairly surprise him of the charges against him, the trial court properly permitted the prosecution to try defendant on the charges as listed in the amended information. Accordingly, defendant has failed to establish plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly