

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ROBERT LONGNECKER,

Defendant-Appellant.

UNPUBLISHED

March 2, 1999

No. 193587

Midland Circuit Court

LC No. 95-007828 FH

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a; MSA 28.305(a), two counts of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of twenty-five to fifty years for the home invasion conviction and ten to fifteen years for each felonious assault conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in prohibiting him from posing alibi-related questions to a witness and arguing an alibi defense. Although defendant failed to file notice of his intent to present an alibi defense, as required by MCL 768.20(1); MSA 28.1043(1), he claims that the trial court should have permitted him to address time frame evidence testified to by Angela Wyatt, a prosecution witness and defendant's fiancée. When a defendant has failed to comply with the statutory alibi notice requirement, we review for an abuse of discretion the trial court's decision whether to permit the defendant to nonetheless introduce alibi evidence. *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993). The Michigan Supreme Court has supplied a test for the trial court to apply in exercising its discretion whether to permit the defendant who has failed to file notice to pursue an alibi defense.

In determining how to exercise its discretionary power to exclude the testimony of undisclosed witnesses . . . a [] court should consider (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to

which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case. [*Id.* at 682.]

We conclude that the trial court did not improperly limit defendant's efforts at raising an alibi defense. In analyzing the factors enumerated by the Supreme Court, we first note that in light of the fact that the prosecutor called Wyatt as a witness and thus presumably had some idea to what she would testify, the prosecutor likely suffered minimal prejudice from defendant's failure to disclose any alibi defense based on Wyatt's testimony. Second, defense counsel's explanation that no notice was provided because one generally never knows to what a witness will testify until the witness actually takes the stand was not a compelling reason for defendant's failure to provide notice. Third, defendant's failure to provide notice resulted in minimal harm to his case. While the trial court prevented defendant from referencing Wyatt's testimony as an alibi defense in closing argument, Wyatt's testimony tending to support an alibi for defendant remained in the record for the jury's consideration. Fourth, eyewitness testimony by one of the robbery victims, the fact that a stolen item was in defendant's possession shortly after the robbery, and the fact that a duffel bag utilized by the robber was found in defendant's car weighed heavily in favor of finding defendant guilty. Fifth, we note that the prosecutor did not express concern regarding the development of an alibi defense until after the trial court had excused Wyatt as a witness. Defense counsel thus had an uninterrupted opportunity during his cross-examinations to pose many questions regarding the time frame of events on the day of the robbery. We also note that Wyatt's time frame testimony at trial was impeached with her prior inconsistent statements to a police officer. Considering these facts, we find no abuse of discretion by the trial court in precluding defendant's development of an alibi defense. See *People v McMillan*, 213 Mich App 134, 140-141; 539 NW2d 553 (1995) (trial court did not abuse discretion in excluding alibi evidence given strength of other evidence and weakness of vague alibi testimony).

Defendant next argues that the trial court erred in denying his motion for new trial based on ineffective assistance of counsel. To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

As the first alleged example of ineffective assistance, defendant first offers defense counsel's failure to file an alibi notice. Defense counsel's decision whether to present alibi witnesses, and thus file notice of an alibi defense, is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Defense counsel's alleged failure to call witnesses only constitutes ineffective assistance if it deprived defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Our review of the *Ginther*¹ hearing transcript reveals that defense counsel's failure to file an alibi notice did not reflect his negligence or ineffectiveness, but a strategic decision. Dennis Mohowitsch testified at the *Ginther* hearing that defendant had purchased a vehicle from him on

the date and time of the robbery, and that he had informed a deputy sheriff of this date. However, defense counsel testified that the information in his file indicated that Mohowitsch had been unable to confirm either the date or time that defendant had purchased the vehicle, and the deputy who had interviewed Mohowitsch prior to defendant's trial testified at the *Ginther* hearing to the same effect. Defense counsel's un rebutted testimony established that he and defendant had fully discussed the possibility of calling Mohowitsch as an alibi witness, but that they had decided against the idea. Defendant and defense counsel also discussed calling Wyatt as an alibi witness, defense counsel's concerns that Wyatt would perjure herself and would be unable to hold up during cross-examination, and defense counsel's belief that the prosecutor would have to call Wyatt as a prosecution witness. Through his own investigation of the locations involved in Wyatt's alleged account of the day of the robbery, defense counsel determined that defendant still would have had sufficient time to commit the robbery. Furthermore, according to defense counsel, defendant himself could not even establish his whereabouts on the date of the robbery. In light of these facts, we conclude that defense counsel's strategic decision to forego an alibi argument did not deprive defendant of a substantial defense. *Daniel, supra*.

Nor does the second ground advanced by defendant, that defense counsel failed to impeach a robbery eyewitness' testimony with the information that she had initially failed to select defendant from a police lineup, qualify as ineffective assistance. While the eyewitness did not select defendant from the lineup at the time she was actually viewing the lineup, she indicated with certainty shortly after leaving the lineup that defendant had committed the robbery. Defense counsel explained his fear that had he attempted to impeach the eyewitness' initial hesitation at the lineup, the prosecutor would have had an opportunity to rehabilitate her by introducing her eventual positive identification, another positive identification of which the jury would otherwise have been unaware. Defense counsel chose instead to focus on the discrepancies in the two eyewitnesses' descriptions of defendant for impeachment purposes. We conclude that a legitimate basis existed for defense counsel's strategic decision to avoid discussion of the lineup procedure, and this Court will not second-guess defense counsel in this matter of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant further contends that defense counsel rendered ineffective assistance when he failed to impeach prosecution witness Warren Lee Johnson with his prior criminal convictions. Although defense counsel admitted at the *Ginther* hearing that he was aware of Johnson's criminal record, defendant had been involved with Johnson in some prior criminal acts and was a codefendant with Johnson in an unrelated robbery/home invasion. Defense counsel feared that his attempts to impeach Johnson with evidence of his prior convictions could have led to statements by Johnson regarding his knowledge of defendant's own, intertwined prior criminal activities. According to defense counsel, he explained to defendant the dangers he perceived in attempting to impeach Johnson with his prior convictions, and defendant comprehended these dangers. We agree with the trial court that this is a close question. However, even assuming that defendant has met his burden of establishing that counsel was ineffective in failing to impeach Johnson, we again agree with the trial court that defendant has failed to show the required prejudice because it is highly unlikely that the impeachment would have made a difference in the outcome of the case.

Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial. *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997).

Next, defendant suggests that the trial court erred by failing to define larceny as a part of the home invasion jury instruction. Defendant indicated his satisfaction with the court's instructions, and therefore our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Defendant never asserted at trial that he had in fact entered the victims' home with permission, or otherwise contested the larceny element of the charge. Because defendant challenged only his presence at the scene and his entire involvement in the crime, we conclude that the trial court's failure to explicitly define larceny for the jury did not result in manifest injustice where the jury was correctly instructed that the prosecutor was required to prove beyond a reasonable doubt that defendant intended to commit larceny when he broke into and entered the house. *People v Petrosky*, 286 Mich 397, 401-402; 282 NW 191 (1938) (trial court's failure to define larceny element of breaking and entering charge was not error when defendant challenged only that he was present at the time and place charged).

Defendant additionally contends that the prosecutor's misconduct during closing argument deprived him of his right to a fair trial. Defendant's failure to object at trial to the prosecutor's closing argument precludes our review of alleged improprieties unless failure to consider the issue would result in a miscarriage of justice. *People v Dalessandro*, 165 Mich App 569, 578; 419 NW2d 609 (1988). In this case, the prosecutor did not improperly shift the burden of proof to defendant. Our review of the prosecutor's allegedly improper remarks in the context of his closing argument reveals no improper conduct when he repeatedly reminded the jury of the correct standard of proof, *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994), and merely commented on the defense theory of the case. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). Finally, even granting defendant's arguments that the prosecutor introduced facts not contained in the record, we find that none of the prosecutor's comments could have significantly diverted the jury's attention from the actual issues in the case. *People v Viaene*, 119 Mich App 690, 698; 326 NW2d 607 (1982).

Lastly, defendant argues that the trial court imposed a disproportionate sentence. The twenty-five to fifty year sentence imposed by the trial court for defendant's home invasion conviction can be said to constitute an abuse of discretion if it violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The trial court had authority to impose on defendant, a fourth habitual offender, imprisonment "for life or for a lesser term." MCL 769.12(1)(a); MSA 28.1084(1)(a). Considering defendant's extensive juvenile and adult criminal history, including seven prior adult felony convictions, and the fact the trial court recognized the proportionality requirement and discussed the nature of the crime and appropriate punishment in the absence of defendant's prior rehabilitation or deterrence, we conclude that the sentence imposed by the trial court is proportionate to the offense and the offender.

Affirmed.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White

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