

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES JOHNSON FRANKLIN WARD,

Defendant-Appellant.

UNPUBLISHED
September 18, 2008

No. 279072
Oakland Circuit Court
LC No. 2006-211808-FH

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant Charles Ward appeals as of right his jury conviction of assault with intent to do great bodily harm.¹ The trial court sentenced Ward to four years' probation, with 11 months to be served in jail. We affirm. We decide this appeal without oral argument.²

I. Basic Facts And Procedural History

A. Underlying Facts

Sometime between 10:00 and 10:30 p.m. on September 12, 2006, Charles Johnson, his brother, Dennis Johnson, and a friend, Toma Hewitt, went to the End of the Park bar in Hazel Park. Charles Johnson testified that he went to that bar frequently and recognized some of the other regulars, including Ward and his cousin, Ron Ward, Jr. Charles Johnson and his companions drank beer and played pool. Tau Gutaovitch and Shawna Harvey arrived at the bar sometime between 10:00 and 11:30 p.m. and joined Charles Johnson's group at the pool table. Around midnight, Charles Johnson noticed that Ward, Ron Ward, Jr., and another man named Victor Holt were playing pool on the next table. Dennis Johnson testified that Hewitt signaled his intention to play on Ward's table by placing his quarters on the side.

At one point, Charles Johnson and Dennis Johnson or Hewitt were playing doubles with Gutaovitch and Harvey. Sometime between 12:45 and 1:00 a.m., they took a break while

¹ MCL 750.84.

² MCR 7.214(E).

Harvey went to use the restroom. During that time, a scuffle broke out. Gutaovitch testified that Ward bumped into Hewitt while moving around his table. Hewitt fell, and his beer spilled. So Hewitt became angry and swore at Ward.

Charles Johnson and Dennis Johnson testified that they were standing and talking, facing away from Ward's table. They heard a noise and turned to see Hewitt fighting with Ron Ward, Jr. Charles Johnson put down his pool cue and took a couple steps toward them, asking, "what the f's going on?" All of a sudden, Charles Johnson was hit in the head with a pool cue. He was looking toward Hewitt and Ron Ward, Jr. and "didn't even see it coming."

Gutaovitch and Dennis Johnson testified that Ward struck Charles Johnson twice with his pool cue, first dazing him and then knocking him to the ground. Gutaovitch testified that Ward swung the cue stick once underhand and hit Charles Johnson over the eye. Charles Johnson turned toward him, and Ward swung the cue stick back around overhand and hit Charles Johnson "on the other side of his head above his ear." Dennis Johnson testified that Ward was holding the cue stick by its tip and hit Charles Johnson with the butt end. Ward "swung underhand, first time, and clipped him in the ear" and then swung the cue stick back the other way and hit Charles Johnson over the eye. Charles Johnson passed out from the force of the blow and "was bleeding profusely." He briefly regained consciousness and saw Dennis Johnson standing over him and the next thing he remembered was "when I woke up in the hospital."

Once Charles Johnson was on the floor, Dennis Johnson "grabbed a pool stick" and stepped toward Ward, ready to fight should he try to hit Charles Johnson again. Hewitt picked up a cue ball. Either Ward dropped his pool cue or someone took it away from him, and he went to the door while Dennis Johnson "was yelling for someone to call the police and an ambulance," and helping Charles Johnson up from the floor. Ward stood there for a moment and then left.

Police Officer Michael Grigsby arrived at approximately 1:00 a.m. and found Dennis Johnson, Charles Johnson, Hewitt, Gutaovitch, and Harvey over by the pool tables; the bartender, Terri Hines, was at the bar. Charles Johnson "had extensive injuries to his head area," including "a large gash over his left eye," which was swollen, and a "cut running down his right ear." The cut over Charles Johnson's eye was "bleeding pretty profusely," and Charles Johnson was "dazed and confused."

Charles Johnson testified that he was in the hospital for four or five days. He had a fractured skull. According to Charles Johnson, "[his] left eye was swollen shut, and [his] brain was bleeding, and [he] was throwing up blood for like three days, four days." He received several stitches for the cuts, which left at least one scar, "and [he] couldn't sit up straight for probably about two months."

Dennis Johnson and Charles Johnson later identified Ward in a photographic lineup. Ward was cooperative and came in for questioning, but he claimed self-defense.

Witness Brian Hulatt testified that he left work at 12:40 a.m. and went to the End of the Park bar. Hines served him a drink and suddenly "started screaming and yelling[.]" Hulatt turned around and saw a man swinging a pool cue at Ward. The cue did not hit Ward, "but it was awfully close." Ward "stepped forward and come over the top and hit [the other man] on the top of the head with a stick." The other man, who was hit only once, went down. Hulatt then

went over to break it up. “[T]hey were still had sticks up. There was another gentleman standing there with a stick, you know, facing off to him again. I came up from behind him, removed the stick and we yelled at him to throw his stick down and then I took all the sticks and threw them up over the bar.” Other people were going through the table pockets “trying to grab pool balls and stuff[.]” Ward left the bar.

Another witness, John Palmer, testified that he saw the fight, but the only person he knew was Ward. He said that someone who was reaching into his pocket went up to Ward. Palmer said that it seemed from “his body language” as if the man was going to attack Ward. Ward punched the man in the mouth, and he fell underneath a table. Someone else swung a pool cue at Ward, who backed up and apparently was not hit. Ward then “went forward” and hit his assailant once over the head, knocking him to the floor. Someone else “came and grabbed all of [the pool cues] out of their hands and threw them behind the bar” The man who had been punched “grabbed a pool ball” and went after Ward with it. Palmer further testified that Ron Ward, Jr. was not in the bar during the altercation; he had left to walk his father, Ron Ward Sr., out to his truck.

Hines testified that she was serving a drink when she heard yelling and turned to see Charles Johnson, Ward, and a third man with their pool cues in the air as if “they were ready to swing them”; Charles Johnson was holding his cue stick “like a baseball bat upside down.” She yelled at them to “stop it.” She started out from behind the bar and took her eyes off the action for a moment. She did not see anyone actually swing his pool cue, but heard a pop and suddenly Charles Johnson was on the floor bleeding. Hines went to the tables and “started grabbing pool sticks.” Then Hulatt “came right behind me and he pulled them and grabbed them all up and he took them off the wall and he threw them behind the bar.” In the midst of the commotion, Ward slipped out the back door. Ron Ward, Jr. “was already outside way before that whole incident.”

Ward testified that he went to the bar by himself between 10:30 and 11:00 p.m. As it happened, Ron Ward, Jr. was there with his father, Ron Ward, Sr. Ward testified that Charles Johnson and his companions “were pretty buzzed up,” and Hewitt was “trying to start a fight with everybody” in the place. While Ward was seated at the bar, Hewitt “came up to me running his mouth,” so Ward walked away and went to shoot pool with Holt. Hewitt followed Ward to the table and started criticizing his game. Ward told him “to shut the f up.” Hewitt responded, “Well, when you leave here, I got something for you.” Ward challenged him to “just give it to me now.” Hewitt “reached to his back like he was going to pull something,” such as a gun or a knife. Ward, who was both angry and scared, punched Hewitt once in the mouth, and he fell to the floor. All of a sudden, Charles Johnson swung the butt end of a pool cue at Ward’s head. Ward moved back but the end of the cue stick grazed his forehead. Charles Johnson continued, swinging the cue stick at Ward, who was backed into a corner and “was scared for my life.” Ward grabbed a pool cue and “came around and swung one time,” striking Charles Johnson in the head. Charles Johnson “went right down,” striking his head on the edge of the pool table. Hines and Hulatt then “came over and grabbed the pool sticks out of” their hands and Ward “ran out the door” before they could “jump on me again[.]” Ward stated that Ron Ward Jr. and Ron Ward Sr. had left the bar before the incident occurred.

B. Motion For New Trial

After the jury found Ward guilty of assault with intent to do great bodily harm, Ward moved for a new trial due to ineffective assistance of counsel based on his counsel's failure to call Ron Ward Jr. and Ron Ward Sr. as witnesses to confirm that they were not in the bar when the altercation took place. He contended that such testimony would have discredited the prosecution witnesses' testimony that Hewitt was fighting with Ron Ward, Jr., which in turn would have caused the jury to believe the defense witnesses' testimony that Ward had acted in self-defense.

Defense counsel testified that during trial preparation, he told Ward "to bring all of his witnesses to my office" to be interviewed. Ward brought three witnesses: Hines, Palmer, and Holt. He may have brought Hulatt as well. Hines and Palmer both told defense counsel that Ron Ward Jr. was not in the bar when the altercation took place. But according to a police report that defense counsel had obtained through discovery, Ron Ward Jr. told the police that he returned to the bar and saw Charles Johnson swinging a pool cue at Ward, who swung back at him with his own pool cue and hit him in the head. Ron Ward Jr. also said that he had hit Hewitt. Although defense counsel included Ron Ward Jr. on Ward's witness list, he and Ward agreed not to call him as a witness because he "was on fugitive status at the time of the case. He was named co-defendant but had not been arraigned on that particular charge" As for Ron Ward Sr., Ward never said that he wanted him to be called as a witness. Defense counsel did not consider Ron Ward Sr. as a defense witness because he had not witnessed the altercation and calling him to testify that he or his son had left the bar "would be cumulative" and "could call into question with the jury what the defense is."

Ron Ward Sr. testified that he went to the bar. He arrived sometime between 11:30 and 11:45 p.m. and left between 12:30 and 12:45 a.m. Ron Ward Jr. and Ward were also there. When it came time to leave, Ward was going to walk Ron Ward Sr. out to his truck, but Ron Ward Jr. said that he would do it instead. Once outside, the two men were talking, when Ron Ward Jr. indicated that he heard a commotion. Ron Ward Sr., who was hard of hearing, did not hear it. Ron Ward Jr. said he was going back inside. Ron Ward Sr. offered to go with him, but Ron Ward Jr. said no. Ron Ward Jr. headed back toward the bar, and Ron Ward Sr. left.

Ron Ward Sr. testified that Ward called him the following day and said that he had been in a fight "with two guys shooting pool and it occurred while Ron was outside. He indicated to me that he hit one of the fellows with his fist and then the other one come around the pool table with a stick at him, he . . . picked up a pool stick and hit the individual." Ron Ward Sr. later spoke to Ron Ward Jr., who said that the fight had ended by the time he got back inside.

Ron Ward Sr. stated that Ward asked him if he would be willing to testify, but Ward did not say what he wanted Ron Ward Sr. to testify to. Ron Ward Sr. readily agreed, although he told Ward that he "didn't know what [he]'d be able to contribute because [he] didn't see anything happen." Defense counsel never contacted Ron Ward Sr. about the case.

Ron Ward Sr. testified that Ron Ward Jr. was charged in connection with the case. He had not seen Ron Ward Jr. since June 2007 and did not know where he was. He knew that a bench warrant had been issued against him in connection with this case.

Ward testified that he gave his uncle's name to defense counsel as a potential witness and "figured if—being an attorney, if it was beneficial for me I would let him make the decision."

Ward testified that he thought that both Ron Ward Sr. and Ron Ward Jr. should have been called as witnesses. He wanted Ron Ward Sr. to testify that Ron Ward Jr. was outside when the altercation took place, which would show that Ward was fighting the others by himself and acting in self-defense. He acknowledged that Ron Ward Jr. was on bench warrant status at the time of trial.

It was Ward's position that defense counsel was ineffective for failing to call Ron Ward Sr. as a witness at trial to "corroborate[] the defense position that at the time the affray started Ron Ward[, Jr.] was out in the parking lot with his father."

The trial court ruled as follows:

I find that the defendant has not met his burden that he was provided ineffective assistance of counsel. . . .

Mr. Hilf, who represented the defendant at trial, reviewed the police reports, discussed the case with the defendant and set up a meeting with potential witnesses. During the several months of trial preparation Mr. Hilf engaged the defendant in several conversations about potential witnesses. Mr. Ron Ward, Senior was discussed as a potential witness. However, when Mr. Hilf asked the defendant to bring witnesses to a meeting a couple weeks prior to the trial the defendant did not bring Mr. Ron Ward, Senior to the meeting.

Similarly, the defendant did not give Mr. Hilf any contact information about Ron Ward, Senior and the defendant did not say that he wanted Ron Ward, Senior to be brought in as a witness.

Nevertheless, Mr. Hilf considered whether Mr. Ward Senior should be brought in as a witness and determined as a matter of trial strategy that Mr. Ward Senior would have added no benefit to the defense of the case.

Moreover, this decision . . . about which witnesses to call was made with the defendant's full knowledge and consent.

In any event, deciding not to call Mr. Ron Ward, Senior was not ineffective assistance of counsel. Indeed, there was no dispute that Mr. Ron Ward, Senior was not present in the bar at the time of the incident. The only value that Mr. Ron Ward, Senior's testimony would have been would be an attempt to contradict some testimony that Ron Ward, Junior was in the bar at the time of the incident. It was borne out at the trial. This testimony can be cumulative to the testimony of several other witnesses.

Moreover, this testimony, contrary to the argument of able defense counsel, would not have gone to the heart of the case. As noted by the People, . . . Ron Ward, Senior's testimony could have been believed, i.e., that he walked out

to the parking lot with his son, and still the defendant could have been convicted of the offense.

Stated another way, that Ron Ward, Senior and Ron Ward, Junior took a short walk in the parking lot would have hardly dispelled the People's case in this matter as is borne out by the verdict in the case.

Ward now appeals.

II. Assistance Of Counsel

A. Standard Of Review

Ward's sole claim on appeal is that he is entitled to a new trial because trial counsel was ineffective for failing to call his father to confirm that Ward had left the bar before the fight started. Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. The trial court's factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel.³

B. Analysis

To establish ineffective assistance of counsel, a defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the 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.⁴ Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy.⁵

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy."⁶ "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."⁷ "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense."⁸ "A substantial defense is one that might have made a difference in the outcome of the trial."⁹ Defense counsel

³ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁴ *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

⁵ *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

⁶ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

⁷ *Id.* at 76-77.

⁸ *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988).

⁹ *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

may be ineffective where he has no strategic reason for failing to call witnesses who can corroborate the defendant's testimony.¹⁰ Defense counsel may even be ineffective where he has no strategic reason for failing to call witnesses who can corroborate another defense witness regarding an issue central to the defense.¹¹

Defense counsel called three witnesses to corroborate Ward's testimony that he acted in self-defense after being set upon first by Hewitt and then by Charles Johnson. Ward never mentioned wanting to call Ron Ward Sr. as a witness. Nevertheless, defense counsel considered the possibility of having Ron Ward Sr. testify but ultimately decided against it because he could not support Ward's theory of self-defense, and the only testimony that he could offer, that his son was not in the bar when the fight occurred, was not central to the defense and was cumulative to that of two other defense witnesses, John Palmer and Terri Hines. Under the circumstances, defense counsel's decision not to call a witness to provide cumulative testimony on a minor point that was not relevant to the issue of self-defense was reasonable and did not prejudice Ward.¹² Therefore, we conclude that the trial court properly denied Ward's motion for a new trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

¹⁰ *People v Bass*, 247 Mich App 385, 391-392; 636 NW2d 781 (2001).

¹¹ *People v Charles Johnson*, 451 Mich 115, 122-124; 545 NW2d 637 (1996).

¹² *People v Carbin*, 463 Mich 590, 602-605; 623 NW2d 884 (2001).