

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLENT CLAYBORNE CERNEY,

Defendant-Appellant.

UNPUBLISHED

November 17, 2005

No. 256569

Macomb Circuit Court

LC No. 2004-000459-FC

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for armed robbery, MCL 750.529. We affirm.

On appeal, defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to investigate the case or meet with defendant before trial, and failed to object at trial to improper expert testimony. After review of the limited record, we disagree. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *People v Rodgers*, 248 Mich App 702, 714-715; 645 NW2d 294 (2001).

Relying on *Mitchell v Mason*, 325 F3d 732, 741-742 (CA 6, 2003), defendant first argues that trial counsel's absence during the pretrial period presumptively prejudiced him. We disagree. Review of the record does not lead to the conclusion that defendant's counsel disregarded his obligation to investigate defendant's case during the critical pretrial stage of the proceedings. Defense counsel was appointed to represent defendant on December 29, 2003, one week after the prosecutor charged defendant with two counts of armed robbery and one count of conspiracy to commit armed robbery. On February 2, 2004, defense counsel appeared with defendant at his preliminary examination and vigorously cross-examined (1) the victim, particularly with regard to his ability to perceive events and the certainty of his observations, (2) Thomas Reggio, who used drugs with the victim, and (3) Warren Police Officer James Wolfe,

including with regard to the discovery by the police of a pellet gun, on which no fingerprint tests had been taken. Defense counsel also argued in closing that no evidence supported either an armed robbery charge relating to Reggio's truck or a charge of conspiracy to commit armed robbery. Defendant was only bound over on one charge of armed robbery, and the additional counts were dismissed.

The subsequent pretrial record reflects a March 1, 2004, arraignment, a pretrial hearing on April 8, 2004, and another pretrial hearing on April 21, 2004; on appeal, defendant "concedes that counsel appeared in court to represent [him] before trial began" by "show[ing] up at scheduled hearings." Before trial testimony commenced, defense counsel participated in jury voir dire, and successfully exercised five challenges to prospective jurors. On appeal, defendant asserts that defense counsel visited him on one occasion in prison, on May 19, 2004, several hours before trial testimony commenced. As the basis of his argument regarding defense counsel's alleged pretrial absence, defendant relies on remarks made by defense counsel after the trial court read jury instructions which indicated that he had not seen one police report, the gun, and some photographs. But the exchange actually shows that defense counsel requested the discovery materials from the prosecutor but, until trial, neither the prosecutor nor defense counsel had received the evidence.

The record reflects that defendant had several opportunities to consult with defense counsel before trial commenced—at the preliminary examination, the pretrial hearings, jury voir dire, and at the jail the next day. See *Mitchell*, *supra* at 743-744. Furthermore, although the record does not disclose with specificity each step in the investigation conducted by defense counsel, it does indicate that defense counsel made the appropriate discovery requests of the prosecution. Defendant offers no suggestion that defense counsel abdicated his duty to investigate by ignoring some relevant information or lead that defendant supplied, or by refusing to communicate with him at the preliminary examination, pretrial hearings, or meeting in jail. This case bears no resemblance to *Mitchell*, in which the defense counsel, who was "suspended from practicing law for the month preceding trial," engaged in a total of "six minutes of consultation [with the defendant] spread over three meetings." *Id.* at 744. Given that defendant had several opportunities to meet with defense counsel before trial testimony began, we conclude that this case falls outside the realm of the presumptively prejudicial category of cases in which a defendant lacks counsel at a critical stage. See *id.* at 741-744.

Further, we conclude that defense counsel diligently and reasonably pursued the strategy of attempting to discredit and impeach the victim, Reggio, and Lori Bucholtz during cross-examination, especially in light of the testimony concerning repeated alcohol and drug abuse by the victim, Bucholtz, Deborah Halley, and Reggio. Defense counsel also reasonably attempted to elicit evidence that Bucholtz and Halley planned and conducted the robbery because they knew the victim had a pillowcase full of cash in the motel room, and successfully elicited that, while Bucholtz had testified to observing defendant handle some bullets, the gun located by the police was a pellet gun, into which no bullets would fit.

Even assuming, as defendant argues, that defense counsel unreasonably failed to ascertain before trial that the gun located by the police had no fingerprints, and failed to object to Officer Smith's testimony regarding the possible reasons why the gun might not bear defendant's fingerprints, defendant cannot show that these deficiencies deprived him of a fair trial. In light of (1) the consistent accounts of the robbery related at trial by the victim, Reggio, and Bucholtz,

who all unequivocally identified defendant at trial as the man who held a gun during the robbery, (2) Bucholtz's testimony regarding the manner in which Halley and defendant planned the robbery, defendant's acquisition of a gun for the purpose of robbing the victim, and her observation that defendant threw the gun out the truck window as the police began to pursue Reggio's truck, (3) testimony by police officers that they located a gun near where either Halley or Bucholtz had advised them defendant had thrown it away, (4) questioning by both the prosecutor and defense counsel of Officer Smith concerning the potentially exculpatory fact that the gun recovered by the police bore no fingerprints, and (5) defense counsel's elicitation of Smith's opinion that given the absence of snow or rain on December 19, 2003, he could not say for certain why the gun lacked fingerprints, we detect no reasonable probability that but for counsel's alleged errors, the result of the proceedings would have been different, or that defendant's trial was fundamentally unfair and unreliable. See *Toma, supra*.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood