

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL FERGUSON,

Defendant-Appellant.

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UNPUBLISHED

May 18, 2001

No. 217955

Wayne Circuit Court

LC No. 98-006090

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a bench trial of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The charges arose from the shooting and subsequent paraplegia of defendant's former girlfriend, Kristie Cole. The trial court sentenced defendant to 3½ to 10 years' imprisonment for the assault conviction and to a consecutive two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first contends that he was denied the effective assistance of counsel. To demonstrate that he was denied the effective assistance of counsel, a defendant must show that (1) his trial counsel's performance was objectively unreasonable; and (2) he was prejudiced by counsel's deficient performance, i.e., but for the deficient performance, there reasonably would have been a different outcome at trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must also overcome a presumption that the challenged actions of trial counsel were trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Moreover, a defendant generally must create a testimonial record in the trial court by moving for a new trial or an evidentiary hearing. *Id.* Absent such a record, this Court's review is limited to the facts contained in the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

At trial, a prosecution witness, Phillip Reese, testified that he was in bed with Cole in her bedroom when he heard defendant enter the bedroom and cock a gun.<sup>1</sup> According to Reese, Cole

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<sup>1</sup> Although defendant and Cole had ceased dating, they continued to share a house.

left the bedroom moments after the cocking sound and was then shot by defendant. Defendant argues that his counsel erred by failing to elicit testimony that based on (1) the requirement that the gun involved be kept fully loaded,<sup>2</sup> (2) the mechanics of the gun, and (3) the number of rounds left in the gun's chamber, Reese could not have heard the gun being cocked that night. Defendant contends that this information would have impeached Reese's testimony and supported defendant's theory that the shooting was a complete accident. However, defendant's "evidence" about the gun was not presented in the lower court but is instead attached to his appellate brief in the form of affidavits. Accordingly, we are not to consider the information on appeal. See *People v Bright*, 126 Mich App 606, 610; 337 NW2d 596 (1983), and *Hurst, supra* at 641.

Defendant further contends that his trial counsel erred by failing to elicit testimony that there was only one useable bedroom (Cole's bedroom) in the house in which the shooting took place. The trial court, in concluding that the shooting was not an accident, mentioned the alleged fact that defendant had his own bedroom in the house. Partially because of this alleged fact, the court disbelieved defendant's statement to the police in which he stated that he had been sleeping on the couch in the house and was startled awake by Cole, after which he accidentally shot her. The court stated that "defendant did in fact have his own separate bedroom, which certainly leads me to believe why [sic] would he choose to go and sleep on the couch when he could in fact go and sleep in his own bedroom?" Defendant contends that he did not in fact have his own bedroom in the house. However, once again the "evidence" about the lack of a separate bedroom was not presented in the lower court but is instead attached to defendant's appellate brief in the form of affidavits. Accordingly, we are not to consider the information on appeal. *Id.*

Defendant further contends that his counsel was ineffective for advising defendant not to testify on his own behalf. However, this Court should not substitute its own judgment for trial counsel's judgment in matters of trial strategy and should not assess the soundness of trial counsel's strategy with the benefit of hindsight. *Rockey, supra* at 76-77. Moreover, the relevant transcript reveals that defendant *chose* not to testify; there is no evidence that counsel persuaded defendant to refrain from testifying. We cannot consider defendant's bald statement on appeal that his counsel advised him not to testify. See *Bright, supra* at 610, and *Hurst, supra* at 641.

Defendant makes a brief statement in his appellate brief that if this Court does not reverse his conviction, the case should be remanded for findings of fact, apparently to elicit testimony about the workings of the gun in question, the sleeping arrangements in the house in question, and the alleged advice by his trial counsel to refrain from testifying. Defendant previously moved for a remand on this basis, however, and this Court denied the motion. We are not at liberty to overturn this decision made by another panel of this Court.

Finally, defendant maintains that the trial court's findings of fact and ultimate conclusion of guilt were not supported by the evidence presented at trial. This Court reviews a trial court's findings of fact for clear error. See *People v Snell*, 118 Mich App 750, 755-756; 325 NW2d 563

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<sup>2</sup> Defendant was a Detroit police officer at the time of the offense. According to defendant, Detroit police officers must keep their firearms fully loaded at all times.

(1982). A finding of fact is clearly erroneous when, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake was made. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). This Court defers to the trial court's determination of factual issues, especially when it involves the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). A trier of fact may draw reasonable inferences from the facts, provided such inferences are supported by direct or circumstantial evidence. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

The trial court's findings of fact and ultimate conclusion of guilt were amply supported by the evidence presented at trial. Indeed, the testimony supported the inference that Cole was worried about defendant seeing her with another man and that defendant shot her after he saw her with Reese. Moreover, the testimony established a timeline that contradicted defendant's contention in his statement to the police that the shooting was accidental.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter