

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AUBREY JILES STANLEY, JR.,

Defendant-Appellant.

UNPUBLISHED
February 12, 2009

No. 276208
Chippewa Circuit Court
LC No. 06-008216-FH

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting a prison employee, MCL 750.197c. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to serve four years and ten months to 15 years consecutive to his current sentence. Defendant appeals as of right and we affirm.

Defendant's arguments on appeal are that his conviction was not sufficiently supported by the evidence against him, that the guilty verdict was against the great weight of the evidence, and that trial counsel's assistance was ineffective. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo, *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007), to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). And the constitutional question of whether an attorney's ineffective assistance deprived a defendant of his Sixth Amendment¹ right to counsel is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

On January 14, 2006, defendant was serving sentences at the Chippewa Regional Correctional Facility for his 1997 convictions of assault with intent to do great bodily harm and possession of a firearm during the commission of a felony. On that day, defendant returned from dinner with several other prisoners to find another prisoner was in a physical altercation with one

¹ US Const, Am VI.

of the resident unit officers. When running to assist in the initial altercation, officer Kevin Volz was struck by an inmate (not defendant) on the side of the jaw.

At the scene of the altercation, defendant disregarded orders to leave the area. At one point, defendant physically resisted an attempt by officers to restrain him. Officer Richard Reed testified that during the confrontations and struggle with defendant, Reed clearly saw defendant punch Volz in the mouth. Volz required six stitches to close the resulting cut on his lip. Eventually, defendant was restrained and dragged from the scene. A videotape of the incident was played in court, and during his testimony Volz pointed out where on the tape he believes defendant struck him.

Defendant contends that there is insufficient evidence to conclude beyond a reasonable doubt that he struck Volz. Due process requires that a prosecutor's evidence is sufficient for a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt. *Tombs, supra* at 459. On appeal, the evidence presented is reviewed in the light most favorable to plaintiff, *id.*, with all conflicts in the evidence resolved in favor of the prosecution, *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). Circumstantial evidence and reasonable inferences that result from this evidence can constitute satisfactory proof of the elements of the crime. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Reed testified that he clearly saw defendant punch Volz in the face. Reed was approaching the altercation when he saw defendant's coat in the hands of an officer and saw defendant attempting to elude restraint. Then he saw the punch and helped restrain defendant thereafter. Volz said that he was sure that defendant punched him in the altercation, and he pointed out on the video when he saw this occurring. Moreover, the jury viewed the videotape of the incident. Defendant attempts to characterize the evidence of the testifying corrections officers as contradictory and thus implausible. However, the testimony of the officers is not contradictory because of the different times they arrived at the altercation, their different physical positions, and the chaos and speed of the physical altercation. Despite defendant's sworn denials, the jury determined that the evidence established beyond a reasonable doubt that defendant struck Volz. We will not interfere with the jury's role in determining the credibility of witnesses. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). Accordingly, there was sufficient evidence for the jury to determine defendant struck Volz beyond a reasonable doubt.

Defendant also contends that the great weight of this evidence is against the finding of defendant's guilt and, therefore, the trial judge should have granted a new trial. A new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *Lemmon, supra* at 642.

As noted above, Reed testified that he saw defendant strike Volz and Volz pointed out on the video where he was struck. Defendant asserts that finding him guilty is a miscarriage of justice because Reed's testimony is contradicted by indisputable physical facts, and no other witness saw defendant strike Volz. "[W]hen testimony is in direct conflict and testimony supporting the verdict has been impeached, if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury." *Id.* at 643, quoting *Anderson v Conterio*, 303

Mich 75, 79; 5 NW2d 572 (1942). As discussed above, Reed's testimony and the testimony of the other officers were not contradictory. Further, while an alternative version of the events was provided by defendant, he did not effectively impeach the officers' testimony. Defendant's assertions also do not demonstrate that the testimony contradicts indisputable physical facts or law. *Lemmon, supra* at 643. That one person has a different account of an event than another does not render either account physically implausible. Accordingly, defendant fails to establish that the trial court abused its discretion in denying the motion for new trial on the ground that the verdict was against the great weight of the evidence.

Finally, defendant asserts that his counsel provided him ineffective assistance. A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. Because defendant's motion for an evidentiary hearing on this issue was denied below, our review is limited to mistakes that are apparent from the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient, that counsel's deficient performance prejudiced the defense and, that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *Id.* A defendant is prejudiced if there is a reasonable probability that, without counsel's errors, the fact finder would have had a reasonable doubt respecting guilt. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

Defendant argued below that counsel had provided ineffective assistance in numerous ways. Defendant has abandoned all but one of these arguments on appeal by failing to make more than a conclusory argument in support of his claim. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007) ("A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim.").

The only one of the numerous assertions to be reviewed is the alleged failure of trial counsel to investigate and call a witness, identified as inmate Jeffrey Gillman. Defendant asserts, without supporting evidence, that Gillman was prepared to testify that he was present at the prison altercation and did not see defendant hit anyone. While the failure to reasonably investigate a case can constitute ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), the failure to interview witnesses does not alone establish inadequate preparation, *People v Caballero*, 184 Mich App 636, 641-642; 459 NW2d 80 (1990).

Further, the failure to call witnesses may be ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* In the current case, the testimony that Gillman allegedly would have provided was similar in substance to testimony elicited from another inmate and from defendant, i.e., that defendant did not strike Volz. These two witnesses not only denied that defendant hit Volz, but placed the blame on a third inmate. Through cross-examination of several witnesses, trial counsel repeatedly elicited testimony that defendant was not seen hitting Volz by many of those present on the scene, including Volz

himself. Thus, defendant was not deprived of a substantial defense by the failure to call Gillman as a witness.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly