

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of BRIAN M. BAKER, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

BRIAN M. BAKER,

Respondent-Appellant.

UNPUBLISHED

April 14, 2000

No. 212257

Wayne Circuit Court

Family Division

LC No. 95-330235

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Respondent, Brian M. Baker, was adjudicated guilty, following a referee hearing, of malicious destruction of property, MCL 750.380; MSA 28.612, and possession of a BB handgun by a person under the age of eighteen, MCL 752.891; MSA 28.436(41). Respondent was ordered to complete a probationary term and make restitution to the victim. Respondent appeals as of right, and we affirm.

On October 9, 1997, a pretrial hearing was held regarding charges levied against respondent for an incident involving a neighbor. Respondent appeared for the hearing with his mother. Respondent waived his right to proceed before a judge or jury, but requested a trial before a referee. On the record, the referee stated that the trial was scheduled for November 19, 1997. On November 19, 1997, respondent appeared for trial and was represented by counsel. Respondent's mother also attended the trial. Emma Porterfield testified that she was at home on August 20, 1997, when she heard shots. Porterfield observed respondent firing a BB gun at the storm door of her home. Respondent lived across the street from Porterfield, and she identified him as the perpetrator of the offenses. Porterfield testified that the incidents occurred at 6:00 and 10:00 p.m. The incident that occurred at 10:00 p.m. involved numerous males who had congregated on Porterfield's lawn. They were eating, making noise, and cursing. Porterfield asked them to leave. They did so after throwing trash on her lawn. Ten minutes after they left, Porterfield observed respondent standing at the curb, firing seven

shots with a BB gun at her door. Porterfield called the police. When they did not respond, she went to the police station and filed a report.

Respondent did not testify on his own behalf. Rather, Officer William Hanna testified that he took a report from Porterfield at the station “around ten o’clock in the evening or shortly thereafter.” Officer Hanna did not go to respondent’s home and try to confiscate the BB gun. He testified that he was aware of respondent and did not wish to go to the home alone. In closing argument, respondent challenged the credibility of Porterfield’s testimony, arguing that her testimony was confusing. Respondent was adjudicated guilty of malicious destruction of property under \$100 and possession of a BB handgun by a person under the age of eighteen. Respondent had additional charges pending for an assaultive incident unrelated to the adjudicated charges. Accordingly, disposition was held in abeyance pending resolution of the other pending case.

On January 28, 1998, respondent was adjudicated not guilty of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, involving an unrelated incident. After adjudicating respondent not guilty of this offense, the referee stated, “[p]arties will have seven days to seek a review of this [r]eferee’s recommendation, twenty one days to file an appeal.” The referee then noted that respondent’s disposition for the adjudication of the malicious destruction of property and possession of a BB handgun offenses had to be addressed. However, the referee proceeded to warn respondent and his co-defendants that an adjudication of not guilty meant only that the prosecutor had not met her burden of proof. He proceeded to warn them that, if they did not alter their conduct, “things come around again.” The referee then reiterated that there was “[s]even days to review, twenty one days to appeal.” The co-defendants were excused, and disposition for respondent’s malicious destruction of property under \$100 and possession of a BB handgun adjudications occurred. The referee noted that respondent had at least three aliases and had committed or been adjudicated in connection with other offenses. The referee then placed respondent on probation and ordered restitution to the victim. The referee then allowed respondent’s mother to make a statement. Respondent’s mother objected to the first trial, stating that the defense did not present alibi witnesses because “we had no knowledge of anything.” The referee did not respond to this allegation and did not repeat the time frame for review following disposition.

Respondent first argues that he was denied a fair trial due to ineffective assistance of counsel. We disagree. In order for this Court to reverse due to the ineffective assistance of counsel, respondent must show that counsel’s performance fell below an objective standard of reasonableness and that the representation so prejudiced respondent that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, respondent must show there was a reasonable probability that, but for his counsel’s errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on respondent to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because respondent failed to move for a *Ginther*¹ hearing below, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).

Respondent's contention that he was unaware of the nature of the trial and the need to present alibi witnesses is not supported by the record. At the initial pretrial attended by both respondent and his mother, the referee announced that November 18, 1997, would be the date of trial. Trial did in fact proceed on that date. Furthermore, counsel's failure to call witnesses is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Counsel may have failed to call the alibi witnesses because he did not know about them or because the witnesses testimony was not believable. *Id.* Accordingly, on the record available, there is no indication that respondent was denied a fair trial based on ineffective assistance of counsel.

Respondent alternatively requests that this Court remand this matter for an evidentiary hearing on the issue of ineffective assistance of counsel. This Court previously denied respondent's motion to remand. Because respondent has failed to set forth any new or additional documentary evidence in support of his request for a remand, we decline to do so. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Respondent next argues that the referee did not advise him of his right to request review of the referee's decision, contrary to MCR 5.913(C). The record indicates that respondent received the advice required by MCR 5.913(C) on two different occasions at that same hearing, albeit in conjunction with a separate case. We believe that this was adequate to apprise respondent of his right to seek review of the referee's decision. Moreover, to the extent that error occurred, respondent has not shown that it affected the outcome or prejudiced his substantial rights. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Therefore, reversal is not required.

Affirmed.

/s/ Harold Hood

/s/ Hilda R. Gage

/s/ William C. Whitbeck

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