# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 15, 2004 |
| v | No. 244022<br>Alcona Circuit Court |
| DANA JAMES SWANTON,<br><br>Defendant-Appellant. | LC No. 02-010909-FH |

Before: Zahra, P.J., Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for second-degree home invasion, MCL 750.110a(3), for which he was sentenced to 300 days in the county jail. We affirm.

## I. Denial of *Ginther*[1] Hearing

### A. Standard of Review

Defendant first argues the trial court erred by denying his motion for a *Ginther* hearing. We review a trial court's decision to hold an evidentiary hearing for an abuse of discretion. *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999); *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). An abuse of discretion "exists where 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 Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

### B. Analysis

The trial court developed the lower court record at defendant's motion for new trial, and we are able to fully address defendant's claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance, a defendant is required to show that (1) his attorney's representation fell below an objective standard of reasonableness, and (2) that the representation so prejudiced him that it deprived him of a fair trial, i.e., there is a reasonable probability that,

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

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). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Thus, defendant is required to overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302.

On appeal, defendant specifically argues that he was denied effective assistance because (1) defense counsel failed to interview defense witness Stacey Karash before trial, (2) failed to establish through Karash that defendant's car was driven away from the Redwood Inn by Louis Sylvester at the time the crime occurred, (3) failed to establish that Karash saw defendant at the Redwood Inn between 11:30 p.m. and 1:30 a.m., which is approximately the time that the crime occurred, (4) refusing to use peremptory challenges or challenging for cause jurors Bouchard, Rekowski and Miller, (5) refusing to request a mistrial base on juror misconduct in discussing the case amongst themselves before being instructed by the court to do so, (6) failing to seek an adjournment based on defense counsel's illness, and, (7) failing to call a witness, Devon Ross, to establish that he was set up by his two accomplices. Of these claims, (1), (3) and (6) are unsupported or contrary to the lower court record and will not be further addressed.[2]

At trial, Karash testified that defendant arrived at the Redwood Inn between 11:00 p.m. and 11:30 p.m. on the night in question. Approximately forty-five minutes after he arrived, defendant asked Karash for change in quarters. Between 1:00 a.m. to 1:30 a.m., Karash locked the outside doors to the Redwood Inn. After having locked the doors, she would have seen defendant enter or exit the Redwood Inn after that time.

We conclude that trial counsel's decision not to establish through Karash that defendant's car was driven away from the Redwood Inn by Sylvester was reasonable trial strategy. Evidence was presented that defendant was in his car when leaving the Redwood Inn, but was not driving. This testimony is consistent with Karash seeing defendant's car driven away from the Redwood Inn by Sylvester. However, rather than raise the question whether defendant was in his car being driven by Sylvester, defense counsel elicited from Karash testimony that she believed defendant was in his room between 11:30 p.m. and 1:30 a.m. This decision to establish that Karash believed defendant was in his room between 11:30 p.m. and 1:30 a.m., rather than attempting to establish that defendant was not in his car merely because he was not seen driving it, was reasonable. Therefore, we conclude that defense counsel's decision was sound trial strategy.

Defendant next argues that trial counsel failed to use his peremptory challenges to remove three jurors, or alternatively, failed to challenge them for cause. An attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which this Court normally declines to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Here, two of the jurors testified that they knew the prosecutor

[2] The record reflects that trial counsel spoke with Karash before trial, defense counsel elicited from Karash that she saw defendant at the Redwood Inn between 11:30 p.m. and 1:30 a.m., and the trial court expressly found that defense counsel performed without any signs of suffering from any type of illness.

from social events, but each of these jurors expressly affirmed that they could be fair and impartial. Defendant contends that the third juror "was angry at defendant for rebutting his advances." The record reflects that this juror initially did not recognize defendant, but during trial, he approached the court to express a belief that his parents may have cleaned defendant's sister's office, and that he may have seen defendant while a patient at defendant's sister's office. While there is evidence that the juror may have before seen defendant, there is no evidence that this juror was biased against defendant. Because there is no evidence of juror bias, trial counsel's actions were not unreasonable. Moreover, "[o]ur research has found no case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would so hold, and we do not so hold in this case." *People v Robinson*,154 Mich App 92, 95; 397 NW2d 229 (1986).

Defendant next argues defense counsel was ineffective in failing to move for a mistrial based on juror misconduct. Specifically, this claim arises from an allegations that an unidentified juror stated to another juror, "[w]ell, we'll be sending this boy to jail." This statement was overheard by Bonnie Martin, a person taking notes on behalf of defendant's mother at trial. A juror's violation of the court's express instructions not to discuss the case is not in itself a mandate for reversal. *People v Rohrer*, 174 Mich App 732, 739; 436 NW2d 743 (1989). Rather, the test is whether "the misconduct had prejudiced the defendant to the extent that he was denied a fair trial." *Id*.

Here, there is no indication in the lower court record that defense counsel was informed of the juror's alleged statement. Accordingly, defense counsel acted reasonably in not moving for a mistrial. Therefore, the trial court properly denied a *Ginther* hearing on this matter. Furthermore, the trial court indicated that Martin's testimony was questionable given her bias toward defendant. Here, defendant has not overcome the presumption that jurors follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 561 NW2d 463 (1997).

Defendant next argues that defense counsel failed to call a witness to establish that he was set up by his two accomplices. Defense counsel's decision whether to call a particular witness is considered trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *Id*.

We conclude that defense counsel's decision not to call Devon Ross was reasonable trial strategy, which did not deprive defendant of a substantial defense. Defendant claims that Bonnie Ladd, Jennifer Rackley's mother, had solicited him to kill her husband and because he refused, Ladd and Rackley set him up in the instant case. Defendant claims that Ross' testimony regarding Ladd's threat against defendant would have made more credible his theory that he had been set up. However, Ross' proposed testimony regarding Ladd's statement is collateral to the commission of the instant offense. Considering that Ross' testimony was collateral and that it would only have been admissible for purposes of impeachment, we conclude that defense counsel did not deprive defendant of a substantial defense by not calling Ross.

Defendant next argues that his trial counsel refused to allow him to testify in his own behalf. The decision whether to "call the defendant to testify is a matter of trial strategy."

*People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984). When a "defendant decides not to testify or acquiesces in his attorney's decision that he not testify, 'the right will be deemed waived.'" *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985), quoting *State v Albright*, 96 Wis 2d 122, 135; 291 NW2d 487 (1980). The record is silent with respect to why defendant did not testify. However, had defendant wanted to testify he could have spoken up at any time or at the point where the judge asked, "Defense counsel and defendant, before I forget – I'm preparing the instructions as the arguments are going along – do you want the instruction that the defendant has not testified?" Defendant remained silent, and defense counsel assured the court that they wanted that instruction. We therefore conclude that defendant acquiesced in his attorney's decision that defendant not testify, and the issue is waived.

Defendant next argues that trial counsel failed to communicate a final plea offer until after it was withdrawn. Defense counsel's failure to convey a plea bargain offer may constitute ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241; 429 NW2d 649 (1988). However, the defendant "has the burden of proving by a preponderance of the evidence that a plea offer was made and that his counsel failed to communicate it to him." *Id*. at 242. A defendant must also prove by a preponderance of the evidence that he would have accepted the plea. *Id*. This issue was not raised before the trial court. Moreover, defendant has failed to support his claim. Defendant only provides an affidavit stating that he did not receive an offer. After considering each of defendant's arguments, we conclude that the trial court did not abuse its discretion in denying defendant a *Ginther* hearing.

## II. Other Issues

Defendant next argues the prosecutor's introduction of evidence concerning defendant's marijuana use was so prejudicial that it denied him a fair trial. Defendant failed to object to the witnesses' testimony that defendant smoked marijuana on the night of the incident; therefore, this issue was not preserved for appeal. *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999). An unpreserved error will only be considered to the extent that a defendant has shown plain error affecting his substantial rights. *Carines, supra* at 763.

Defendant argues that the prosecutor, in disregard of MRE 404(b)(2), failed to notify defendant that he intended to introduce evidence of defendant's drug use. MRE 404(b)(2), provides in relevant part:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence.

However, defendant was notified at the preliminary examination that the prosecution intended to elicit testimony regarding defendant's use of marijuana on the night in question. Indeed, during the preliminary examination, defense counsel cross-examined Sylvester about defendant smoking marijuana before the breaking and entering. Moreover, the evidence concerning defendant's use of marijuana before the breaking and entering was admissible because the drug use could have affected his behavior during the events surrounding the crime charged. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). In addition, because the use of marijuana by defendant could have affected not only his actions and behavior but his

memory, it was important for the jury to hear the complete the story to explain why defendant may not remember the events of the night the same as Sylvester and Rackley. Also, the evidence regarding defendant's use of marijuana on the night in question was not unduly prejudicial considering that substantial evidence was presented that defendant planned the offense. Therefore, defendant has failed to show plain error affecting substantial rights.

Last, defendant argues that his sentence was excessively harsh and that the trial court improperly scored offense variable 14. However, The record reflects that defendant has long since served his sentence of 300 days in the county jail. Therefore, because this Court is unable to provide a remedy for the alleged error, the issue is moot and need not be addressed. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 6209 (1994).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper