

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTOINE HICKS,

Defendant-Appellant.

UNPUBLISHED

December 16, 2004

No. 250181

Wayne Circuit Court

LC No. 01-013018-01

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

PER CURIAM.

Defendant appeals as of right his convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, discharge of a firearm at a dwelling, MCL 750.234b(1), and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged in connection with a shooting at complainants' residence. The prosecution's theory was that defendant went to complainants' residence between 9:30 p.m. and 10:00 p.m. on October 22, 2001, shot at one complainant in the driveway, and shot at the other complainant as she looked out a window of the residence. Defendant filed notice that he intended to call Cheryl Hicks and Darnell Delbridge as alibi witnesses and that they would testify that he was at his sister's home when the incident occurred. Delbridge, defendant's stepfather, so testified. Hicks, defendant's mother, was not called as a witness.

Defendant asserts on appeal that trial counsel was ineffective for failing to call Hicks as a witness. In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment."

Strickland, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The failure to call a witness can constitute ineffective assistance only if the failure deprived the defendant of a substantial defense, and a substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). Defendant placed his alibi defense before the jury via Delbridge's testimony. Defense counsel's decision to refrain from calling Hicks was a matter of trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The failure to call Hicks did not deprive defendant of a substantial defense.¹ *Hyland*, *supra*. Complainants unequivocally identified defendant as the person who came to their residence and fired shots. The jury was entitled to accept this testimony. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Defendant has not established that an error by counsel resulted in prejudice. *Carbin*, *supra*.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly

¹ Hick's affidavit indicates that she would have been unable to specifically testify that she took defendant to his sister's home on the night of the incident, or that defendant remained at his sister's home the entire evening. Further, defendant notes that Delbridge testified that defendant and Hicks were already at the sister's home when he arrived; however, Hicks' affidavit avers that she drove defendant to the home and Delbridge was already present at the location. Considering this inconsistency and Hicks' inability to claim that she was with defendant for the entire evening, it is certainly reasonable for trial counsel to decide to pass on calling Hicks as it might have undermined the testimony of Delbridge, who could place defendant at the home for the entire night. Minimally, defendant does not overcome the strong presumption that counsel's performance constituted sound trial strategy.