STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2004
v	No. 249103 Oakland Circuit Court
WILLIAM JOSEPH KNOPPE, Defendant-Appellant.	LC No. 02-187438-FH

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of operating a vehicle while under the influence of intoxicating liquor or with an unlawful blood alcohol level, third offense (OUIL/UBAL-3d), MCL 257.625(8)(c), and operating a vehicle while his operator's license was suspended or revoked, second or subsequent offense (DWLS-2d), MCL 257.904(3)(b). Defendant was sentenced to 334 days in jail for the OUIL/UBAL-3d conviction, and 183 days in jail for DWLS-2d conviction. We affirm.

I. Facts

At approximately 2:35 a.m. on October 11, 1999, two Michigan State Troopers arrived at the scene of a one-car accident on Interstate-75 in the city of Hazel Park. A car registered to defendant had struck the median wall and rolled over. Defendant was standing outside the car in the traffic lanes on the driver's side. One of the troopers observed that defendant had red, watery eyes, smelled strongly of alcohol, was slurring his speech, and was having trouble standing and walking. Defendant also urinated on the median in the presence of the troopers. When a trooper asked defendant if anybody else was in the car, defendant responded, "No." Defendant did not say anything that morning about somebody else being the driver. At the hospital, the troopers observed that defendant had a rainbow-shaped bruise on his chest, which looked like it had been made from impact with a steering wheel. A blood test revealed that defendant's blood alcohol level was 0.14.

Defendant testified that he had been drinking before the accident and that his license was suspended, but that he had only been the passenger of the car when the accident occurred.

According to defendant, Dwight Jackson had picked defendant up from the Club Room in Royal Oak and had been driving when the accident occurred.[1] After the accident, defendant and Jackson got out of the car on the driver's side. Defendant walked to a streetlight and Jackson disappeared. Defendant thought that the accident was caused by a problem with the car's steering.

II. Analysis

A. Substitute Appointed Counsel

Defendant first argues that the trial erred in denying defendant's motion for substitute appointed counsel. We review the decision to permit substitution of appointed counsel for an abuse of discretion. *People v Russell*, ___ Mich ___; ___ NW2d ___ (Docket No. 122998, decided July 27, 2004), slip op at 13 n 25; *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*Id.*, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991) (citations omitted from *Mack*).]

Here, defendant argues that his appointed counsel refused his request to present relevant evidence. Defendant argues that this constituted a legitimate difference of opinion regarding trial tactics.[2] However, defendant does not specify on appeal what evidence trial counsel refused to present, and there is no indication on the record that counsel refused to present relevant evidence at trial. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *Traylor, supra* at 464, quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). At trial, counsel presented defendant's theory of the case, arguing that defendant was not driving the morning of the accident, and elicited testimony in support of this defense. There is no indication that defendant and counsel had a difference of opinion regarding a fundamental trial tactic or defense. Further, counsel's decision regarding what evidence to present is a matter of professional judgment or trial strategy that does not justify substitution of counsel. *Traylor, supra* at 463, citing *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979).[3] The trial court did not abuse its discretion in concluding that defendant failed to show

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[1] Defendant testified that he had been paying Jackson to drive him to and from work because defendant did not have a driver's license. Jackson kept the car on the weekends.

[2] Defendant erroneously relies on *People v Fett*, 257 Mich App 76; 666 NW2d 676 (2003), which was vacated by our Supreme Court, 469 Mich 907 (2003).

[3] Defendant also contends that he was entitled to substitute counsel because his appointed counsel met with him for only twelve minutes before the trial. There is nothing on the record to

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good cause for appointment of substitute counsel. Additionally, the trial court was not required to make further inquiries into defendant's claim of dissatisfaction with his appointed counsel. See *Mack, supra* at 14 (where this Court rejected the defendant's argument that the trial court's failure to make further inquiries into the defendant's claim of dissatisfaction with his appointed counsel essentially forced the defendant to represent himself, thereby denying his constitutional right to counsel).

B. Effective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel for several reasons. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Because defendant failed to preserve this issue, our review is limited to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra* at 600. In addition to showing counsel's deficient performance, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Carbin, supra* at 600. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland, supra* at 694.

1. Lack of Preparation

Defendant first claims that his trial counsel failed to provide effective assistance, because counsel met with him for only twelve minutes in the months before trial and was, therefore, not prepared for trial. When claiming ineffective assistance due to trial counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Here, there is no testimony verifying defendant's claim that counsel only met with him for twelve minutes before trial. Additionally, the record

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support this contention. Further, such a fact would not support defendant's argument that he should have been assigned substitute counsel, because it would not show that defendant and his counsel had a difference of opinion regarding a trial tactic. Instead, this contention is relevant to counsel's effectiveness, which we will discuss, *infra*, in part II(B)(1) of this opinion.

does not show that counsel was unprepared. On the day of trial, trial counsel stated that he was ready for trial. The record reveals that trial counsel knew the facts, effectively questioned prosecution witnesses and defendant, and presented a cohesive defense. Because the record does not support the claim that trial counsel was unprepared, defendant has failed to show any prejudice due to lack of preparation. Therefore, defendant's claim ineffective assistance of counsel due to lack of preparation lacks merit.

2. Trial Strategy

Defendant next argues that he received ineffective assistance of counsel because his counsel had no trial strategy. We disagree. The record reveals that defendant's counsel had a legitimate trial strategy. Trial counsel's strategy, apparent from his opening remarks and questioning of the witnesses, was to inject reasonable doubt regarding whether defendant was the driver of the car. Defendant asserts that counsel's lack of trial strategy was apparent because defendant did not know before trial whether he was going to testify or what he would testify about. However, uncertainty about whether defendant was going to testify did not interfere with trial counsel's strategy, and defendant does not demonstrate how such uncertainty prejudiced him. Further, we will not substitute our judgment for that of counsel regarding trial strategy, and simply because a strategy failed does not render it ineffective assistance. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Therefore, defendant did not receive ineffective assistance of counsel based on lack of trial strategy.

3. Failure to Call Witnesses

Defendant next claims that he received ineffective assistance of counsel because trial counsel failed to locate and call the following witnesses at trial: Jackson, the dispatcher, the EMTs, defendant's nurse, and defendant's doctor. Failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 246739, issued August 24, 2004), slip op at 3, lv pending (Supreme Court Docket No. 126996). There is no indication on the record that these potential witnesses would have testified favorably for defendant. Defendant has not demonstrated that he was deprived of a substantial defense because those witnesses were not presented. Further, decisions regarding whether to call witnesses are presumed to be matters of trial strategy, and we will not second guess such decisions with the benefit of hindsight. *Id.*

4. Stipulation to Blood Alcohol Level

Defendant next argues that his trial counsel was ineffective because he stipulated to defendant's unlawful blood alcohol level. We disagree. The evidence of defendant's intoxication the morning of the accident was overwhelming. When asked if he was intoxicated at the time of the accident, defendant responded, "Oh absolutely." Defendant admitted that he was "above the legal." Because the evidence strongly supported defendant's unlawful blood alcohol level, trial counsel instead focused on injecting doubt as to whether defendant was the driver of the car. This was sound trial strategy. Regardless, we will not substitute our judgment for that of trial counsel regarding matters of trial strategy. *Kevorkian, supra* at 414.

5. Cross-Examination

Finally, defendant argues that his counsel was ineffective for failing to cross-examine the troopers on two key issues. As discussed, decisions regarding whether to question witnesses are presumed to be matters of trial strategy. *Dixon, supra* at 3. We will not substitute our judgment for that of counsel regarding trial strategy. *Kevorkian, supra* at 414. First, defendant contends that his counsel should have cross-examined the troopers about the bruise they saw on defendant's chest at the hospital. However, the record shows that defense counsel did indeed try to raise doubts about the bruising in his cross-examination of the troopers. Counsel questioned one trooper about the lack of information about the bruise in his initial police report, and he questioned both troopers about the absence of photographs of the bruise. Defense counsel may well have deliberately chosen not to question the troopers about their conversation with the doctor so as to not reinforce the troopers' vivid observations about the rainbow-shaped bruise on defendant's chest. Second, defendant maintains that defense counsel should have cross-examined the troopers regarding an inconsistency in their testimony: one trooper testified that the crashed car landed on all four wheels, while the other trooper testified that it landed on its roof. While such an inquiry may have cast doubt on the troopers' memory, the position of the car was not an issue in the case, and defendant has not demonstrated how this omission prejudiced him. Thus, defendant has failed to show ineffective assistance of counsel.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot