STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2004
v	No. 243103 Wexford Circuit Court
JUSTIN DUANE JOHNSON, Defendant-Appellant.	LC No. 02-006538-FH

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of larceny from a motor vehicle, MCL 750.356a(1). The trial court sentenced defendant to serve a prison term of ninety days and to pay $865 in restitution and costs, and placed defendant on twenty-four months' probation. We affirm.

This case involves the theft of an amplifier from the complainant's automobile. The primary witness in this case testified that he went to defendant's house and defendant gave him several amplifiers, including one later identified as that stolen from the complainant's automobile. Defendant, in his testimony however, denied ever stealing the amplifier.

Defendant's sole argument on appeal is that he received ineffective assistance of counsel. Defendant's challenge is based on the following remarks made by defense counsel during closing argument:

> I know it comes down to which liar do you believe, my client has got a reason to lie, because he's charged with a crime. The other guy has got a reason to lie because he wanted to get a deal and he wants the deal to stick. So they both got reasons to lie, and that's why I say to you not proven beyond a reasonable doubt.

Defendant argues that counsel's characterization of him as a "liar" was prejudicial and denied him a fair trial.

Because defendant failed to move for either a new trial or a *Ginther*[1] hearing, our review is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the strong presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The primary witness against defendant was Justin Patykowski. Patykowski assisted the police in the investigation of the theft of the amplifier. In exchange for his cooperation, potential felony charges pending against Patykowski stemming from another incident were reduced.[2] At the direction of the police, Patykowski met with defendant and told him that Patykowski knew "a guy who was looking to purchase some equipment." Patykowski testified that defendant gave him four amplifiers defendant had in his bedroom. Patykowski then took the equipment to the Cadillac Police Department, and the complainant later identified one of these amplifiers as the amplifier stolen from his vehicle.

During cross-examination, Patykowski admitted that he lied to defendant about what he was going to do with the stereo equipment. This admission allowed defense counsel to characterize Patykowski as a liar in general. Counsel used this characterization to argue that this "self-acknowledged liar" also had a reason to lie about where he got the stolen amplifier, i.e., to curry favor with the authorities and get the charge pending against him reduced.

Defense counsel's strategy, however, was frustrated by the prosecution's contention that defendant lied during his testimony at trial. At trial, Cadillac Police Officer Jason Straight directly contradicted testimony given by defendant. Defendant testified that he had given Patykowski two, not four, amplifiers, and that he had gotten one of these amplifiers from his own car, and the other from his brother. When asked if he told the police about the source of the two amplifiers, defendant testified that he had. Conversely, Straight testified that defendant told him that he had gotten the two amplifiers from "an honest friend." The prosecutor used this discrepancy as a means of arguing that defendant lied and that the jury could disregard all of defendant's testimony if it found that he had lied.[3]

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

[2] Patykowski eventually pleaded guilty to misdemeanor retail fraud in this other matter.

[3] The jury was eventually instructed as follows:

> Now there has been some evidence that the defendant made an earlier statement that did not agree with his testimony during trial. This is the statement that he allegedly made to police officer, Jason Straight. . . .
>
> Consider the statement carefully . . . . Then remember that you may only use the prior statement to help you decide whether you believe the defendant's testimony here in court.

Faced with the contradiction in testimony, defense counsel apparently made the reasonable strategic decision to acknowledge the lie. *Smith, supra*. In so doing, counsel could reasonably have believed that this decision would strengthen his credibility, and thus his ability to argue to the jury that the prosecution had not proved defendant's guilt beyond a reasonable doubt. If both defendant and Patykowski had lied, then the resolution of the case arguably rested on the issue of which "liar" should be believed concerning defendant's possession of the stolen amplifier. In essence, defense counsel was arguing that in such a situation there is no way to be able to discern the truth. This is a reasonable trial strategy that we will not second-guess on appeal. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

In any event, deferring to the jury's superior ability to judge witness credibility, *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998), the weight of the evidence presented at trial obviates against concluding that but for any potential error on this matter, the outcome of the trial would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage