

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY B. PETTES,

Defendant-Appellant.

UNPUBLISHED

December 28, 1999

No. 211055

St. Clair Circuit Court

LC No. 97-002920 FH

Before: Saad, P.J., and McDonald and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305, and habitual offender, fourth offense, MCL 769.12; MSA 28.1084, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, the evidence showed that perpetrators broke into a factory and damaged equipment and furnishings. The perpetrators wore white gloves. Two individuals ran from the building when the police arrived. Defendant was found hiding in a box in the factory. He had white gloves in his possession. After the prosecution rested, the trial court granted defendant's motion for a directed verdict on the charge of conspiracy to break and enter a building with intent to commit larceny, MCL 750.157a; MSA 28.354(1); MCL 750.110; MSA 28.305. Defendant called no witnesses. The trial court found defendant guilty of breaking and entering a building with intent to commit larceny. Defendant acknowledged three prior felony convictions.

At sentencing, defendant maintained that he entered the building only to convince the other individuals to leave, and that he had no larcenous intent. He indicated that he had wanted to testify at trial, but that his counsel prohibited him from doing so. The trial court sentenced defendant to four to ten years in prison, with credit for 200 days.

Defendant appealed, and another panel of this Court remanded this matter to the trial court to allow defendant to move for an evidentiary hearing on the issue of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant's position was that counsel

rendered ineffective assistance by failing to call a witness, co-defendant Donte Hall, who would have testified that he (defendant) was not involved in the breaking and entering. In addition, defendant asserted that counsel prohibited him from testifying on his own behalf. The trial court declined to hear testimony, concluding that even if defendant and Hall had testified that defendant was not involved in the breaking and entering, it would have rejected their testimony as incredible in light of the other evidence, and would have found defendant guilty.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is presumed to have afforded effective assistance. A defendant can overcome that presumption by showing that counsel's failure to perform an essential duty resulted in prejudice. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987). We do not second guess counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; ___ NW2d ___ (1999).

Defendant argues that he was denied the effective assistance of counsel at trial. We disagree and affirm. Decisions as to what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). The failure to present evidence or call witnesses constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. A substantial defense is one which might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). On remand, the trial court indicated that its verdict would have been the same even if presented with testimony from Hall and defendant that defendant was not involved in the breaking and entering. As the trier of fact, the court would have been entitled to reject such testimony. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Given the circumstantial nature of the case against defendant, counsel's decision to refrain from calling co-defendant Hall, assuming his testimony could have been obtained at all, presumably constituted the type of trial strategy for which we will not substitute our judgment. *Rice, supra*.

Defendant's assertion that trial counsel prevented him from testifying on his own behalf is supported only by his affidavit. On remand, defendant did not submit an affidavit from trial counsel, and the trial court did not address the issue. While the trial court was not required to ascertain on the record that defendant knowingly and intelligently waived his right to testify, *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995), defendant gave no indication at trial that he wished to testify. He has not overcome the presumption that counsel afforded effective assistance. *Stubli, supra*.

Affirmed.

/s/ Henry William Saad
/s/ Gary R. McDonald
/s/ Hilda R. Gage