

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE LURICE HARRIS,

Defendant-Appellant.

UNPUBLISHED

May17, 2007

No. 267047

Gratiot Circuit Court

LC No. 05-004905-FH

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of three counts of assaulting a prison employee, MCL 750.197c, for which he was sentenced as a second habitual offender, MCL 769.10, to serve 30 to 72 months' imprisonment. We affirm.

While serving as an inmate at the St. Louis Correctional Facility, defendant refused to obey an order to return to his cell. Defendant then punctured an officer's hand with an ink pen and kicked a second officer in the face. Several officers subsequently restrained defendant. As they transported him to a segregated area, he bit a third officer on the leg.

Defendant first argues that the trial court erred in denying defense counsel's request to withdraw so that substitute counsel could be appointed to represent defendant. We review a trial court's decision to deny the substitution of counsel for an abuse of discretion. See *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). The abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). If the trial court's decision is within the range of principled outcomes, it has not abused its discretion. *Id.*

An indigent person entitled to appointed counsel is not entitled to choose his own lawyer. *People v Russell*, 471 Mich 182, 192 n 25; 684 NW2d 745 (2004); see also *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *Traylor, supra* at 462. Genuine disagreement over the use of a substantial defense or of a fundamental trial tactic is adequate cause, but differences of opinion regarding professional judgment or trial strategy are not. *Id.* at 462-463. A mere allegation that a defendant lacks confidence in his lawyer will not warrant substitution. *Id.* at 463.

Defendant failed to show good cause warranting substitution of counsel. Defendant claims he was entitled to substitute counsel because of a breakdown in communication with his attorney and because his attorney failed to arrange for a polygraph test, to obtain a videotape of the incident, and to interview the doctors who treated the injured officers. Defendant has, however, failed to show the substance of the proposed testimony of the officers' treating physicians or that a videotape of the incident even exists. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *Id.* at 464, quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Moreover, defense counsel's decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), which do not support a finding of good cause for substitution. See *Traylor, supra* at 463. We find no legitimate disagreement between defendant and his trial counsel over the use of a substantial defense or a fundamental trial tactic warranting the appointment of substitute counsel.

Further, defendant has failed to show that substitution of counsel would not have unreasonably disrupted the judicial process. Before trial, this case was adjourned on at least three occasions. Defendant waited until the day of the trial, when two expert witnesses were waiting to testify, to express any dissatisfaction with his attorney. A substitution of counsel would have necessitated an additional adjournment, thereby disrupting the judicial process. Defendant was negligent in waiting until trial to seek to replace his attorney. See *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999). Because defendant failed to show good cause justifying substitution of counsel and that substitution would not unreasonably disrupt the judicial process, we find that the trial court did not abuse its discretion in declining to permit counsel to withdraw so that new counsel could be appointed to represent defendant.

Alternatively, defendant argues that he was denied the effective assistance of counsel as a result of his trial counsel's failure to arrange for the polygraph test, obtain the videotape, and interview relevant witnesses. Because defendant failed to move for a new trial or an evidentiary hearing pursuant to *Ginther, supra* at 443, we are left to our own review of the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether the facts in the record suggest that defendant was deprived of his right to the effective assistance of counsel presents a question of constitutional law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's errors, it is likely that the outcome of the proceeding would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*

Defendant has failed to overcome the presumption of effective assistance of counsel. Counsel's decisions regarding which witnesses to call or question and what evidence to present are presumed to be matters of trial strategy, for which counsel is entitled to deference. *Dixon, supra* at 398; *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, considering that defendant has provided no evidence concerning the substance of the alleged videotape or of the proposed testimonies, we cannot find that defense counsel's alleged failures

affected the outcome of this case. We note further that, even if defendant took and passed a polygraph, the results would have been inadmissible at trial. See *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988). Thus, defendant cannot demonstrate that the failure to obtain a polygraph was outcome determinative.

Defendant next argues that the trial court erred when it found that he was not legally insane at the time of the offenses. We review a trial court's factual findings for clear error. MCR 2.613(C); *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

"Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked 'substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law.'" *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001), quoting MCL 768.21a(1). The defendant bears the burden of proving an insanity defense by a preponderance of the evidence. MCL 768.21a(3); *Carpenter*, *supra* at 231.

At trial, both parties presented expert testimony concerning defendant's state of mind at the time of the offenses. Although Dr. George Drozd testified that defendant was not criminally responsible for his behavior because of a delusional episode, Dr. Jennifer Balay testified that defendant was criminally responsible because he did not suffer from a mental illness and he could appreciate the wrongfulness of his conduct. The trial court determined that Dr. Balay's opinion was more credible and, therefore, that defendant was not legally insane at the time of the offenses. When a trial court's findings are based on witness credibility, as is the case here, we give special deference to those findings. *People v Sherman-Huffman*, 241 Mich App 264, 267; 615 NW2d 776 (2000).

The evidence showed that defendant had no history of mental illness before incarceration and that he displayed no signs of mental illness when he was evaluated after the incident. Defendant had a history of malingering mental illness and was diagnosed as malingering shortly after the incident. While defendant argues that Dr. Balay's opinion lacked credibility, she considered defendant's psychiatric history in forming her opinion and there is no evidence that she relied on any false information. Moreover, the trial court concluded that Dr. Drozd placed too much emphasis on the information provided by defendant. Considering the evidence pointing to defendant's criminal responsibility and the trial court's credibility findings, we cannot conclude that the trial court clearly erred in finding that defendant was not legally insane at the time of the offenses. The evidence did not preponderate in favor of the defense.

Finally, defendant argues that he was denied due process of law because Dr. Balay falsely testified about his use of anti-psychotic medication, and the prosecutor used her testimony in this regard to establish that he was not mentally ill. We review this unpreserved claim for plain error affecting defendant's substantial rights, i.e., error that was obvious and affected the outcome of the trial. *Rodriguez*, *supra* at 32; see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

While a prosecutor may not knowingly use false testimony to obtain a conviction and may not allow false testimony to stand uncorrected, *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998), defendant has failed to establish that the challenged testimony was in fact false. According to defendant, Dr. Balay falsely testified that he did not take any medication during his stay at Huron Valley Center (HVC) from July 2004 through May 2005. But Dr. Balay repeatedly testified that she did not know whether defendant took any medication during his stay at HVC. The only testimony offered by Dr. Balay with any certainty was that defendant was not on any medication when he was evaluated in September and November of 2004, and defendant has not provided any evidence to the contrary. Thus, we cannot conclude that Dr. Balay testified falsely or that false testimony was used to secure the convictions.

Further, we note that even if Dr. Balay's testimony concerning defendant's use of anti-psychotic medications was incorrect, the testimony was not outcome determinative. Where false testimony is elicited or stands uncorrected, a new trial may be required, but only if the false testimony reasonably affected the outcome of the case. *Id.* at 280. In articulating its findings, the trial court emphasized that defendant had a history of malingering and that he was diagnosed as malingering shortly after the incident. There is no indication that the trial court relied on defendant's medication usage in determining whether he was criminally responsible for his actions at the time in question.

Alternatively, defendant asserts that his trial counsel was ineffective for failing to impeach Dr. Balay. However, because there is no evidence that Dr. Balay's testimony was actually false, defense counsel cannot be deemed ineffective for failing to impeach her. See, e.g., *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Furthermore, the record shows that defense counsel effectively cross-examined Dr. Balay about defendant's medication usage. Defendant cannot establish that defense counsel's failure to impeach Dr. Balay was outcome determinative, and has failed to overcome the presumption of effective assistance of counsel. *Henry, supra* at 145-146.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens