STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2009
v	No. 281467 Cheboygan Circuit Court
ERIC DEWAYNE HUGHES, Defendant-Appellant.	LC No. 07-003664-FH

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv) and MCL 750.157a. Defendant was sentenced as a repeat drug offender, MCL 333.7413(2), to 4 to 40 years' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of conspiring to deliver cocaine on January 25, 2007. David Juillet, and his wife, Paula, both testified against defendant pursuant to plea agreements. Their testimony indicated that David phoned defendant from Cheboygan on a cell phone sometime between 3:30 and 4:00 p.m. and left a message because there was no answer. Defendant called David back approximately 15 minutes later and David arranged to purchase $500 worth of cocaine from defendant. David had some additional phone conversations with defendant before he and Paula met defendant at a Taco Bell restaurant in West Branch to purchase the cocaine. Defendant left the restaurant in a sport utility vehicle (SUV). The Juillets were stopped by police officers while driving back to Cheboygan.

Several police officers testified that the Juillets were under surveillance while at the restaurant. Trooper Douglas Gough identified defendant as one of the occupants in the SUV based on a traffic stop that he conducted after the SUV left the restaurant. Defendant admitted having contact with the Juillets at the restaurant, but testified that it was not a prearranged meeting and that he did not sell any cocaine. Defendant testified that he and an acquaintance stopped at the restaurant after doing some shopping together.

On appeal, defendant argues that defense counsel was ineffective for failing to introduce sales receipts for clothing to support his testimony that he went shopping. Defendant also claims that defense counsel should have introduced phone records to support his testimony that he did

not speak with David to arrange for a meeting and that the specific phone number that David claimed he first called to leave a message for him was not in service.

Because defendant failed to raise this issue in a motion for a new trial or a *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A defendant claiming ineffective assistance of counsel bears the burden of establishing the factual predicate for the claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The defendant must first show that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id*.; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Horn*, 279 Mich App 31, 37 n 2; 755 NW2d 212 (2008). Second, the defendant must show that the deficient performance prejudiced the defense. *Carbin*, *supra* at 600. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.*

It is apparent from the record that defense counsel gave consideration to the use of phone records as evidence. He verified at the beginning of the trial that the prosecutor did not have any phone records and later elicited from a detective involved in the investigation that no effort was made to obtain the Juillets' phone records. He also elicited from defendant that the phone number that David claimed to have called had not been in service for seven or eight months. Finally, he suggested in closing argument that the prosecutor should have produced the phone records to prove her case, stating, "[t]he easiest way to show there was an agreement would be to get some phone records. I mean, for crying out loud, all you have to do is call the phone company – could have done the same thing."

Further, it is apparent from trial counsel's opening statement that he was aware that defendant planned to testify that he went shopping before stopping at the restaurant, albeit counsel deferred his opening statement until after he made an unsuccessful effort to elicit supporting testimony from Trooper Gough. Although Trooper Gough denied seeing new clothing in the SUV during the traffic stop, defendant later testified that he pointed out the clothes in the back seat.

The record does not contain evidence regarding the extent of trial counsel's pretrial investigation into whether phone records or sales receipts existed that could aid the defense. At best, defendant testified on cross-examination by the prosecutor that he had phone records located "down state" which would show that the phone number was not in service. Defendant attributed his failure to produce the records at trial to his incarceration, but agreed that he could have asked trial counsel to obtain them. Similarly, defendant testified on cross-examination by the prosecutor that he had receipts for purchases in his "property," although he did not produce them at trial.

Without evidence regarding the extent of trial counsel's pretrial investigation or the phone and receipt records themselves that defendant claims would have supported his testimony,

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

we have no basis for concluding that trial counsel's performance was deficient or prejudicial. Thus, defendant has failed to establish a necessary factual predicate to establish his claim of ineffective assistance of counsel. *Carbin, supra* at 600-601. Limiting our review to the record, we find no basis for relief.

We affirm.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher