

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DWAYNE HILL,

Defendant-Appellant.

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UNPUBLISHED  
February 16, 2010

No. 287226  
Macomb Circuit Court  
LC No. 2007-004578-FC

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

Defendant Kevin Dwayne Hill appeals his conviction for assault with intent to murder, MCL 750.83. The trial court sentenced defendant to 12 to 20 years' imprisonment, with credit for 335 days served. We affirm.

Defendant says that he was denied the effective assistance of counsel because his trial counsel failed to request that the baseball bat and knife involved in the altercation leading to the charge against defendant be tested for latent fingerprints, and instead merely assumed that these items were tested. In the absence of a *Ginther*<sup>1</sup> hearing, we review this claim for errors that are apparent on the record available. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). To prevail, defendant must show that defense counsel's performance was deficient according to an objective standard of reasonableness considering the prevailing professional norms. *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Defendant must also prove that he suffered prejudice as a result of the deficient performance, such that there is a reasonable probability that, absent the error, the outcome of the trial could have been different. *Id.* at 314. In making this showing, defendant "must also overcome the presumption that the challenged action was trial strategy." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defense counsel is obligated to make a reasonable investigation of a defendant's case. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005); *Wiggins v Smith*, 539 US 510, 521-522; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Defense counsel's role is "to choose the best defense for the defendant under the circumstances." *Pickens*, 446 Mich at 325. Defense

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

counsel's decisions regarding what defenses to present are presumed to be matters of trial strategy, and defendant bears the burden of overcoming the strong presumption; this Court will not substitute its own judgment for defense counsel's judgment. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The fact that a chosen strategy does not work does not render defense counsel's performance deficient. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

We find that defense counsel's performance did not fall below an objective standard of reasonableness, and defendant has failed to overcome the strong presumption that defense counsel's actions were a matter of trial strategy. *Pickens*, 446 Mich at 312-314. The record reflects that defense counsel's trial strategy was to paint defendant as incapable of forming a conspiracy because of his low intelligence and vulnerability to another's influence, attack the credibility of the prosecution's witnesses, and criticize the adequacy of the police investigation. Defense counsel argued that defendant merely entered Asim Balcinovic's house to commit a robbery, and Balcinovic assaulted defendant with the bat when he tried to flee through the window. Defense counsel attacked the credibility of Mario Reed, who was also involved in the incident and accepted a plea bargain and testified against defendant. Defense counsel pointed to inconsistencies in the eyewitnesses' testimony and argued that the police could have simply tested the knife and bat for fingerprints to solve the case, but they failed to do this. Defense counsel cross-examined witnesses regarding why the police and investigators failed to have the bat and knife tested for fingerprints, and presented the testimony of defendant's mother, who noted defendant's impressionability and low intelligence.

Defendant assumes on appeal that testing the items would have revealed Balcinovic's fingerprints, contradicting Balcinovic's claim that he did not touch the items and supporting defendant's theory. However, contrary to defendant's assertion on appeal, Balcinovic never claimed that he did not touch the knife or the bat. Balcinovic testified that he touched the knife when he deflected defendant's attack from out of the bedroom closet, and he grabbed the baseball bat that he saw leaning in the closet and threw it on the bed. Other evidence indicated that Balcinovic touched the knife when he later handed it to police. Additionally, defendant overlooks the possibility that testing these items could have revealed that they contained defendant's fingerprints. This would have provided extremely inculpatory evidence and limited defendant's possible defenses. Defense counsel's strategy allowed him to paint the police investigation as inadequate and insinuate that simple testing could have solved the case and exonerated defendant. Given the circumstances, defense counsel's failure to request that the items be tested for fingerprints and his chosen defense was reasonable. *Pickens*, 446 Mich at 325.

In so ruling, we note that the record does not exactly support defendant's claim that counsel assumed the items had been submitted for testing. To the contrary, defense counsel's statements are contradictory regarding what he thought. And, on the record, defendant cannot demonstrate that there was a reasonable probability that the result of trial would have been different if counsel had been clear on whether the items were tested and recommended testing. *Id.* at 314. Because evidence showed that defendant possessed the knife and bat, testing may have revealed his fingerprints on these items. Moreover, considering that Balcinovic conceded that he touched the knife and bat, a test revealing the presence of his fingerprints would not have been surprising or changed the outcome of the trial. Such a result, however, would have

prevented counsel from using the lack of testing as part of the defense. Importantly, defendant's conviction was supported by substantial evidence, including the testimony of Reed, Balcinovic, and several eyewitnesses; the knife prick on Balcinovic's neck; and the fact that no DNA was found on the bat, which discredited defendant's theory that Balcinovic hit defendant in the head with the bat, causing him to bleed.

Defendant also argues that the trial court coerced the jury's verdict when two jurors indicated during deliberations that they had other commitments in the ensuing days. "Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered." *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992), citing *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). It is generally permissible for the trial court to "impress upon the jury the propriety and importance of coming to an agreement, and harmonizing their views, state the reasons therefore and tell them it is their duty to try to agree; but should not give instructions having a tendency to coerce the jury into agreeing on a verdict." *Malone*, 180 Mich App at 352-353, quoting *People v Strzempkowski*, 211 Mich 266, 268; 178 NW 771 (1920).

The trial court's actions did not coerce the jury into reaching a verdict at any time. The trial court attempted to accommodate one juror by beginning deliberations later the next day after that juror informed the trial court of a conflicting doctor's appointment. The trial court did not respond to another juror's note requesting the following Friday off because of other commitments. However, the trial court never used coercive language designed to force the jury into reaching a verdict, *People v Holmes*, 132 Mich App 30, 749; 349 NW2d 230 (1984), and "[i]t is not erroneous for the trial court to return the jury for further deliberations when one juror has suggested that he might not be available the next day." *People v Coles*, 28 Mich App 300, 304; 184 NW2d 214 (1970). The trial court previously instructed the jurors that they should consult with each other "and try to reach agreement if you can do so without violating your own judgment," and that they should rethink their views but not give up their honest beliefs. The court instructed the jury to resume deliberations after giving a deadlocked jury instruction. Even after this instruction and during the time the trial court received the two notes at issue, the jurors requested to see evidence, to use an easel, and deliberated for several hours before reaching a verdict. Moreover, assuming defendant is correct that the jury reached its verdict shortly after the notes were given to the trial court requesting accommodation, this is not evidence of coercion. See e.g. *Holmes*, 132 Mich App at 749 (jury returned within one half hour of a deadlocked jury instruction, and no coercion was found).

Affirmed.

/s/ David H. Sawyer  
/s/ Henry William Saad  
/s/ Douglas B. Shapiro