

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 16, 2015

v

DONTE LASHAWN BAILEY,
Defendant-Appellant.

No. 321959
Wayne Circuit Court
LC No. 13-009970-FC

Before: HOEKSTRA, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Following a bench trial, defendant appeals as of right from his convictions of armed robbery, MCL 750.529; larceny involving property valued at \$1,000 or more but less than \$20,000, MCL 750.356(3)(a); and two counts of assault with a dangerous weapon (felonious assault), MCL 750.82. Defendant was sentenced to 135 months to 15 years' imprisonment for the armed robbery offense, one to five years' imprisonment for the larceny offense, and one to four years' imprisonment for each felonious assault offense. We affirm.

Defendant first argues that his Sixth Amendment right to effective trial counsel was infringed upon because defense counsel's performance was objectively unreasonable, and but for counsel's errors, the result of defendant's trial would have been different. Because defendant did not move for a new trial in the trial court or for an evidentiary hearing, this Court's review "is limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). The determination of whether a defendant was denied effective assistance of counsel presents a mixed question of fact and law. *People v Herron*, 303 Mich App 392, 395; 845 NW2d 533 (2013). Constitutional issues are reviewed de novo and factual findings are reviewed for clear error. *Id.*

In *People v Johnson*, 451 Mich 115, 121; 545 NW2d 637 (1996), the Michigan Supreme Court set forth the standard for determining whether a defendant was denied the effective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive

the defendant of a fair trial, a trial whose result is reliable. [Citation and quotation marks omitted.]

A defendant who is alleging ineffective assistance of counsel bears a “heavy burden” because he is required to show defense counsel’s deficient performance and to show prejudice, and he must also establish the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

There is also a strong presumption that defense counsel’s performance consisted of sound trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The Supreme Court stated in *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012):

Defense counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The inquiry into whether counsel’s performance was reasonable is an objective one and requires the reviewing court to determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. This standard requires a reviewing court to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did. [Citations and quotation marks omitted.]

Additionally, this Court affords defense counsel “wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case.” *Heft*, 299 Mich App at 83.

After a thorough review of the lower court record, we are not persuaded that defense counsel’s performance fell below an objective standard of reasonableness and amounted to ineffective assistance. Defendant first asserts that the testimony of a notary public who notarized an earlier recantation affidavit by victim Denoleous Buchanan should have been introduced. As part of his argument, defendant asserts that the trial court expressed “prejudice against the testimony of notary publics.” This statement mischaracterizes the trial court’s statements. Contrary to defendant’s assertion, rather than expressing prejudice against persons who act as a notary public, the trial court was merely expressing its opinion after balancing matters of credibility.¹ Further, to the extent defendant criticizes defense counsel’s decision to not call the notary public witness, “[d]ecisions 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). “[T]he failure to call witnesses only constitutes ineffective

¹ The trial court stated in its factual findings that “they’ve got this stuff [in the affidavit] written so small” and further stated, “we’ve had notaries in here before. And I don’t know if [Buchanan] was able to see all that. So, this notarized thing doesn’t mean anything to this Court in regard to [Buchanan’s] credibility. Especially when I have . . . the video for Exhibit Number 9 that tells it almost exactly like the victim claims it happened.”

assistance of counsel if it deprives the defendant of a substantial defense.” *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (citation and quotation marks omitted).

A review of the record confirms that defense counsel, after the close of the prosecution’s proofs and after inquiring of the trial court, made a considered decision to not pursue the introduction of the notary public testimony. Counsel’s decision, while made quickly, was a considered decision, and this Court is not persuaded by anything in the existing record that counsel’s decision was outside the broad range of professionally competent assistance. Moreover, we are of the view that defendant was not deprived of a substantial defense because defense counsel vigorously cross-examined Buchanan on the issues of his signing the affidavit and whether he understood what he was signing. In addition, the court specifically mentioned that it had seen the affidavit. While a notary public could presumably have testified with regard to whether Buchanan had actually signed the document in question, testimony would have been speculative with regard to what Buchanan understood when signing the document.

With regard to the element of prejudice, we are also not convinced that, but for defense counsel’s action in not calling the notary public, there is a reasonable probability that the result of defendant’s trial would have been different. *Carbin*, 463 Mich at 600. The trial court clearly found Buchanan to be a credible witness and accepted his testimony about what happened at the gas station in question on October 15, 2013. Indeed, the trial court stated that the notary would not have swayed the court in rendering its factual findings and ultimate decision.

Next, defendant argues that his counsel provided ineffective assistance in not calling two potential alibi witnesses on his behalf. Specifically, defendant contends that his sister and her friend would have testified that he was at home with them when Buchanan was assaulted and his mother’s vehicle was stolen. Defendant asserts that defense counsel’s performance was particularly deficient given that defendant was not shown on the videotape footage of the incident. Defendant has not submitted any affidavits or other documentary evidence to support his contentions.

On this record, we are not persuaded that defense counsel’s performance fell below an objective standard of reasonableness to the extent it could be characterized as ineffective assistance of counsel. As noted above, defense counsel’s decisions concerning the calling of witnesses and the presentation of evidence are presumed to be the result of sound trial strategy. *Rockey*, 237 Mich App at 76. Further, 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 Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), quoting *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Aside from defendant’s assertions in his brief on appeal, there is no confirmation of how these witnesses would have testified. Therefore, defendant has simply not established the factual predicate of his claim of deficient performance. *Carbin*, 463 Mich at 600. We are not convinced that defense counsel’s decisions were outside the range of professionally competent assistance. *Vaughn*, 491 Mich at 670. Indeed, there are myriad possible and conceivable reasons for why defense counsel may not have called these potential witnesses. With no mistakes apparent from the record, we are left to conclude that defense counsel had strategic reasons for not calling the witnesses and not presenting an alibi defense. Further, defendant has not made any factual or

evidentiary showing that, but for defense counsel's actions, there is a reasonable probability that the outcome of the proceedings would have been different. *Carbin*, 463 Mich at 600.²

Defendant next argues that his right to a fair trial was violated when the trial court allegedly made disparaging and prejudicial comments about notary publics. The unpreserved issue regarding whether defendant was denied his due process right to trial by an impartial judge is forfeited unless defendant can demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*

The applicable court rule governing whether the trial court judge in this case demonstrated impermissible bias is MCR 2.003(C)(1), which provides, in pertinent part, that "[d]isqualification of a judge is warranted for reasons that include, but are not limited to, the following: (a) The judge is biased or prejudiced for or against a party or attorney." When considering a claim of judicial bias, "as a general rule, a showing of actual, personal prejudice is required to disqualify a judge under MCR 2.003." *People v Wade*, 283 Mich App 462, 470; 771 NW2d 477 (2009). However, "there might be situations in which the appearance of impropriety on the part of the judge . . . is so strong as to rise to the level of a due process violation." *Id.* (citations and quotation marks omitted). "Therefore, a showing of actual bias is not necessary when the judge (1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism, (3) is enmeshed in other matters involving the petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact-finder or initial decision maker." *Id.* "[A] trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption." *Id.*

In the instant matter, defendant's assertions on appeal simply do not meet the heavy burden of overcoming the presumption of judicial impartiality. Contrary to defendant's argument, the trial court did not "reject" Buchanan's affidavit stating defendant was innocent. It is clear from the record that the trial court *duly considered* the affidavit and the statement that Buchanan allegedly made in it. After hearing Buchanan's trial testimony about when he was assaulted and his mother's vehicle stolen and the circumstances of the signing of the affidavit, however, the court determined that the affidavit was not credible, trustworthy evidence. This

² We also note that defense counsel asked very pointed questions of Buchanan directed at the issue of the identification of the person who hit Buchanan from behind. In closing argument defense counsel highlighted the fact that defendant's presence was not depicted in the videotape footage of the gas station during the offenses. In other words, the issue of whether it was defendant who assaulted Buchanan from behind was adequately explored at trial. Buchanan clearly testified that it was defendant who, along with defendant's brother, stole Buchanan's mother's truck, and that it was only the two brothers who knew the special way to start the truck. The trial court assessed Buchanan's credibility positively.

credibility determination was entirely within the trial court's discretion to make as the finder of fact in this bench trial. *People v Hughes*, 20 Mich App 294, 295; 174 NW2d 81 (1969). Further, the trial court's comments with regard to its prior experience with persons acting as a notary public were ambiguous and were made in its final ruling on defendant's charges after defense counsel, acting within his professional discretion, declined to call the individual who notarized Buchanan's affidavit. The comments evidence no bias against any witness. Put simply, while the trial court commented about its prior experience on the bench dealing with persons who act as a notary public, the instant matter does not present a case of seriously improper behavior on the part of the trial judge giving rise to a due process violation. *Wade*, 283 Mich App at 470. Certainly, no plain error is apparent.

Finally, defendant makes a very cursory argument that defense counsel's performance was defective because counsel did not object to the trial court's comments or move for a mistrial. Under the circumstances of this case, we are not persuaded that defense counsel's performance was objectively unreasonable. It is fair to assume that defense counsel recognized that the trial court's comments were innocuous and not prejudicial enough to warrant objecting or moving for a mistrial. Moreover, given that an objection or motion for a mistrial would have been futile, defendant has further failed to make the necessary factual showing that but for defense counsel's actions there is a reasonable probability that the result of his trial would have been different. *Carbin*, 463 Mich at 600.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Patrick M. Meter