

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MACK J. RODGERS,

Defendant-Appellant.

UNPUBLISHED

April 25, 2000

No. 209526

Wayne Circuit Court

Criminal Division

LC Nos. 97-004169;

97-004416

Before: Collins, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of felonious assault, MCL 750.82; MSA 28.277, carjacking, MCL 750.529a; MSA 28.797(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, complainant testified that on March 9, 1997, defendant stole his car at gunpoint, and that on March 13 or 20, 1997, defendant threw a fuel pump and fired shots at him. Defendant presented two alibi witnesses who testified that on March 9, 1997, defendant worked with them at Techni-Color. On rebuttal, Techni-Color's payroll assistant testified that records indicated that defendant did not work on Sunday, March 9, 1997, but did work the following four days. On surrebuttal, a police officer testified that defendant was incarcerated on March 13, 1997.

The trial court found defendant guilty of felonious assault, carjacking, and felony-firearm, and not guilty of armed robbery. The court found that the testimony of defendant's alibi witnesses was not worthy of belief in light of the fact that the timecard evidence showed that defendant did not work on March 9, 1997. In addition, the court noted that complainant's testimony indicated that the encounter with defendant which allegedly occurred on March 13, 1997, may well have occurred on March 20, 1997.

Defendant claimed an appeal to this Court, and moved for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), in the trial court. The trial court adjourned the matter

to allow appellate counsel to investigate to determine if records existed to show that defendant worked for another temporary agency on March 9, 1997. When the hearing continued, appellate counsel reported that she had not located the other temporary agency. The court held that defendant had not advanced sufficient facts to warrant a full hearing.

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).

Defendant argues that the trial court abused its discretion by denying his request for a full hearing pursuant to *Ginther, supra*. We disagree. Defendant's argument that trial counsel rendered ineffective assistance by failing to investigate whether he worked for another temporary agency on March 9, 1997, is without merit. Appellate counsel conducted such an investigation and could find no such evidence. Defendant has not demonstrated that any such evidence exists. The lack of investigation on the part of trial counsel did not result in prejudice to defendant. *Pickens, supra*. The trial court, as trier of fact, was entitled to rely on the evidence established via the testimony of the payroll assistant and conclude that defendant did not work on March 9, 1997. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Furthermore, the trial court's findings of fact indicate that the court was aware of the contradictory testimony regarding whether defendant worked or was incarcerated on March 13, 1997. The trial court was entitled to find that complainant's testimony that the second encounter with defendant may well have occurred on March 20, 1997, was worthy of belief, *id.*, notwithstanding the existence of the contradictory testimony. Trial counsel's failure to place greater emphasis on this testimony did not result in prejudice to defendant. *Pickens, supra*. Defendant did not support his motion for a hearing with evidence that trial counsel's representation resulted in prejudice. *Ginther, supra* at 442. The trial court did not abuse its discretion by declining defendant's request for a full hearing.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Janet T. Neff

/s/ Michael R. Smolenski