STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2008
v	No. 273483 Chippewa Circuit Court
ROBER LEE BAILEY, Defendant-Appellant.	LC No. 06-008205-FH

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault of a prison employee, MCL 750.197c. He was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of three to eight years. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of assaulting a prison guard, Officer Christopher Golladay, who had been searching defendant's cell. Corrections officers ordered defendant to go to the dayroom after dinner, but he ran down a hallway toward his cell while stripping off his coat throwing it to the floor. Golladay and other corrections officers testified that defendant hit Golladay, who then pushed defendant into the hallway and attempted to subdue him. A melee involving other prisoners and officers ensued. A videotape depicted the portion of the incident that occurred in the hallway.

I. Refusal to Appoint Substitute Counsel

Defendant argues that the trial court abused its discretion by refusing to appoint substitute counsel. We disagree. This Court reviews a trial court's decision regarding substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Appointment of substitute counsel requires a showing of good cause and that the substitution will not unreasonably disrupt the judicial process. Good cause exists where a defendant and his counsel develop a legitimate difference of opinion with regard to a fundamental trial tactic. *Id.*

In a pretrial motion, defendant claimed that his relationship with assigned trial counsel had broken down, and that counsel had not made herself available to defendant and failed to work for his best interests. At a hearing on the motion, defendant complained that counsel failed

to interview witnesses. Counsel explained that she had interviewed the witnesses listed in the police report and that defendant had failed to provide necessary information to enable her to locate other inmates that defendant wanted her to interview. The record does not demonstrate a difference of opinion regarding a fundamental trial tactic, but rather a deficiency in communication that could be remedied without substitution of counsel. The trial court's decision to urge communication rather than appoint substitute counsel was a principled decision under the circumstances and, therefore, was not an abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

II. Ineffective Assistance of Counsel – Failure to Subpoena Witnesses

Defendant argues that trial counsel was ineffective for failing to subpoena exculpatory witnesses.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error. *Id*. Whether, on the facts found by the trial court, the test for ineffective assistance of counsel has been satisfied is a question of constitutional law, which is reviewed de novo. *Id*. at 579, 582. To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id*. at 302-303 (citation and internal quotation marks omitted).

At a posttrial evidentiary hearing, Frank Mathis testified that he saw Golladay slam defendant's TV down on a desk during the search and that the screen went dark. He claimed that he saw defendant walk back from dinner and saw Golladay run out of the cell, grab defendant, and put him against the wall. Bernard Johnson testified that he was not present when the fight began. He testified that Golladay had harassed defendant and that Mathis told defendant before dinner that Golladay had broken defendant's TV.

Defendant contends that the testimony of Mathis and Johnson would have established that Golladay was not being truthful about whether he damaged defendant's TV, and may have led the jury to conclude that he was not being truthful about defendant punching him out of view of the camera. We agree with the trial court that there is no reasonable probability that the testimony of these witnesses would have changed the outcome of the trial. Even if the jury believed that Golladay had harassed defendant and damaged his TV, the video of defendant charging down the hallway and throwing his jacket to the floor before entering his cell was compelling evidence that he assaulted Golladay. Further, the testimony of these witnesses would have further established a motive for defendant to assault Golladay. Thus, counsel's failure to call these witnesses did not amount to ineffective assistance of counsel.

III. Prosecutorial Misconduct

Defendant argues that the prosecutor made an improper civic duty argument to the jury through the following remarks during rebuttal argument:

> This case is really about personal responsibility, accountability. Find Mr. Bailey responsible. Hold him accountable for his actions. This is about safety of the prison, safety of the officers who are doing a difficult job. Mr. Bailey didn't like what was happening and he assaulted Officer Golladay is in essence what happened and I ask you to find him guilty.

Because there was no objection to these remarks at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A "civic duty" argument urges the jury to convict for the good of the community, appeals to the jurors' fears and prejudices, and thereby injects issues broader than the guilt or innocence of the accused. See *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).

To the extent that the prosecutor's argument could be considered improper, any prejudice was cured by the trial court's instructions directing the jury to return a verdict based only on the evidence and to not let sympathy or prejudice influence its decision. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Therefore, the remark did not affect the outcome of the proceeding.

Similarly, because any prejudice was cured, there is no reasonable probability that the result of the proceeding would have been different had defense counsel objected. Therefore, defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's remarks fails as well.

IV. Ineffective Assistance of Counsel – Failure to Secure the TV

Defendant, in propria persona, argues that defense counsel was ineffective for failing to secure defendant's TV as evidence, because it would have added to the claim that Golladay lied when he denied breaking defendant's property in the cell. Because defendant did not raise this issue at his posttrial evidentiary hearing, our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Even if a broken TV could have been secured by counsel and admitted at trial to impeach Golladay's credibility on this point, we are not persuaded that there is a reasonable probability that it would have resulted in a different outcome given the other evidence at trial. Therefore, counsel's failure to secure the TV was not prejudicial and does not entitle defendant to relief.

V. Refusal to Compel the Production of Witnesses

Defendant also argues, in propria persona, that his right to compulsory process was violated when defense counsel attorney did not call any of his witnesses.

Defendant confuses the issue of the denial of compulsory process by a trial court with the issue of trial counsel's failure to call witnesses and to pursue available defenses. Defendant does not cite any instance of the court denying a request for compulsory process. To the extent that defendant argues that trial counsel was ineffective for failing to request process or call witnesses, we have rejected that argument.

VI. Forcing Defendant to Choose Between Testifying and his Right to Conflict-Free Counsel

Defendant, in propria persona, also contends that he repeatedly informed the trial court that he did not want to proceed because he was not being adequately represented and that the trial court "failed to consider the impact" on forcing him to proceed. He contends that he was "entitled both to testify in his own defense and to be represented by conflict-free counsel" and that the trial court erred by forcing him defendant to choose between his right to testify in his own defense, see *Rock v Arkansas*, 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987), and his right to conflict-free counsel as guaranteed by the Sixth Amendment and *Holloway v Arkansas*, 435 US 475; 98 S Ct 1173; 55 L Ed 2d 426 (1978).

Defendant relies on *United States ex rel Wilson v Johnson*, 555 F2d 115 (CA 3, 1977), in which the defendant declined to testify after the trial court told him that if he wanted to testify, the court would permit defense counsel to withdraw and the defendant would have to represent himself. This case is clearly distinguishable. Although defendant complained about appointed counsel at trial, his assertion that the trial court "forced him to choose" with respect to his right to testify is not supported by the record. Rather, the record indicates that defense counsel and defendant disagreed concerning whether he should testify and that defendant ultimately declined to do so. Assuming arguendo that the disagreement with counsel influenced defendant's decision, "there is no constitutional right to have an attorney who agrees with a defendant's desire to testify." *United States v Taylor*, 128 F3d 1105, 1109 (CA 7, 1997). Inasmuch as there is no factual support for defendant's contention that he was forced to make a choice with respect to his right to testify and his right to counsel, we reject this claim of error.

Affirmed.

/s/ Jane E. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood