

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAPHAEL TRAMBLE,

Defendant-Appellant.

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UNPUBLISHED

September 18, 2008

No. 276083

Wayne Circuit Court

LC No. 06-011723-01

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

PER CURIAM.

Defendant appeals by right his jury convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, discharge of a firearm at a building, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's convictions resulted from a domestic dispute involving defendant and his children's grandfather, Gerald Poole. At trial, Poole testified that at approximately 10:00 p.m. on September 25, 2006, defendant arrived at the home Poole shared with his daughter, Krista Poole, and her children. Defendant and Poole spoke in the yard. Krista's son began to yell, and Poole told him to be quiet. As defendant walked down the driveway to leave, Poole heard him complain to Krista about Poole, using profanity. Defendant called the home approximately five minutes later. Poole told defendant not to return to the home because he was tired of defendant swearing at him. Defendant replied that he would come by the home anytime he felt like it and that he would return to the home in five minutes. Poole told Krista that he did not want defendant at the house. Poole went upstairs and placed his shotgun on a table near his bedroom window, allegedly because he knew that defendant possessed a handgun. Poole looked out his bedroom window and saw defendant return to the home. Defendant retrieved an object from his trunk and walked across the driveway into the yard. Defendant and Poole traded insults, and Poole told defendant to leave. Defendant then started firing his handgun. Poole moved to the side of the window while defendant fired two or three times; then Poole returned fire, shooting once. Defendant ran back to the car while continuing to shoot at Poole. Poole again returned fire. At some point, Krista called 911. Defendant drove away from the home.

Defendant contended that Poole fired at him first and that he shot at Poole in self-defense. Defendant maintained that Poole did not give defendant a chance to move before Poole began shooting. Defendant went to his car and tried to enter the driver's seat while Poole shot at him.

Defendant subsequently opened his trunk, and retrieved his gun. He shot at Poole before driving away.

On appeal, defendant maintains that he is entitled to a new trial because trial counsel provided ineffective assistance. Alternatively, he requests a remand for an evidentiary hearing to provide an opportunity to develop his claim of ineffective assistance. He specifically maintains that trial counsel failed to interview critical *res gestae* witnesses, such as the paramedic who helped him after the shooting or the detective who interviewed defendant in the hospital. He also maintains that counsel was ineffective for not hiring an investigator after the trial court authorized it, for failing to obtain a copy of Krista Poole's call to the police, and for failing to pursue complainant's criminal record as a method of impeachment.

Defendant raised these claims when he moved for a *Ginther*<sup>1</sup> hearing below after trial, but the trial court denied his motion. A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). We review the trial court's factual findings for clear error and its constitutional determination *de novo*. *Id.* "To prove that counsel has been ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *Id.* at 57-58. A *Ginther* hearing is appropriate when the defendant's claim of ineffective assistance of counsel depends on facts not of record. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). The trial court should take testimony if a factual dispute exists. *Id.* at 442. However, in general, it is incumbent on a defendant seeking an evidentiary hearing to show where further elicitation of facts would advance his position. See *People McMillan*, 213 Mich App 134, 142; 539 NW2d 553 (1995).

"[D]ecisions 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), quoting *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses constitutes ineffective assistance only 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 grds 453 Mich 902 (1996). A failure to interview witnesses justifies a finding of ineffective assistance of counsel only when "the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited" the defendant. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).

Defendant has presented nothing to support his claim that trial counsel provided ineffective assistance or to show that a further evidentiary hearing would reveal support for this claim. Defendant claims that defense counsel did not interview the paramedic who treated him, but he has not presented a supporting affidavit from the paramedic. Nor has defendant presented anything to show that the paramedic would have testified as defendant believes. Any claim that the paramedic's testimony would have made a difference at trial by countering the testimony of

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

officer who maintained that defendant would not tell her what had happened is purely speculative. Defendant's assertion that the detective who questioned him at the hospital would have provided favorable testimony is also speculative, as defendant has not provided an affidavit by this detective or other supporting evidence, such as the police report defense counsel discussed at trial.<sup>2</sup> Defendant faults trial counsel for allegedly failing to obtain a copy of the 911 tape of Krista Poole's call, yet he did not present the trial court with a copy of the tape during the motion for an evidentiary hearing, and he did not explain how any statements she made during the call would have helped his case. Nor does he do so now. Apart from defendant's bare assertions, he has not established any evidentiary support for his contention that additional res gestae witnesses existed. Therefore, he cannot show that any alleged failure to utilize the appointed investigator prejudiced him. Nor has defendant presented any evidence to support his claim that Poole has a criminal record. Neither defense counsel nor the prosecutor were able to find any record of such a conviction at the time of the motion hearing below. Defendant has presented nothing to support this claim. In short, defendant requests to go on a fishing expedition, without any initial showing of either unreasonableness on the part of trial counsel or possible prejudice at trial. We find that defendant has failed to support a claim of ineffective assistance of counsel or that an evidentiary hearing is warranted.

Affirmed.

/s/ Bill Schuette

/s/ Brian K. Zahra

/s/ Donald S. Owens

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<sup>2</sup> We find defendant's claim that he told the paramedic and an officer that Poole shot him somewhat tangential to the central question of who fired first.