STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 9, 2009
v	No. 283053 Wayne Circuit Court
EDWARD RICKS, Defendant-Appellant.	LC No. 07-013326-FC

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of carjacking, MCL 750.529a, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, receiving or concealing a stolen motor vehicle, MCL 750.535(7), and receiving or concealing stolen property valued between $1,000 and $20,000, MCL 750.535(3)(a). He was sentenced to concurrent prison terms of 17-1/2 to 35 years for the carjacking and armed robbery convictions, one to five years each for the felon-in-possession and the two receiving or concealing convictions, and one to four years for the felonious assault conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We reverse defendant's convictions and sentences.

Defendant's convictions arise from the theft of a wine delivery truck from the driver, Fred Wingfield, at gunpoint. Wingfield identified defendant as the person who robbed him. The truck was equipped with a tracking device and Peter Bullach, a director in charge of loss prevention with the wine company, spotted the vehicle shortly after the offense. According to Bullach, defendant exited the vehicle, produced a gun, and then ran off. The defense theory at trial was mistaken identity.

I. Effective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to investigate and pursue an alibi defense at trial, and for failing to present an expert witness on eyewitness identification.

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To justify reversal under either the federal or state constitution, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Thus,

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. [*Id.* at 600, quoting *Strickland*, *supra* at 687, 690, 694.]

Defendant contends that he was bringing his girlfriend, Lenora Watson-Parker, to Detroit Metropolitan Airport when the crime occurred and that defense counsel was ineffective for failing to investigate his alibi defense, and for failing to call Watson-Parker as an alibi witness and search airport security video for visual images of defendant at the airport.

In *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999), this Court explained:

> A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a difference in the outcome of the trial. This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires. [Citations omitted.]

The record does not support defendant's claim that defense counsel failed to investigate a possible alibi defense. At a post-conviction hearing on defendant's motion for a new trial, defendant admitted that defense counsel had contacted Watson-Parker regarding defendant's claim of alibi, but Watson-Parker was not willing to testify in support of an alibi defense. Further, counsel was not able to get access to airport videotapes. Thus, the record discloses that counsel investigated defendant's claim of alibi, but was unable to present evidence in support of that defense. Further, defendant has not submitted an affidavit from Watson-Parker showing that she could have provided testimony supportive of an alibi defense, or any evidence showing that airport video or other records supportive of an alibi defense actually exists. Thus, defendant has not demonstrated that he was deprived of a substantial defense. For these reasons, defendant has failed to show that defense counsel was ineffective with respect to this claim.

Defendant also argues that counsel was ineffective for failing to call an expert witness on eyewitness identification. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601

NW2d 887 (1999). The failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

The record shows that defense counsel explored the possibility of presenting an expert witness on eyewitness identification, but could not obtain a qualified expert who would testify. Instead, counsel obtained the appointment of Dr. Steven Miller and consulted with Dr. Miller before trial. At trial, defense counsel challenged the identification evidence during his cross-examination of the witnesses, eliciting that Wingfield, the delivery truck driver, identified a different suspect at the preliminary examination, that Bullach initially identified a different suspect in a photographic array, and that Bullach's partner, Kenneth Anderson, was unable to identify any suspect. Defense counsel also elicited during his cross-examination of Bullach, a former police officer, that a stressful situation and a person's tendency to focus on a displayed gun, can affect a witness's ability to focus on a suspect's physical characteristics during a crime. Counsel referred to these factors during his closing argument to attempt to undermine the reliability of the identification testimony in this case.

On this record, defendant has failed to show that defense counsel's performance was deficient. Rather, counsel explored the possibility of calling an expert witness and consulted with an expert before trial, but did not call one because he could not obtain a qualified expert who would testify. Instead, he attacked the identification evidence through his cross-examination at trial. Moreover, defendant has not submitted an affidavit from Dr. Miller or another expert witness showing what expert testimony could have been provided at trial and, therefore, has not demonstrated factual support for his claim that he was deprived of a substantial defense. Thus, defendant has not shown that he received ineffective assistance of counsel.

II. Right of Confrontation

Defendant argues that his constitutional right of confrontation was violated when a police officer, Detective Ellison, was permitted to testify regarding an anonymous tip she received, which eventually led to defendant's arrest.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same objection asserted on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). In this case, defendant argued at trial that Ellison's testimony violated his rights under the Confrontation Clause. Therefore, this issue is preserved. This Court reviews constitutional issues de novo. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002).

A defendant has the right to confront the witnesses against him. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). The Confrontation Clause prohibits the admission of all out-of-court testimonial statements, used to prove the truth of the matter asserted,[1] unless the

[1] We recognize that "the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, *supra* at 11. Thus, a statement offered merely to show why police officers acted as they did does
(continued…)

declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *Id.* at 10-11. "Testimonial" statements include prior trial testimony, pretrial statements that the declarant could reasonably expect to be used in a prosecutorial manner, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *People v Jambor (On Remand*), 273 Mich App 477, 487; 729 NW2d 569 (2007). A statement by a confidential informant to police authorities generally constitutes a testimonial statement. *Chambers*, *supra* at 10; *United States v Cromer*, 389 F3d 662, 674-675 (CA 6, 2004).

In part, Ellison testified as follows:

> *Q*. Okay. Does there come a time in which you're able to garner, as a result of your investigation, more information on the case?
>
> *A*. Yes.
>
> *Q*. Okay. Any how is it that you come across further information?
>
> *A*. From an anonymous phone call to my office to my desk.
>
> * * *
>
> *Q*. Okay, so based on information that you received from an anonymous caller, what information, first of all, were you (provided).
>
> *A*. I was provided with a name and the place where this person used to work at.
>
> *Q*. Okay.
>
> *A*. A first name that is. A first name and the place that this person used to work at.
>
> *Q*. And what first name where you provided?
>
> *A*. Edward.
>
> *Q*. Okay. And during he course of your investigation in this matter, what's the first name of the Defendant in this case?
>
> *A*. Edward.

(…continued)

not violate the Confrontation Clause. *Id*. However, in this case, as explained below, Ellison's testimony concerning the anonymous tip went far beyond providing a context, explanation or reason for the investigation the police undertook. The tipster's account directly implicated defendant as the guilty culprit.

> *Q*. Okay. So based upon that information that you have, what actions do you take?
>
> *A*. I contact the place where the informant said he used to work at and indeed he did used to work there according to the—I think she was in charge of payroll.

This account of the tipster's statement informed the fact-finder of two crucial matters, - that the tipster had information that the person who committed the crimes alleged here was named Edward, defendant's name, and that the person who committed the crime used to work at a particular place which Ellison testified used to be defendant's employer. Thus, Ellison's testimony about the anonymous tipster's statements was useful to the prosecutor in bolstering the case against defendant as the person who committed the crimes, in response to his claim of mistaken identity. Accordingly, when this testimony was permitted by the trial court over defendant's Confrontation Clause objection, his constitutional rights were violated.

Further, we cannot conclude that this error was harmless, i.e., when assessing the error in the context of the untainted evidence introduced at trial, we conclude that it is more probable than not that the error affected the outcome of the trial, such that a different outcome would have resulted without the error. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Apart from the anonymous tipster, there were only two people who provided testimony from which the fact-finder could have concluded that defendant was the guilty party, Wingfield and Bullach.[2] Both of these witnesses only observed the perpetrator of the offenses while that person was pointing a gun at them, making their identification testimony somewhat suspect to begin with. And, more importantly, neither of these witnesses consistently identified defendant as the guilty person. A few days after the incident, Bullach identified someone else as the person he saw leaving the truck, in a photo array. About a month after the incident, Winfield had similarly selected someone else as the guilty party at a preliminary examination. Beyond the equivocating identifications of defendant by these two witnesses, there was no physical or other evidence tying defendant to the crimes.

We cannot conclude that it is more probable than not that, had the anonymous tipster's bolstering testimony to the effect that defendant had rightly been identified as the culprit been properly excluded, the jury would have concluded, beyond a reasonable doubt, that defendant was the perpetrator, based on the less than compelling identification testimony of Bullach and Winfield. Accordingly, because defendant's right to confront the witnesses against him was violated and we cannot conclude that it was without prejudice, we reverse his conviction and remand for further proceedings.

In light of that determination, we need not consider other issues raised on appeal. However, for the benefit of the trial court should the issue arise again, we note that any court order imposing an obligation on a defendant to pay attorneys fees must be supported by a

[2] Another person, who said he did not get a good look at the perpetrator's face and made no in-court identification, had identified another person rather than defendant at a photo lineup several days after the incident.

sufficient record regarding a defendant's ability to pay. *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007); *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004).

We reverse.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio