

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH M. GREEN,

Defendant-Appellant.

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UNPUBLISHED

December 28, 1999

No. 200893

Recorder's Court

LC No. 96-000786

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to a term of five to fifteen years' imprisonment for the assault conviction, to be served consecutively to the mandatory term of two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant first asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

No separate evidentiary hearing was held below with regard to defendant's claim of ineffective assistance of counsel. Therefore, our review of this issue is limited to the lower court record. See *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998).

Defendant claims that counsel was ineffective for failing to call two additional witnesses to support his alibi defense. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Consequently, in order to overcome the presumption of sound trial strategy, defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

After carefully reviewing the record, we conclude that defendant was not denied a substantial defense that would have affected the outcome of the proceeding. Defendant presented below the affidavit of Christopher McCauley, who averred that he and defendant both attended a party on January 7, 1996, and defendant did not leave the party between 8:00 p.m. and the time that the police arrived. However, Janet McCauley testified that defendant was with her at a party the evening of the attempted robbery. Although Janet McCauley admitted that she did not have defendant in view every second, she stated that defendant did not have the opportunity to commit the crimes at issue. Thus, Christopher McCauley's testimony would have been essentially cumulative to Janet McCauley's testimony. Under the circumstances, it is unlikely that Christopher McCauley's testimony would have made a difference in the outcome of the trial. See *id.* Moreover, defendant has failed to overcome the presumption that counsel's failure to call other witnesses might be considered sound trial strategy.<sup>1</sup> See *Stanaway*, *supra*. Defendant has not established that he was denied the effective assistance of counsel at trial.

## II

Defendant next claims that the trial court abused its discretion in denying his motion for a new trial on the basis that the verdict was against the great weight of the evidence. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Defendant argues that the identification testimony of Makhail Muhammad and Christine Thomas was not credible both because the assailant wore a mask and in light of his alibi. However, it is well settled that this Court may not attempt to resolve credibility questions anew. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The trial court, sitting as the trier of fact, was aware of the defense arguments regarding the two witnesses' identification of defendant as the robber and nonetheless found the witnesses to be credible. The fact that the trial court's finding was bolstered by the evidence of the tracking dog does not affect our analysis, as defendant has offered no evidence to support his claim that the tracking dog evidence may have been fabricated.<sup>2</sup> Defendant has not demonstrated that the verdict was against the great weight of the evidence, and the trial court therefore did not abuse its discretion in denying his motion for a new trial.

## III

Finally, defendant maintains that the trial court abused its discretion in denying his motion for a new trial because his conviction was secured through the use of false testimony. As previously stated,

whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of discretion. *Jones, supra*.

A prosecutor may not knowingly use false testimony to secure a conviction. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). However, in the present case, defendant has failed to indicate precisely what testimony he believes to be false. Rather, he merely points to inconsistencies between the trial testimony and the testimony presented at a pretrial evidentiary hearing. We reject defendant's implicit assertion that the existence of discrepancies in witness testimony automatically means that false testimony has been presented.<sup>3</sup> Indeed, variations in the witnesses' perceptions of an event are common and to be expected. Defendant was free to use the testimony from the pretrial hearing to impeach the testimony of the prosecution witnesses at trial; the task of resolving any inconsistencies in the testimony was the responsibility of the trier of fact. See *People v Callahan*, 152 Mich App 29, 32; 391 NW2d 512 (1986). Because defendant has not shown that his convictions were obtained through the use of false testimony, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Kelly

<sup>1</sup> Before trial, defense counsel filed a notice of alibi defense that listed Sherry McCauley, as well as Christopher and Janet McCauley, as witnesses. However, the record is silent regarding what Sherry McCauley in fact would have testified. Accordingly, defendant has not shown that a reasonable probability exists that, if counsel had called her as a witness, the outcome of the proceedings would have been different. See *Pickens, supra*.

<sup>2</sup> Even if a police car did arrive at the address where defendant was apprehended before the tracking dog, it does not follow that the evidence that the dog tracked the scent to that location was somehow tainted.

<sup>3</sup> In any case, knowledge of the falsity of testimony is not imputed to the prosecutor when a prosecution witness' testimony is in conflict with the statement of another witness. *United States v Lopez*, 985 F2d 520, 524 (CA 11, 1993).