STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 8, 2008
v	No. 277173 Ottawa Circuit Court
SCOTT ALLAN RANDALL, Defendant-Appellant.	LC No. 06-030227-FH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for disturbing the peace, MCL750.170, assault and battery, MCL 750.81, and two counts of resisting and obstructing, MCL 750.81d(1). We affirm.

I. FACTS

Defendant and his son attended a hockey tournament in Holland. In the evening, they were at dinner at the Hampton Inn with several parents and players. Defendant, who had been drinking relatively heavily, decided to pull his pants partially down to expose the upper portion of his posterior. Apparently, he had done this before at other hockey events as a prank. However, the owner of the hotel thought the behavior was inappropriate and asked one of the regular patrons, Steve Klaasse, to ask defendant to desist. Klaasse approached defendant, who told Klaasse to mind his own business. Klaasse left, but he returned ten minutes later with the manager of the restaurant, who asked defendant to stop the behavior. Defendant rudely refused. Defendant then elbowed Klaasse in the face and punched him repeatedly. The manager attempted to restrain defendant, but he could not do so. Other patrons restrained defendant, and the front desk clerk took defendant outside.

Ottawa Sheriff Deputy Bing arrived in response to a call from a hotel employee. He questioned defendant briefly, and then he decided to take defendant into custody. Defendant initially complied as Bing placed him in handcuffs, but then he began to struggle after the officer had cuffed one wrist. Other officers arrived and helped restrain defendant. As the officers walked defendant to the patrol car, defendant turned and headbutted Bing in the mouth. The officers then restrained defendant face down on the hood of the car until he could be placed in the car.

Defendant admitted that he was joking with his friends and partially exposing himself. He also admitted that he began the fight inside the restaurant by striking Klaasse. He further admitted that he did "swing away" and then struggled when Bing initially placed the handcuffs on him, but he maintained that he did so because the handcuffs were too tight. However, he maintained that he did not deliberately strike Bing with his head but contended that he stumbled as he was being dragged toward the police car.

On appeal, defendant maintains that his trial counsel provided ineffective assistance when he failed to question other witnesses at the restaurant and to present their testimony at trial. Defendant contends that other eyewitness testimony would have supported his claim that he did not deliberately attack Bing but simply stumbled. We disagree.

II. STANDARD OF REVIEW

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*[1] hearing before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is "limited to mistakes apparent on the record." *Id.* "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant did not move for a new trial or a *Ginther* hearing before the trial court; therefore, our review of his ineffective assistance claim is limited to mistakes apparent on the record. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

III. ANALYSIS

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this presumption, defendant must show: (1) "that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms" and (2) "that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*

Defendant maintains that counsel failed to adequately investigate the case and failed to call "members of the hockey team and their families" who were in the restaurant at the time of the incident. Defendant apparently contends that they would not have suffered from the same prejudices as the prosecution's witnesses, who were friends with one another. Decisions regarding 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).

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

Further, the failure to call witnesses only constitutes ineffective assistance if it deprives defendant of a substantial defense. *Id*. "A defense is substantial if it 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 (1996).

After reviewing the existing record, *Cox*, *supra* at 453, we find that defendant has failed to demonstrate that counsel's decision not to call these unnamed witnesses deprived defendant of a substantial defense. Defendant argues that "there is nothing on the record indicating that defense counsel intended to call [others who witnessed his arrest] as witnesses or even attempt to find out what they saw and knew." However, defendant has presented nothing on the record to show that counsel did not interview other potential witnesses. He has not presented a signed affidavit from himself or his trial counsel to support his contention on appeal that he requested that counsel interview or call additional witnesses or that counsel refused to do so. Nor has he furnished this Court with a list of possible witnesses who would have been able to testify about the circumstances of the alleged assault outside.

More importantly, defendant has not presented any substantive support as to what these witnesses would have testified. He has failed to obtain an affidavit from any of these other witnesses. Instead, he asks this Court to assume that the other eyewitness testimony would have been so beneficial to the defense that it would have resulted in a different outcome at trial. This is purely speculative. In addition, even if other testimony would have supported defendant's version of the alleged assault on Bing, there is no guarantee that the jury would have found that testimony more credible. We conclude that because defendant has not established the factual predicate for his claim of ineffective assistance, he is not entitled to relief.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette