

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 22, 2014

v

KENNETH D. JACKSON,
Defendant-Appellant.

No. 312551
Wayne Circuit Court
LC No. 12-004164-FC

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his convictions of armed robbery, MCL 750.529, and carjacking, MCL 750.529a, following a bench trial. Defendant was sentenced to 15 to 30 years in prison for each conviction. Defendant moved for a new trial, resentencing and for a *Ginther*¹ hearing in the trial court. The court denied defendant’s motion for new trial. We affirm.

The complainant was robbed in “broad daylight” of his wedding band, car keys, wallet, \$550 in cash and his car. Complainant later picked defendant’s photograph from an array, identifying him as the person who had pointed the gun at him during the robbery, took his personal property and drove his car away.

I. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first contends that his counsel was ineffective at trial. Defendant asserts three bases for his counsel’s ineffectiveness. First, counsel failed to obtain and present certain 911 records and medical records to support the defense of duress, which defendant says he would otherwise have asserted. Second, trial counsel was ineffective for giving the wrong advice about the parole consequences of a potential guilty plea, resulting in his rejection of the prosecution’s pretrial offer. Third, trial counsel was ineffective when he stated during closing argument that defendant was guilty of armed robbery. We disagree.

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

A trial court's denial of a motion for new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). The underlying issue of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Trakhtenberg*, 493 Mich at 51; *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). The defendant bears a heavy burden of overcoming a strong presumption that counsel's assistance constitutes sound trial strategy. *Trakhtenberg*, 493 Mich at 52.

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Decisions regarding what evidence to present and on what to focus in closing argument are presumed to be matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Counsel's failure to call or question witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, i.e., one that might have made a difference in the outcome of the trial. *Id.*

1. FAILURE TO SUPPORT THE DURESS DEFENSE

Defendant first argues that his counsel was ineffective because he refused to move for funds to employ an investigator and failed to obtain and present certain 911 records and medical records to support the defense of duress, which, defendant contends, he would otherwise have asserted. In *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009), this Court quoting *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997), stated that a defense of duress requires proof of four elements:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm.

“[T]he threatening conduct or compulsive act must be present, imminent, and impending.” *Id.*

Defendant testified at trial in his own defense and admitted he participated in “what later turned out to be a robbery and a carjacking.” Defendant’s admission was in response to the first substantive question posed by his attorney. The timing and direct nature of this inquiry could hardly have been accidental and was clearly part of a defense trial strategy to concede some degree of complicity in order to set up his duress defense to avoid criminal culpability.

Defendant described the “threat” he said he felt when his accomplice² pulled a gun and pointed it toward the complainant, “in his face,” and took the complainant’s property. The accomplice then told defendant to “check [complainant’s] pockets,” and defendant complied because “I didn’t want nobody to get harmed . . . I didn’t want to get shot.” On cross-examination, defendant said he took the complainant’s money and wallet out of fear.

The complainant provided a contrary and unequivocal description of defendant’s more direct role, testifying that he clearly saw defendant pointing a black revolver directly at his face. Further, the complainant testified that defendant said, “what you got, what you got?” Defendant then took the complainant’s wedding band off his finger and his car keys; his accomplice searched through complainant’s pockets, removing his wallet and \$550 in cash. Then, as he jumped into the driver’s seat of the complainant’s car and his accomplice got in the passenger’s side, defendant ordered the complainant to walk away. Defendant and his accomplice then drove off.

In making its findings in its role as fact-finder, the trial court acknowledged defendant’s testimony that he “did all this out of fear . . . he was fearful of his own safety by the co-defendant.” Contrary to defendant’s argument that counsel’s ineffectiveness prevented him from presenting the duress defense, the trial court actually considered it: “[n]ow, the defense does not specifically state the defense of duress, but for the purposes of these proceedings the Court is going to consider it because the defendant himself said, I went along because I felt I had to, because I would be in danger.” The trial court concluded, “This is not a case of duress, plain and simple. The prosecution presented evidence beyond a reasonable doubt that the defendant was a willing participant in this crime,” and found defendant guilty.

Defendant submitted an affidavit in support of his post-conviction motion for new trial and *Ginther* hearing, attesting that unspecified 911 records and medical records “would have shown that h[e] was pistol whipped by Twan and left unconscious by the side of the road on the date of the incident.” In response, the trial court again determined that defendant admitted his complicity in the robbery, and determined that defendant “was not under duress when both he and Tajuan robbed and carjacked [the complainant].”

Defendant’s actions hardly demonstrate the reluctant actions of a person in fear of death or serious bodily harm. *Chapo*, 283 Mich App at 371. Nothing in the record suggests that, during the commission of the crime, a reasonable person could perceive that codefendant threatened defendant. Defendant’s testimony about his alleged fear of his codefendant contains a

² The accomplice’s name is spelled variously in the record as “Twan,” “Tawn,” and “Tajuan.” The original spelling is retained in direct quotations; otherwise, “Twan” is used for consistency.

few nebulous allusions at best, and does not rise to the level of “threatening conduct” that would “create in the mind of a reasonable person the fear of death or serious bodily harm.” *Id.* Defendant’s “fear,” therefore, was not based on the type of “present, imminent, and impending” threatening conduct during the commission of the crime. *Chapo*, 283 Mich App at 371.

Moreover, the record shows that the trial court did consider the defense of duress before rejecting it. The court found complainant credible and believed his version of events and found defendant guilty. In a bench trial, this Court will defer to the trial court to determine the credibility of witnesses and the weight of the evidence. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Counsel was not ineffective because defendant was not deprived of a substantial defense—the defense of duress. *Russell*, 297 Mich App at 716. Defendant has failed to overcome the strong presumption that counsel employed reasonable trial strategy. *Trakhtenberg*, 493 Mich at 52.

Defendant has not shown that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms. Further, there is no reasonable probability that the result of the proceedings would have been different had the 911 records or the medical records been presented because the trial court considered his duress defense. Therefore, defendant’s argument that he was deprived of an opportunity to assert duress is without merit, and trial counsel was not ineffective because he did, in fact, pursue it.

2. ADVICE ABOUT PAROLE CONSEQUENCES OF GUILTY PLEA

Defendant next argues that trial counsel was ineffective for giving the wrong advice about the parole consequences of a pretrial plea offer, in that counsel told defendant that he would have to “serve out the remainder of the sentence for which he was on parole before he would even start his new sentence,” which resulted in his rejection of it. In the context of a plea bargain, a defendant claiming ineffective assistance of counsel must demonstrate that counsel’s performance was below an objective standard of reasonableness and that there was resulting prejudice. *Lafler v Cooper*, 566 US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012); *Hill v Lockhart*, 474 US 52, 58-59; 106 S Ct 366; 88 L Ed 2d 203 (1985). Counsel is not obliged to specifically recommend whether to plead guilty, *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995), but must inform the defendant of the direct consequences of his plea, *People v Fonville*, 291 Mich App 363, 384-385; 804 NW2d 878 (2011). Here, the record reveals:

MR. SHREWSBURY (defense counsel): Before we start trial, earlier this morning the prosecutor and I approached the Court for a Cobbs’ evaluation without giving you any specific facts about the case, only about my client’s background. And the Court gave a Cobbs of nine years to 20 years. And the problem with that is, I mean, that’s the bottom of the guidelines. That’s a good evaluation except that my client would have to serve that consecutively.

THE COURT: Right.

MR. SHREWSBURY (defense counsel): And therefore, he is not accepting it. So that’s why we’re going to trial.

MCL 768.7a(2) states that when a person is convicted of a felony while on parole for an earlier offense, the sentence for the new conviction “shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.” While the parole board does have the discretionary authority to keep a defendant until he reaches his maximum sentence, *Wayne Co Prosecutor v Dep’t of Corrections*, 451 Mich 569, 572; 548 NW2d 900 (1996), trial counsel did not say defendant would have to serve the maximum of his initial sentence and he was thus not wrong. In fact, trial counsel was correct when he said that the sentence resulting from the proposed plea would be consecutive to the sentence for which defendant was on parole. Defendant has thus not demonstrated that counsel’s performance was below an objective standard of reasonableness and that there was resulting prejudice. *Lafler*, 132 S Ct at 1384. Therefore, defendant cannot demonstrate error or that counsel was ineffective for giving the wrong advice about the parole consequences of a potential guilty plea.

3. CONCEDING GUILT OF ARMED ROBBERY

Defendant’s last argument that trial counsel was ineffective is based on counsel’s statements during closing argument conceding that defendant was guilty of armed robbery. A lawyer does not render ineffective assistance by conceding certain points as a matter of strategy, including conceding guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). The record shows that counsel’s closing argument included the following statements:

MR. SHREWSBURY (defense counsel): Now, my client is not trying to evade his responsibility about participating in it because he was there doing what Twan told him to do and he knows he was wrong for that.

* * *

But that doesn’t mean my guy is one hundred percent guilty of doing this thing. He didn’t have a gun. He said in his own statement, yes, he was there and he participated.

* * *

I would ask the Court to find that there were mitigating circumstances of my client’s involvement and that whatever you find, however you find factually and legally, I would ask that you give him some kind of consideration for his minimal participation. He admitted to the police as soon as they got him that he stuck his hand in the guy’s pocket and Twan was holding a gun on him.

* * *

But I would ask for a finding of not guilty on the carjacking and guilty of whatever lesser crime could be involved in the, in the robbery armed.

Here, the strategy of defense to the charges against defendant was that he was under duress. Decisions regarding what evidence to present and on what to focus in closing argument

are presumed to be matters of trial strategy. *Russell*, 297 Mich App at 716. To pursue the duress strategy, counsel had to necessarily concede that a crime occurred, in order to argue that defendant was not responsible for his actions because of the elements outlined in *Chapo, supra*, 283 Mich App at 371. The record shows that although it was unsuccessful, trial counsel, as part of his trial strategy, conceded that defendant was guilty of “whatever lesser crime could be involved in the . . . robbery armed” in his closing argument. Because this was not a complete concession of guilt, but rather part of a trial strategy, this Court will not second guess counsel. *Emerson (After Remand)*, 203 Mich App at 349. Defendant has not overcome the strong presumption that counsel’s trial strategy was sound. *Trakhtenberg*, 493 Mich at 52.

The three alleged shortcomings of defendant’s trial counsel, including his refusal to obtain and present certain 911 and medical records to support the defense of duress, incorrect advice about the parole consequences of a potential guilty plea, and counsel’s closing argument, were not outcome-determinative error, and defendant was not denied the effective assistance of counsel such that he is entitled to a new trial.

B. OFFENSE VARIABLE 14 SCORING

Defendant next contends that offense variable (“OV”) 14 was scored incorrectly. Defendant was given 10 points for being the leader in a multiple-offender circumstance. Defendant argues that OV 14 should have been scored zero because there was no evidence on the record of either defendant or his accomplice directing the other or masterminding the incident. Again, we disagree.

Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

OV 14 of the sentencing guidelines addresses the offender’s role. MCL 777.44(1); *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013). The variable applies to the offense categories of crimes against a person, MCL 777.22(1). Under OV 14, MCL 777.44(1), a court must assess points applicable to the offense according to the following:

- (a) the offender was a leader in a multiple offender situation.....10
- (b) the offender was not a leader in a multiple offender situation.....0

In scoring OV 14, the entire criminal transaction should be considered. MCL 777.44(2)(a). A “multiple offender situation” is one consisting of more than one person violating the law while part of a group. *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350 (2013), vacated in part on other grounds 494 Mich 880 (2013).

The record shows that contrary to defendant’s testimony at trial, the complainant unequivocally described defendant’s leading role in the offense and testified that defendant pointed a black revolver directly at his face. Defendant said, “What you got, what you got?”

Defendant then took complainant's wedding band off his finger and his car keys while his accomplice searched through complainant's pockets, removing his wallet and \$550 in cash. Defendant then ordered the complainant to walk away, as he jumped into the driver's seat of complainant's car and drove off with the accomplice, who was in the passenger's seat.

These facts supported, by a preponderance of the evidence, *Hardy*, 494 Mich at 438, the trial court's factual determinations that "the other perpetrator . . . was relatively quiet," and further, that "there was ample evidence to support the conclusion that Defendant was both the initiator and spokesman for this criminal duo." In addition, our de novo review of these facts show they are adequate to satisfy the scoring conditions prescribed by MCL 777.44(1) and the trial court's decision to assess 10 points for OV 14. *Hardy*, 494 Mich at 438.

Because the record supports the trial court's finding that defendant was the leader in a multiple-offender offense, the trial court did not err when it assessed 10 points in its OV 14 scoring decision.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder