STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2004
v	No. 247709 Wayne Circuit Court
CHARLYNNE DELRESE FOSTER, Defendant-Appellant.	LC No. 02-006853

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for embezzlement by an agent of over $20,000, MCL 750.174(5)(a). Defendant was sentenced to five years' probation with use of a tether. We affirm.

Defendant first argues that she was denied the effective assistance of counsel. Defendant has not fully preserved this issue for review by moving for a new trial or a *Ginther*[1] hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Consequently, this Court's review is limited to mistakes apparent on the record. *Id*.

A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and, (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

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

First, defendant claims that counsel was ineffective by failing to interview or call at trial certain witnesses whose names had been presented to him by defendant. Second, defendant contends that counsel was ineffective by not presenting existing physical evidence at trial. Decisions as to what evidence to present and whether to interview or call witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses or present other evidence only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

In this case, defendant neither specifies what witnesses and evidence should have been presented, nor the substance of such evidence or testimony. Thus, defendant has not shown that, by the presentation of these witnesses and evidence, it is reasonably probable that the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defense counsel did present witnesses and cross-examined the prosecution's witnesses, presenting a substantial defense. Further, even if defendant did tell defense counsel the names of the desired witnesses and the substance of the evidence that she wanted to admit, it is considered a matter of trial strategy for defense counsel to decide not to produce them. The Court will not second-guess matters of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003)*; People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Failure of trial strategy does not necessitate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Third, defendant argues that trial counsel was ineffective by convincing her not to testify. 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 does not relate why defendant did not testify; however, had defendant desired to do so, she could have spoken up at any time. Further, the Michigan Rules of Professional Conduct state that:

> In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer*, with respect to . . . whether a client will testify. [MRPC 1.2 (emphasis added).]

Trial counsel was proper in counseling defendant. Defendant acquiesced in her attorney's decision that defendant not testify, and the issue is thus waived.

Fourth, defendant argues that trial counsel was ineffective by failing to ask the trial judge to recuse herself. Defendant states that the trial judge and the complainant, Daniel Reid, knew each other from law school and that the trial judge's husband and Reid's nephew practice law together. Defendant does not point to anything on the record or any extrinsic facts that would support her claim. Defendant's mere assertion that her rights were violated, without record citations or cogent argument supported by authority, is insufficient to present this issue for review by this Court. MCR 7.212(C)(7); *People v Jones* (*on Rehearing*), 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Further, counsel is not required to advocate a meritless

position. *Snider, supra* at 425. Defendant has failed to overcome the presumption that counsel rendered effective assistance. *LeBlanc, supra* at 578.

Defendant next argues that the trial court abused its discretion by not allowing defendant to call a rebuttal witness. We disagree. Admission of rebuttal evidence is within the trial court's discretion and will not be disturbed on appeal absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

Rebuttal testimony may be used to clarify, dismiss, or counter evidence that an opposing party has presented in order to weaken and impeach that evidence. *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). Rebuttal evidence is limited to contesting, challenging, or clarifying evidence presented by the opposing party. *Leo, supra* at 422. Rebuttal evidence must be on a material matter, not a collateral issue. *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). The evidence that it is offered to rebut determines whether the rebuttal testimony is relevant. *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988). The proper test of whether rebuttal evidence was correctly admitted is not whether the evidence could have been offered by the prosecutor in his case in chief, but whether the evidence is "properly responsive to evidence introduced or a theory developed by the defendant." *Figgures, supra* at 399; *Bettistea, supra* at 126. A defendant is not permitted to present surrebuttal testimony that merely reiterates evidence he formerly presented during his case in chief. *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985).

In her defense, defendant presented testimony from three witnesses who had worked for or with Daniel Reid, the complainant: Kristi Glenn, Johnny Hawkins, and George Lyons. All three of defendant's witnesses testified to having disputes with Reid over money, stating that they were not paid as much as Reid had orally agreed to pay them. Lyons stated that he severed his relationship with Reid due to financial reasons.

In rebuttal, the prosecution responded with three witnesses who testified to Reid's reputation in the community for honesty. Reid also was recalled to testify regarding the money disputes and firings. Reid testified that he had fired Lyons because Lyons had started dating a client's girlfriend, Mary Johnson, while they were working on his case.

Defendant then recalled Johnny Hawkins in surrebuttal to clarify who was authorized to put Reid's signature on specific forms. Defendant also requested that Lyons be allowed to take the stand again as a surrebuttal witness. Defense counsel stated that he wanted Lyons to testify regarding when he began dating his fiancée in an attempt to establish why Lyons was fired from the law firm. The trial court denied the request, stating that Lyons' proffered testimony would be on a collateral matter.

We conclude that the trial court did not abuse its discretion in denying defendant's request that Lyons be called as a surrebuttal witness. As the trial court properly recognized, such testimony, if allowed, was on a collateral issue and was not relevant to the charges against defendant. *Teague, supra* at 566; *Figgures, supra* at 398.

In defendant's statement of this issue, she also mentions "other witnesses" whom the trial court purportedly would not allow to testify. Defendant does not articulate the identity of these other witnesses or otherwise address this issue in her brief. Because the merits of this allegation

are not addressed, the issue is not properly presented for review. *Jones*, *supra* at 456-457. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White