

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAMELA JOYCE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

May 18, 2010

No. 289485

Kent Circuit Court

LC No. 08-001592-FH

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right her conviction for the false report of a felony, MCL 750.411a(1). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 12 days in jail and 36 months probation, with credit for 12 days in jail. We affirm.

Defendant asserts that she never made a false statement, but rather repeatedly indicated that defendant's estranged husband, Michael Williams (hereinafter Williams), did not have permission to take her car; thus, there was insufficient evidence to support defendant's conviction. We review de novo whether there was sufficient evidence to support the verdict by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). A "person who intentionally makes a false report of the commission of a crime, . . . knowing the report is false, is guilty of" a felony if the person falsely reported a felony. MCL 750.411a(1). "One who provides false details about the crime has made a false report of 'the act of committing or perpetrating' a crime." *People v Chavis*, 468 Mich 84, 94; 658 NW2d 469 (2003).

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. The record reflects that defendant told Officer James Morningstar that Williams did not have permission to be in her home. But defendant failed to disclose to Officer Morningstar that although there was a no contact order against Williams precluding him from being at defendant's home, defendant was expecting Williams to be at her home that morning and consented to his being there and entering her home. She later revealed these facts. Therefore, we conclude that the record supports a finding that defendant knowingly provided false details about the crime of home invasion at the time she reported that Williams was not supposed to be at or in her home on the morning in question. This was a false detail that defendant knew was false when, as she

later stated, she consented to Williams' being there. *Chavis*, 468 Mich at 94. In addition, because Detective Stephanie Morningstar testified that defendant also later claimed that she knew that Williams was going to take her car that morning, a reasonable fact-finder could conclude that defendant reported a false detail relating to the commission of a crime when she told Officer Morningstar that Williams did not have permission to take her car. If what defendant later stated were true, she obviously knew that the report was false. *Id.* Based on the foregoing and viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Herndon*, 246 Mich App at 415.

Defendant also argues that a new trial should be granted because the verdict was against the great weight of the evidence. The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Because defendant failed to preserve the issue, we review defendant's claim for plain error affecting her substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). In light of the evidence set forth above that defendant provided false details about the crime of home invasion and unlawful use of a motor vehicle, we conclude that defendant has not shown that her conviction was against the great weight of the evidence so as to result in plain error affecting her substantial rights. *Id.* Defendant has not demonstrated that the testimony contradicted indisputable physical facts or laws, the testimony was patently incredible or defied physical reality, the material witness's testimony was inherently implausible such that it cannot be believed, or that a witness was seriously impeached. *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). While defendant's testimony conflicted with Detective Morningstar's and Officer Morningstar's testimony, this is not grounds for a new trial, and the jury was properly left to resolve the credibility determinations. *Id.* There was no plain error affecting her substantial rights. *Musser*, 259 Mich App at 218.

In addition, defendant argues that letters Williams wrote to the trial court after the trial in which he admitted his guilt constitute new evidence warranting a new trial. Because defendant failed to preserve the issue, we review defendant's claim for plain error affecting her substantial rights. *People v Cox*, 268 Mich App 440, 450; 709 NW2d 152 (2005). A new trial may be granted on the basis of newly discovered evidence if a defendant shows that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citations and quotation marks omitted).

We find that the information contained in Williams' letters does not constitute newly discovered evidence. Williams appeared during the trial and asked to be heard. Counsel later indicated his client wanted Williams to testify. On the record before us, we conclude that the information contained in the letters could have been discovered and produced at trial through the exercise of reasonable diligence. Also, we find that the purported new information would not make a different result probable on retrial. Consequently, there was no plain error affecting defendant's rights. *Cox*, 268 Mich App at 450.

In the alternative, defendant argues that defense counsel was ineffective for failing to request sooner that proofs be reopened so that Williams could testify. To establish ineffective assistance of counsel during trial, defendant must show that her trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for her counsel's errors, there is a reasonable probability that the result of his trial would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *Id.* The decisions of defense counsel regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). And, the failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.* A substantial defense is a defense which might have made a difference in the outcome of the trial. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

In this case, the record reflects that defense counsel interviewed Williams but did not want to call him as a witness. Counsel only requested that he be called after defendant indicated at the last minute that she wanted Williams to testify. We must presume defense counsel's initial decision to not call Williams as a witness was a matter of trial strategy. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Payne*, 285 Mich App at 190; *Rodgers*, 248 Mich App 715. Moreover, defendant cannot establish counsel's failure to present Williams as a witness resulted in prejudice. The record reflects that defendant provided false details to the police concerning the crime of home invasion and also provided the police with false details regarding whether Williams had permission to use defendant's car. Accordingly, it is unlikely that the Williams testifying to the information contained in the letters would have made a difference in the outcome of the trial or resulted in there being a reasonable probability that the result of her trial would have been different. *Payne*, 285 Mich App at 189; *Rodgers*, 248 Mich App 714. Defendant was not denied the effective assistance of counsel.

Defendant next argues that the refusal of the trial court to provide the jury with standard jury instructions on the elements of home invasion, unlawfully driving away an automobile, and the unlawful use of an automobile denied defendant her right to a fair trial because the jury was in no position to evaluate whether defendant knowingly falsely reported a crime, whether her report was in any sense false, or whether a reasonable person might have believed that she was a victim of the reported crime. We review claims of instructional error de novo. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). But we review for an abuse of discretion a trial court's determination that a jury instruction is not applicable to the facts of the case. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). Importantly, it is the judge's role to "instruct the jury regarding the law applicable to the case . . . and fully and fairly present the case to the jury in an understandable manner." *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991).

In this case, the jury was properly instructed regarding the elements of falsely reporting a felony. Moreover, because the statute encompasses situations where no crime was committed at all, it is unnecessary that the jury be instructed on the elements of the crimes that were falsely reported, i.e. home invasion, unlawfully driving away an automobile, and the unlawful use of an

automobile. We conclude that the requested instructions on crimes for which defendant was not on trial likely would have only confused the jury. *Id.* The pertinent inquiry was whether defendant knowingly provided *false details* to a police officer about a crime, regardless of whether a crime was actually committed or a reasonable person would have believed that a crime was committed. Based on the foregoing, we conclude that the trial court did not abuse its discretion by denying defendant's jury instruction request. *McKinney*, 258 Mich App at 163.

We affirm.

/s/ Jane E. Markey

/s/ Brian K. Zahra

/s/ Elizabeth L. Gleicher