

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY LAMAR MCNEAL,

Defendant-Appellant.

UNPUBLISHED
October 24, 2000

No. 214721
Recorder's Court
LC No. 96-009211

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to one to twenty years' imprisonment. We affirm.

Defendant argues that he was denied the effective assistance of counsel and his conviction should be reversed. We disagree. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). An objective standard of reasonableness is used to evaluate the performance. *Id.* There is a presumption of effective assistance of counsel, which defendant must overcome. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999); *Rocky, supra*. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Prejudice exists where the court concludes that there is a reasonable probability that a different outcome would have resulted had the errors not occurred. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994), quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Noble, supra* at 662.

Defendant's first allegation of ineffective assistance of counsel arises from trial counsel's limited contact with defendant before the trial. We conclude that trial counsel's limited contact with defendant did not result in prejudice, as defendant's theory of mistaken identity was presented to the jury. In the opening statement, trial counsel stated that defendant was not at the location for a significant period of

time, that defendant had been working before to arriving at the location, and that the raid team arrived shortly after defendant entered the house. During cross-examination, trial counsel questioned Officer Johnson's ability to simultaneously observe the drug transactions occurring on the porch of the house and the activities occurring on the sidewalk. Trial counsel also asked Officer Johnson whether any money was found on defendant and if Officer Johnson observed defendant giving money to a codefendant. Trial counsel also called defendant's sister and father to testify on defendant's behalf. Defendant's sister testified that her father and defendant picked her up from Henry Ford Hospital at approximately 12:45 p.m., and they drove to Taylor Street. Defendant exited the vehicle, went into the house, and had just closed the door when the police arrived. Defendant's father testified that he picked defendant up from his job in order to take defendant to an appointment, apparently shortly after 12:30 p.m. On the way to defendant's appointment, they stopped at the house on Taylor Street so that defendant could tell a friend about a basketball game later that night. In light of the opening statement, the cross-examination of Officer Johnson, and the direct examination of defendant's sister and father, we conclude that trial counsel's limited contact with defendant was not deficient as it did not prevent trial counsel from adequately presenting a defense.

Defendant also argues that he was denied effective assistance of counsel when trial counsel failed to obtain his work records, thereby precluding the possibility of corroborating testimony presented by the defense. We disagree. Trial counsel testified that she subpoenaed the work records by sending a subpoena to Total Gas Station, located at 16850 James Couzins. The assistant manager of the station accepted process and forwarded the subpoena to corporate headquarters. Trial counsel spoke with the keeper of the records, who stated on two separate occasions that defendant was not an employee. Defendant did not provide trial counsel with verification of his employment, and trial counsel testified that she had no reason to doubt the information she had been given.

Furthermore, even if trial counsel's attempts to obtain the work records were deficient, defendant cannot establish that he was prejudiced. The work records would not have presented new evidence, as the jury heard through the testimony of defendant's father, that defendant had been working earlier that day. Additionally, the records that defendant wanted trial counsel to present as evidence contained inaccuracies that diminished their evidentiary value. Given the testimony of defendant's father regarding where and when he picked up defendant and the fact that the records indicated that defendant worked until 2:00 p.m., which was after defendant's arrest, there is no reasonable probability of a different outcome had trial counsel introduced the records during defendant's trial.

Defendant also argues that he was denied the effective assistance of counsel when trial counsel decided not to call defendant as a witness. We disagree. The evidence presented, the witnesses called, and the decision to question witnesses are presumed to be trial strategy. *Rockey, supra* at 76. Failure to call a witness results in ineffective assistance of counsel only if the defendant is deprived of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902 (1996). A substantial defense is one that might have affected the outcome. *Id.*

Trial counsel testified that she and defendant discussed the possibility of defendant testifying, and defendant chose not to take the stand. Although defendant denied that he was told that he had a right to testify and claimed that trial counsel made the decision that he would not testify, the trial court found trial counsel's testimony more credible. Deference is given to the trial court based on its opportunity to judge the credibility of the witnesses. MCR 2.613(C). This is particularly the case where the testimony is in conflict. *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998). As nothing in the record casts doubt on the trial court's determination of credibility, this Court will defer to the trial court's conclusion.

Defendant also argues that the trial court erred when it failed to inquire into the grounds for defendant's waiver of his right to testify. Defendant acknowledges that there is no requirement that a defendant's waiver of the right appear on the record, but urges this Court to reject the reasoning of prior cases and adopt such a requirement. Defendant contends that there is no reason to treat the waiver of the right to testify differently from the waiver of other constitutional rights. We disagree. In *People v Simmons*, 140 Mich App 681, 683-684; 364 NW2d 783 (1985), this Court determined that an on-the-record waiver of a defendant's right to testify was not required. In reaching this conclusion, the *Simmons* Court reasoned that "a formal waiver requirement might 'provoke substantial judicial participation that could frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy.'" *Id.* at 684, quoting *State v Albright*, 96 Wis 2d 122; 291 NW2d 487 (1980). This Court's holding in *Simmons* has been followed with approval in such later cases as *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995), and *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Defendant's argument is not persuasive, and a new trial is not warranted.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins