STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2002
v	No. 227216 Muskegon Circuit Court
ANTHONY WILLIAM GORDON, Defendant-Appellant.	LC No. 99-043375-FC

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

A jury found defendant guilty of bank robbery, MCL 750.531, possession of a firearm during the commission of a felony, MCL 750.227b, and conspiracy to commit bank robbery, MCL 750.531 and MCL 750.157a. Defendant was sentenced as a second habitual offender, MCL 769.10, to eleven to twenty-five years' imprisonment for bank robbery, two years' imprisonment for felony-firearm, and eleven to twenty-five years' imprisonment for conspiracy to commit bank robbery, with the sentences for bank robbery and conspiracy to commit bank robbery to run consecutively to the felony-firearm sentence. Defendant appeals by right. We affirm.

In this case, defendant planned and executed an armed robbery at a credit union. Defendant's first contention on appeal is that it was improper for the trial court to allow into evidence the fact that marijuana was found at his home on the date of his arrest for armed robbery, after the prosecution had earlier stipulated not to seek to admit it. "We review the admission of evidence for an abuse of discretion." *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

At the hearing on defendant's motion in limine, defense counsel indicated that he and the prosecution had worked out a stipulation regarding marijuana found at defendant's home. In response, the prosecutor made the following comment.

> Correct, your Honor. At this time, we would stipulate we don't plan on introducing the marijuana found at the Defendant's home, unless in some unforeseen circumstance it would become relevant, in terms of impeachment.

> But, other than that, we would stipulate that it's not relevant and don't plan on using it. But we'd like an opportunity to bring it back before the Court in the event it becomes relevant—to bring a motion.

At trial, during defense counsel's cross-examination of Danica Butts, a prosecution witness, the following colloquy occurred.

> [MR. HOOPES:] Do you have personal knowledge as to what [defendant] does in the mornings prior to April 16th?
>
> THE COURT: Like in the three weeks before that, Mr. Hoopes?
>
> MR. HOOPES: That would be fine.
>
> THE WITNESS: That's—that's when I was into drugs. I would go over there and smoke a blunt, get high. That's what we did.

Defense counsel also asked Butts during cross-examination whether she was currently high or using drugs, and she responded negatively. In addition, defense counsel subsequently inquired into defendant's morning routine, and Butts responded that she used to get high with defendant at his home in the morning. Defense counsel went on to inquire about Butts' drug use and rehabilitation. Upon the prosecution's objection regarding relevance, the trial court excused the jury so that the parties could address the issue. Defense counsel argued that Butts' drug use and rehabilitation went to her perception and credibility. The prosecution responded by stating that the marijuana that was excluded at the hearing on the motion in limine was now admissible because it went to credibility, and defendant opened the door. The trial court agreed to allow the marijuana testimony but limited inquiry regarding it and gave a limiting instruction to the jury.

Defendant essentially makes two arguments. First, he argues that the marijuana was not relevant. MRE 401 states that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Reversal is not warranted when evidence is admitted that defendant himself made relevant. *Knapp, supra* at 377-378. A matter can be placed into issue by cross-examination. *People v Bates,* 91 Mich App 506, 510; 283 NW2d 785 (1979).

As noted, on cross-examination, defense counsel questioned Butts twice regarding whether she knew what defendant did in the morning in the three weeks preceding April 16. She responded that she smoked marijuana with defendant at his home. Defense counsel went on to inquire about Butts' drug use and rehabilitation and argued that the evidence was relevant because it went to her perception and credibility. As the trial court stated, the fact that there was marijuana found at defendant's home went directly to her credibility and whether she was testifying truthfully about smoking marijuana at defendant's home with him. Therefore, it was relevant. Besides, defense counsel, by his own admission, indicated that he was attacking Butts' credibility. Therefore, the prosecution was entitled to rehabilitate her. See MRE 608. The parties and the trial court agreed that the marijuana originally was not relevant. However, as the prosecution argued and the trial court noted, defendant placed the matter in issue and the marijuana issue became relevant through his cross-examination of Butts.

Defendant's second argument is that the admission of the marijuana violated MRE 404(b)(1), which prohibits the admission of other bad act evidence to show defendant acted in conformity with the bad act. Defendant's argument is very vague, and he offers no evidence that the marijuana was introduced as other bad acts evidence. Besides, the trial court, in admitting the marijuana evidence limited its use specifically to rehabilitate Butts' credibility and gave the jury instructions regarding its use. Therefore, defendant's argument is without merit, and the trial court did not abuse its discretion in admitting the marijuana.

Although we conclude that there was no error in admitting the marijuana testimony, we also note that even if there were error, the error would be harmless. Under the harmless error rule, an error justifies reversal if it is more probable than not that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The disputed evidence was marijuana found at defendant's home at the time of his arrest. Defendant was not on trial for a drug crime. He was charged and convicted of bank robbery, felony-firearm, and conspiracy to commit bank robbery. Defendant has failed to show that the result would have been different if the evidence had not been admitted. Any error in the admission of the evidence was harmless.

Defendant's second contention on appeal is that the trial court improperly denied his motion for a new trial brought on a claim of ineffective assistance of trial counsel. Defendant claims his attorney was ineffective because he failed to call a witness defendant specifically requested, which witness, defendant claims, was critical to his defense, and who, if believed, would have cast reasonable doubt upon the prosecution's theory of the case. This Court reviews a claim of ineffective assistance of counsel to determine if (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) defendant was prejudiced by counsel's defective performance (but for counsel's errors the result of the proceedings would have been different). *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

At the hearing on defendant's motion for a new trial on the basis that trial counsel was ineffective, defendant argued that trial counsel was ineffective for failing to call several witnesses. On appeal, defendant only takes issue with trial counsel's failure to call as a witness Arneda Sneed, a neighbor who lived across the street from defendant.

At the hearing on the motion, Sneed testified that on the day of the robbery, which occurred at approximately 8:30 a.m., she got up at 6:10 a.m., opened her blinds at 7:00 a.m., readied her son for school, and waited for the school bus to pick him up at 7:30 or 7:40. She often spent time looking out of her window in order to monitor the neighborhood. She had a clear view of the front and back doors of defendant's home. From the time that she opened the blinds until the time that the police officers came to arrest defendant, she never really moved out of the window except to put her son on the school bus, and she did not observe defendant going from his home.

At the hearing on the motion, Kenneth Hoopes, defendant's trial counsel, testified concerning his decision not to call Sneed. He was aware of Sneed. Defendant and defendant's

girlfriend told him that Sneed was a nosey neighbor who often looked out of her window. He observed Sneed's home on a couple of occasions. He did not interview Sneed because defendant told him that she was not in any way involved with the crime, and he did not feel that she would have had "useful enough information." He did not believe that Sneed's information was useful because of the layout of her home, and "I'd have to prove, one, that this woman watches out her window non-stop; otherwise it's somewhat, you know, fruitless to prove that what she saw or didn't see. And I just thought it would probably show the jury that we're kind of like reaching for straws to bring somebody in that's going to say something like this." He testified that the decision not to call Sneed was a matter of trial strategy.

The trial court noted that several eyewitnesses testified to seeing defendant across the street from the credit union just before the robbery and emerging from the bank after the robbery. The court also observed that defense counsel's reason for not calling Sneed was plausible trial strategy, and, that in any event, there was some testimony from defendant's father supporting defendant's alibi defense. Therefore, the trial court concluded that defendant had not shown ineffective assistance of counsel and denied defendant's motion.

Defendant has failed to satisfy both parts of the two-part test in determining whether trial counsel was ineffective. First, defendant has failed to show that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. In assessing whether trial counsel's performance was reasonable, the defendant must overcome a strong presumption that trial counsel's performance constituted sound trial strategy, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), and this Court will not second-guess trial counsel regarding matters of trial strategy with the benefit of hindsight, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). This Court has repeatedly held that decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *Garza, supra* at 255; *Rockey, supra* at 76. The failure to call witnesses can constitute ineffective assistance of counsel only when it deprived the defendant of a substantial defense (one that affected the outcome of the trial). *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

We agree with the trial court that trial counsel had sound strategic reasons for not calling Sneed, and we will not second-guess trial counsel regarding matters of trial strategy. Therefore, defendant has failed to overcome the strong presumption that trial counsel's decision not to call Sneed constituted sound trial strategy, and trial counsel's performance did not fall below the objective standard of reasonableness.

In addition, defendant was not deprived of a substantial defense or prejudiced because he failed to show that the result would have been different. Even if the jury believed Sneed's testimony that she did not see defendant leave his home, that does not prove that defendant was in fact in his home and did not participate in the robbery. Defendant could have left or returned to his home while she was distracted by putting her child on the school bus.

Also, and as the trial court noted, the evidence against defendant was overwhelming. Several witnesses testified that defendant participated in planning to rob the credit union, waited

for the teller, ambushed her, and robbed the credit union at gunpoint. Although defendant denied participating in the robbery, the overwhelming evidence was against him. Therefore, defendant failed to show that the result would have been different, and his claim that trial counsel was ineffective is without merit.

We affirm.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens