

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 16, 2010

v

DWAYNE ANTHONY TAYLOR,

Defendant-Appellant.

No. 285175
Wayne Circuit Court
LC No. 07-021067-FC

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of first-degree murder (MCL 750.316), possession of a firearm during the commission of a felony (felony firearm) (MCL 750.227b), and felon in possession of a firearm (MCL 750.227f). We affirm.

I. FACTS

On the day of the murder, Isaiah Sanders, Marvin Wilburn, DeAndre Tistle, defendant and the victim were chatting in the driveway of Wilburn's house. The victim was making fun of Wilburn and before Wilburn could respond, he saw a gun pressed against the victim's head and Sanders and Tistle had "disappeared." Wilburn heard two shots, but was not looking to see who was shooting. Wilburn testified that he heard someone who he thought sounded like defendant, but he could not say for sure, say "hum keep stealing." Wilburn testified that before the shooting the victim had stolen marijuana from defendant.

Sanders testified that defendant was the shooter. He watched as defendant went through the victim's pockets and took out the victim's wallet and marijuana. Defense counsel then produced, and questioned Sanders about, a written statement that Sanders had given to defendant's sister the previous day, in which he had written that he could not identify the shooter and that he had not been threatened or offered money for the statement. Sanders testified that he had written the statement in the presence of defendant's sister and another man. He testified that he had been offered money for the statement and further testified that he simply copied what defendant's sister wrote because he was afraid. He stated that he was promised that if he didn't go to court, he would be looked after and given money from time to time. He also claimed that everything written in his purported statement was "a total lie."

Bush testified that he saw the shooting and saw “two other guys standing close by,” but he could not identify the shooter. He saw the shooter standing over the victim’s body and heard him say, “you won’t steal.”

After sentencing, defendant appealed and filed a motion to remand. This Court granted defendant’s motion to remand for an evidentiary hearing on the matter of whether defense counsel was ineffective.

On remand the trial court conducted a *Ginther*¹ hearing, during which defendant’s trial defense attorney, Che Karega testified, as well as defendant’s sister Shaniqua Taylor and defendant’s mother, Sherian Jones.

Karega stated that he hired an investigator named “Juan” to get a statement from Sanders. He said that he did not know Juan’s last name, but that he had used him for three or four years and that he was a person who knew the streets. Karega stated that he wrote out an example of the type of statement that he wanted Juan to get from Sanders. He asked Juan to have Sanders write his statement and sign it.

When Juan returned to Karega with a written statement, which was purportedly made by Sanders, Karega decided not to put Juan on the witness stand. He also decided not to question Juan about how he had obtained the statement from Sanders. Karega stated that he made these decisions based on the fact that the statement that Juan delivered back to Karega was word-for-word the same as the sample statement that Karega had given Juan as an example of the type of statement Juan was to obtain from Sanders. Karega said that he had intended the sample to be a guide or an outline, but when he saw that Sanders’ statement was a verbatim copy of his guide, Karega felt it would be improper to try to perpetuate the statement as being a prior inconsistent statement. Karega also testified that he did not call defendant’s sister to testify because he somehow became aware that defendant’s sister did not get the statement from Sanders.

Next, defendant’s sister Shaniqua Taylor testified that on the first day of trial, she, her son, her grandmother, and her cousin Juandale (also called Juan), left the courthouse for lunch. On their way home, they stopped at a gas station, where they saw Sanders. They invited him back to Taylor’s house and he accepted. They asked him to write out a statement saying that he did not see defendant commit the murder. She stated that Sanders was never threatened nor offered money to make this statement. She also said that Sanders was not a good speller, so her grandmother had to help him spell some of the words. She testified that after Mr. Karega received Sanders’ statement, he never asked her to testify. Defendant’s grandmother testified to a similar version of events.

The trial court issued an opinion and order denying defendant’s motion for a new trial. Defendant now appeals as of right.

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

II. STANDARD OF REVIEW

A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *Id.* We review the trial court’s findings of fact for clear error and its ultimate decision whether the defendant was denied the effective assistance of counsel de novo. *Id.* If resolution of a factual issue depends on the credibility of witnesses or the weight of evidence, we must defer to the trial court’s superior opportunity to evaluate these matters. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Further, to the extent that defendant raises claims not considered at the *Ginther* hearing, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel erred so seriously that counsel was not performing as the “counsel” guaranteed by the Sixth Amendment, overcoming a strong presumption that the performance was sound trial strategy and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 US at 694.

It is counsel’s duty to make an independent examination of the facts, laws, pleadings, and circumstances involved in the matter, and to pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004). Counsel may be ineffective for failing to make a reasonable investigation of the case. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Generally, defense counsel’s “failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). “In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel’s failure to prepare for trial resulted in counsel’s ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant.” *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997). The defendant has the burden of establishing the factual predicate of his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant has failed to establish that he was deprived of a substantial defense, or that there was valuable evidence that would have benefited defendant that defense counsel failed to present. Defendant claims that counsel was ineffective for failing to call defendant’s sister as a witness, for failing to engage a neutral investigator to take a statement from Sanders, and for failing to inquire further about the circumstances surrounding Sanders’ handwritten statement.

As far as defense counsel's choice not to call defendant's sister to the stand, decisions regarding what evidence or defenses to present are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We will not substitute our judgment for that of counsel regarding matters of trial strategy, and will not assess counsel's competence with the benefit of hindsight. *Payne*, 285 Mich App at 190.

Both defendant's sister and grandmother testified that they were in court during much of the trial and available to testify. Defense counsel declined to call them to the witness stand because he was uncomfortable with the fact that the statement obtained from Sanders was a verbatim copy of the sample statement he had given to Juan as an example of the type of statement he should try to get. This, in conjunction with Sanders' testimony, indicated to defense counsel that defendant's sister may have engaged in witness tampering or was possibly prepared to commit perjury if he called her to testify. A lawyer may not knowingly call a witness to the stand who he believes will commit perjury. *People v Dyer*, 425 Mich 572; 390 NW2d 645 (1986). Also, the failure to present perjured testimony does not constitute ineffective assistance. See *Nix v Whiteside*, 475 US 157, 171; 106 S Ct 988; 89 L Ed 2d 123 (1986).

Additionally, during the *Ginther* hearing, the trial court found defendant's sister to be "totally lacking in credibility." We defer to the trial court's superior opportunity to evaluate the credibility of the evidence below. *Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). While defense counsel did not specifically ask defendant's sister about the circumstances surrounding Sanders' statement, he had enough other evidence to conclude that it would be very unwise. His determination that it would be improper to try to perpetuate the statement as being a prior inconsistent statement was sound trial strategy. We decline to find defense counsel ineffective for failing to call a witness who was either preparing to commit perjury, or preparing to admit to evidence tampering.

Furthermore, even if defense counsel had erred, defendant has not proven the second prong of the *Strickland* test; that but for the error the result of the proceedings would have been different. Defendant has presented no evidence that Sanders has changed his story since the trial. Thus, defendant's assertion that the outcome of the trial would have been different had defense counsel engaged a neutral investigator is unsubstantiated. In addition, even if Sanders' credibility had been thoroughly impeached by the testimony of Juan or defendant's sister or a neutral investigator, there were two other witnesses to the crime. Wilburn stated that he did not see the shooter, but testified that at the time of the shooting the two other individuals that had been in his driveway had "disappeared." This would indicate that defendant was likely the only other person besides the victim and Wilburn in the group of friends that had been chatting that remained in the vicinity of the murder. Wilburn also said that he heard someone that sounded like defendant say "hum quit stealing" to the victim. He stated that he had known defendant for ten years and knew the sound of his voice. This testimony was corroborated by Bush, who saw someone standing over the victim's body and heard that same person say "you won't steal." Based on this testimony there was not a reasonable probability that allowing defendant's sister to testify would have altered the result of the proceedings.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood