STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 269555 Wayne Circuit Court
ANDRE DELL SIMMONS, Defendant-Appellant.	LC Nos. 05-010936-01 05-010937-01 05-010938-01

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a), three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), and three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b). Pursuant to MCL 769.11, defendant was sentenced as a third habitual offender to concurrent terms of 25 to 48 months' imprisonment for the CSC IV conviction, 20 to 40 years' imprisonment for each of the CSC III convictions, and 427 to 720 months' imprisonment for each of the CSC I convictions. We affirm.

Defendant first argues that the trial court improperly denied him the opportunity to present witnesses at his *Ginther*[1] hearing. However, upon review of the record, we find that the trial court did not prevent defendant from calling his witnesses. Rather, defendant unequivocally agreed with the trial court that the witnesses did not need to testify. Accordingly, defendant has waived any error on appeal, and we need not address the merits of this issue. See *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001).

Defendant next argues that he received ineffective assistance of counsel at trial. Effective assistance of counsel is presumed and a defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for defense counsel's errors, there is a

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

reasonable probability that the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive the defendant of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that trial counsel was ineffective for not investigating his case by contacting and interviewing witnesses, and for failing to call those witnesses at trial. A defendant is entitled to have his counsel "prepare, investigate, and present all substantial defenses," and a substantial defense is "one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). But decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *Id.*

From the record, it is apparent that none of the people defendant proposed as witnesses could have provided a substantial defense. Collectively, their testimony would have been minimally relevant. Because trial counsel's failure to investigate the proposed witnesses did not deprive defendant of a substantial defense, defendant has failed to show that trial counsel was ineffective. See *Pickens*, *supra* at 303. Moreover, trial counsel was not ineffective for failing to call these people as witnesses at trial because the potential witnesses would have offered little to defendant's defense. *Dixon*, *supra* at 398.

Defendant also argues that trial counsel's performance was deficient because counsel did not perform any meaningful pretrial discovery. Defendant points to the facts that trial counsel did not file any pretrial motions and did not file a witness list. However, defendant does not describe what type of pretrial motions trial counsel should have filed, nor does he allege how he would have benefited had trial counsel filed pretrial motions. Defendant has the burden of establishing the factual predicate for his ineffective assistance claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). He has not done so in this regard. Further, as discussed above, none of the people defendant suggested as witnesses could have supplied a substantial defense. See *Dixon*, *supra* at 398. It follows, then, that trial counsel's failure to file a witness list was not ineffective assistance.

Defendant also argues that trial counsel should have explored the possibility of hiring an expert witness. Defendant alleges that trial counsel deprived him of his "only potential defense," which "would have been to obtain an expert who would identify that children make misrepresentations after their parents divorce." The decision to call an expert witness is a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Trial counsel chose, based on his trial strategy, to forgo hiring an expert witness and to pursue an alternative defense by attacking the victims' credibility on cross-examination. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey*, *supra* at 76-77. Defendant has failed to overcome his burden of showing that trial counsel's performance was not sound trial strategy. Defendant has not shown that trial counsel was ineffective for declining to call an expert witness.

Defendant next contends that trial counsel was ineffective because he coerced defendant not to testify. At the *Ginther* hearing, trial counsel testified that he spoke to defendant about testifying at trial. Trial counsel asserted that he described the consequences of testifying or deciding not to testify, and advised defendant concerning what he should do. According to trial counsel, after the conversation defendant indicated that he did not want to testify. Trial counsel also produced a letter defendant wrote him before trial. In the letter, defendant stated that he did not want to testify unless trial counsel thought it was necessary.

Defendant gave a different account of his conversation with counsel. Defendant testified at the *Ginther* hearing that he told trial counsel that he thought he needed to testify and that he wanted to tell the jury his side of the story. According to defendant, trial counsel told him he did not need to testify. Defendant asserted that he then asked trial counsel to consult his family members, who were watching the trial. According to defendant, counsel told him that his family agreed that he should not testify. However, after trial, defendant's family members were angry and apparently indicated to defendant that they never told counsel that defendant should not testify. Defendant submitted affidavits from family members, stating that they told trial counsel that defendant should testify.

Ultimately, it was for the trial court to determine whose *Ginther* hearing testimony was most credible. The trial court found that counsel had advised defendant of his right to testify, and that defendant had freely opted not to testify. We defer to the trial court's superior ability to evaluate the credibility of the witnesses, *People v Canter*, 197 Mich App 550, 561; 496 NW2d 336 (1992), and we must also defer to the trial court's findings at a *Ginther* hearing, *People v Grant*, 470 Mich 477, 485 n 5; 684 NW2d 686 (2004). We conclude that the trial court did not clearly err in making its factual findings following the *Ginther* hearing in this case because we are not left with "a definite and firm conviction" that the court mistakenly evaluated the witnesses' credibility. See *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). We accordingly affirm the trial court's ruling that trial counsel's advice to defendant about his right to testify did not render his performance ineffective.

Defendant's last argument on appeal is that the prosecutor's use of peremptory challenges to remove only African-American jurors violated his constitutional right to equal protection of the law. We disagree.

In *Batson v Kentucky*, 476 US 79, 84; 106 S Ct 1712; 90 L Ed 2d 69 (1986), modified by *Powers v Ohio*, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991), the United States Supreme Court determined that the use of a peremptory challenge to strike a veniremember solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment, US Const Am VIX, § 1. The *Batson* Court developed a three-step test to determine whether a peremptory challenge has been used improperly to disqualify a veniremember on the basis of race. *Id.* at 96-98.

First, the party contesting the peremptory challenge must make a prima facie showing of discrimination on the basis of race. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128, amended 474 Mich 1201 (2005). After the contesting party makes a prima facie showing of discrimination, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. *Id*. at 283. If a race-neutral explanation is proffered, the trial court must then decide if purposeful discrimination occurred. *Id.*

In this case, the prosecutor offered race-neutral explanations for the removal of veniremembers Heath and Washington, and the trial court decided that purposeful discrimination had not occurred. "[I]f the proponent of the challenge offers a race-neutral explanation, and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot." *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005).

Turning to the second *Batson* step, we find that the prosecutor's explanations for removal were race-neutral as a matter of law. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 337, quoting *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Here, the prosecutor said that she had excused veniremember Heath because of Heath's body language and demeanor. This reason is not inherently racially biased, and is therefore race-neutral as a matter of law. *Id*. The fact that it is not a particularly compelling reason for dismissal is irrelevant, because the reason merely has to be nondiscriminatory. *Id.* The prosecutor stated that she had excused veniremember Washington because Washington expressed doubts about whether the criminal justice system had treated her brother fairly. Again, this reason is not discriminatory on its face and is also race-neutral as a matter of law. *Id.*

The third *Batson* step requires us to determine whether the trial court properly decided that there was no purposeful discrimination. When deciding whether purposeful discrimination has occurred, the trial court determines whether the race-neutral reason proffered by the proponent of the peremptory challenge is credible or merely a pretext for a racially motivated removal. *Id*. at 337-338. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v Dretke*, 545 US 231, 241; 125 S Ct 2317; 162 L Ed 2d 196 (2005).

Defendant argues that the prosecutor's reason for removing veniremember Heath was pretexutal and that the prosecutor did not provide a sufficient explanation for removing Heath. However, as discussed above, the prosecutor's reason for excusing Heath was race-neutral. The prosecutor satisfied her burden by offering a race-neutral reason for removing Heath; she was not obligated to provide further explanation.

Defendant argues that the prosecutor's reason for removing veniremember Washington was pretextual because the reason could have been applied to otherwise-similar nonblack veniremembers—specifically including veniremembers Sellers, Haroutinian and Carpenter, who were permitted to serve on the jury. Defendant is correct that we will infer discrimination when a similarly situated nonblack veniremember is allowed to serve. *Id*. However, defendant has failed to establish that Sellers, Haroutinian and Carpenter were nonblack veniremembers, nor can we determine their race from the record. Moreover, Sellers, Haroutinian and Carpenter were not "otherwise-similar" within the meaning of *Miller-El*, *supra*. Sellers was not allowed to serve on the jury; he was excused for cause. Haroutinian was not "otherwise-similar" to Washington because although she reported that her husband's half-brother had committed a felony, she did not express any doubts about whether her husband's half-brother had been treated fairly by the criminal justice system. Finally, even though Carpenter was "otherwise-similar" to Washington by way of his relationship to a felon, he likewise expressed no doubts concerning whether his brother had been fairly treated by the criminal justice system.

With respect to veniremember Washington, defendant has failed to demonstrate that nonblack "otherwise-similar" veniremembers were allowed to serve on the jury. Consequently, no inference of discrimination arises from the circumstances of Washington's removal from the jury. Reversal is not required on this ground.

Lastly, defendant argues that the prosecutor failed to proffer a reason for removing veniremember Martin, and that the trial court erred by failing to ask the prosecutor to provide a reason. Defendant did not attempt below to make a prima facie case of discrimination with respect to Martin's removal. It is only upon a showing of a prima facie case of discrimination that the proponent of the peremptory challenge must proffer a reason for removal. *Bell*, *supra* at 283. Because defendant did not attempt to make out a prima facie showing with respect to Martin, the prosecutor was not obliged to provide a race-neutral explanation for veniremember Martin's removal.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood