STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2009
v	No. 282607 Wayne Circuit Court
FARAND ULYSSES PHILLIPS, Defendant-Appellant.	LC No. 07-005515-FC

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon in a motor vehicle, MCL 750.227. Defendant was sentenced to 7 to 12 years' imprisonment for the assault with intent to rob while armed conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, two years' imprisonment for the felony-firearm conviction, and two to five years' imprisonment for the concealed weapon conviction. We affirm.

On appeal, defendant contends that he was denied the effective assistance of counsel because his attorney failed to present a defense based on necessity and duress or to request a jury instruction on these theories. "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and 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). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* Because defendant failed to request a *Ginther*[1] hearing, this Court's review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel, "encompasses the right to 'effective' assistance of

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

counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Dixon*, *supra* at 396.

Duress is an affirmative defense premised on "[t]he rationale . . . that, for reasons of social policy, it is better that the defendant faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997) (citation omitted). Stated more succinctly, the defense is "applicable in situations where the crime committed avoids a greater harm." *Id.* To support instructing the jury on the defense of duress, a defendant bears the burden of producing "some evidence from which the jury can conclude that the essential elements of duress are present." *Lemons*, *supra* at 246 (citation and internal quotation marks omitted). To be entitled to an instruction on duress, a defendant must present evidence, which demonstrates:

> (A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; (B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant; (C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and (D) The defendant committed the act to avoid the threatened harm. [*People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003).]

Although defendant contends he was entitled to an instruction on duress based on testimony presented at trial, he has failed to establish that the alleged threatening conduct of his codefendants was of sufficient magnitude to create in the mind of a reasonable person the fear of death or serious bodily harm. As noted by the prosecutor, while defendant may have been intimidated by his codefendants he was never subjected to any threats. Defendant testified that he dropped off Caribe Sanford and Jeffrey Trice, Jr., and waited for them in the car, believing that they were visiting Sanford's aunt. When his codefendants returned, defendant observed Sanford with a handgun. However, there was no testimony that Sanford or Trice ever threatened defendant with the weapon. At most, defendant was merely instructed not to speak and to drive the vehicle. There is no evidence to suggest that Sanford or Trice gave any verbal or physical indication to defendant that he would be harmed if he refused to continue driving. Specifically, there was no testimony that either codefendant ever pointed a gun at defendant, made any threatening gestures, or engaged in any form of physical contact with defendant.

This Court has previously held that being slapped and ordered to drive is not sufficient to cause a reasonable person to fear death or serious bodily harm. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). Although Sanford was in possession of a gun, he placed it in the vehicle's glove compartment as soon as he and Trice returned and entered the car. Because defendant's testimony is not sufficient to create a prima facie case for duress, he was not entitled to a jury instruction on this theory. Therefore, defense counsel cannot be deemed ineffective for

failing to pursue a meritless argument. *People v Jordan*, 275 Mich App 659, 668; 739 NW2d 706 (2007).

Defendant further claims that his counsel was ineffective for failing to even raise the defense of duress. To establish the ineffective assistance of counsel in this context, defendant must show that he was deprived of a substantial defense. "A substantial defense is one which might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). However, "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

A review of the trial transcripts demonstrates that defense counsel could not have proffered a successful duress defense because it would have been inconsistent and contradictory with defendant's asserted defense that he was completely unaware of his codefendants' plans or actions. Sanford and Trice both testified on behalf of defendant, that he was completely unaware and not involved in the attempted robbery. However, these codefendants did not assert that they engaged in any form of threat or coercion to induce defendant to drive the vehicle. If defense counsel had argued duress, it would have effectively diminished the credibility of defendant's own witnesses, who averred that defendant played no role in the attempted robbery. Based on his failure to demonstrate that a defense of duress was viable or to overcome the strong presumption that his counsel's performance constituted sound trial strategy, defendant's contention that he was deprived of a substantial defense is without merit. *Dixon*, *supra* at 396.

Finally, defendant also suggests that his trial counsel was ineffective for failing to argue necessity as a defense. On appeal, defendant attempts to merge the defenses of duress and necessity. However, the defense of necessity "applies to situations involving natural physical forces, whereas duress applies to the threatened conduct of another human being." *People v Jones*, 193 Mich App 551, 554; 484 NW2d 688 (1992), rev'd on other grounds 443 Mich 88 (1993). Because there is absolutely no evidence that defendant's conduct was the result of or influenced by a natural physical force, an instruction or pursuit of the defense of necessity would not have been proper. Therefore, defendant's counsel was not ineffective for failing to pursue a meritless argument. *Jordan, supra* at 668.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio