

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENTA MOORE,

Defendant-Appellant.

UNPUBLISHED

March 20, 2001

No. 223069

Muskegon Circuit Court

LC No. 99-043070-FH

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

After a bench trial, the trial judge convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and breaking and entering, MCL 750.115; MSA 28.310. The court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to four to fifteen years' imprisonment for the assault conviction and to ninety days in jail for the breaking and entering conviction. Defendant appeals as of right, and we affirm.

Defendant's sole ground for appeal is his claim that his lawyer failed to provide effective representation at trial. Defendant contends that defense counsel performed below an objective standard of reasonableness which deprived him of a fair trial. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that this so prejudiced him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Regarding performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *Id.* To prove prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.* at 302-303. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant questions why alibi witnesses Donna Williams, Keke Duncan and Deshary Warren were not subpoenaed or called to testify by defense counsel even though they were present in court.

Decisions concerning “what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one which might have made a difference in the outcome of the trial. *Id.*

We agree with the trial court that defense counsel’s decision not to call the alleged alibi witnesses to testify was a matter of trial strategy. *Rockey, supra* at 76. Therefore, to warrant setting aside his otherwise valid conviction, defendant had to show that the lack of alibi testimony deprived him of a substantial defense. *Daniel, supra* at 58. We find that defendant did not carry his burden because he failed to present the testimony of the witnesses at the evidentiary hearing¹ to establish that their testimony would have supported his alibi defense. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994).

Moreover, defense counsel made the strategic decision to base his defense on the discrepancies in the victim’s story rather than relying on an alibi defense because one of defendant’s proposed witnesses gave him the distinct impression that the alibi testimony would be fabricated. A claim of ineffective assistance of counsel cannot be premised upon the failure to present perjurious testimony. *People v LaVearn*, 448 Mich 207, 217-218; 528 NW2d 721 (1995).² Moreover, defense counsel may have reasonably concluded that presenting an alibi defense which may have turned out to be false would do more harm than good for his client. Defense counsel had the opportunity to review the facts and talk to witnesses and we will not second guess his trial strategy.

Defendant also claims that defense counsel was unprepared for trial because he admittedly did not discuss an alibi defense with witnesses Donna Williams or Keke Duncan before the trial date and because he did not interview prosecution witnesses. To establish ineffective assistance due to defense counsel’s unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 459 NW2d 80 (1990). The failure to interview witnesses does not by itself establish inadequate preparation. *Id.* at 642.

Although we note the trial court’s observation that defense counsel could have better prepared for trial, we agree with the trial court that he presented an adequate defense. On the record before us, defendant has failed to show that trial counsel’s level of preparedness prejudiced him.

¹ Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

² Defendant’s accusation that defense counsel should have subpoenaed the alleged alibi witnesses is groundless where, as here, counsel’s sound trial strategy did not require the presence of those witnesses.

Finally, defendant asserts that defense counsel failed to inform him of his rights or explain his trial strategy. However, trial counsel's testimony and defendant's own admissions belie his assertions.

Because we find that defense counsel did not perform below an objective standard of reasonableness and that the claimed poor performance of counsel did not prejudice defendant, we refuse to overturn defendant's conviction on defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell