STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 1, 2012
v	No. 301330 Wayne Circuit Court
KARLA LYNETTE LEWIS, Defendant-Appellant.	LC No. 10-005359-FH

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, for which she was sentenced to a prison term of 23 months to 10 years. She appeals by right. We affirm.

Defendant was convicted of intentionally pouring hot water on her husband, Ernest Edwards, causing severe burns. Edwards testified that defendant poured the water on him while he was sleeping. Defendant testified that Edwards was burned by the water during a struggle when he was choking her; however, defendant's testimony describing the incident was confusing and unclear. At some points, defendant appeared to indicate that she deliberately threw the water on Edwards. At other points, her testimony suggested that she accidently hit a water pot, causing the water to splash on Edwards. Photographs of Edwards's injuries taken at a hospital showed extensive blistering on the back of his right upper arm and his right side from the armpit down to and including his right buttock. At the conclusion of the trial, the trial court found defendant's testimony "to be utterly and completely incredible."

I. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant argues that trial counsel was ineffective in several respects. Following an evidentiary hearing, the trial court determined that defendant was not denied the effective assistance of counsel at trial.

"Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first 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). We

review the trial court's factual findings for clear error and the constitutional question de novo. *Id*.

To establish his claim of ineffective assistance of counsel, defendant must "show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011).

Defendant first argues that trial counsel was ineffective for failing to impeach Edwards with apparent discrepancies between his trial testimony and information he previously provided to the police. Trial counsel offered an explanation for his decision not to probe the alleged inconsistencies. Moreover, the alleged inconsistencies involve mostly insignificant details. Trial counsel's failure to explore these discrepancies was not an error "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, because the discrepancies were mostly insignificant, there is no reasonable probability that counsel's failure to explore them might have affected the result of the proceeding. *Id*. at 694.

Defendant also argues that trial counsel was ineffective for failing to impeach Officer Beauvais with his police report. Beauvais's trial testimony that defendant said she did not pour the hot water is inconsistent with defendant's reported account as recorded in the police report (i.e., that she threw hot water on Edwards because they were fighting). There are multiple explanations for the conflict. Beauvais may have forgotten what defendant said at the scene. Alternatively, defendant may have indicated to Beauvais that defendant did not do it, but then admitted to other officers that she had thrown the water. Certainly, the latter would not have helped the defense. Defendant had the opportunity to explore the apparent discrepancy at the evidentiary hearing, but failed to call Officer Beauvais to determine whether cross-examination concerning the discrepancy would have been, on balance, helpful or damaging to the defense. The record does not show that counsel's failure to explore this discrepancy was an error "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 US at 687. Further, without establishing how Beauvais would have responded to the questioning that defendant claims should have occurred at trial, defendant has not shown a reasonable probability that, but for counsel's allegedly deficient performance, the result of the proceeding would have been different. *Armstrong*, 490 Mich at 290.

Defendant next argues that trial counsel was ineffective for failing to investigate and present proof of Edwards's past aggressive conduct, including a prior arrest and conviction for assaulting his ex-wife and brother. Defendant has not suggested any theory for admitting this evidence. The trial court correctly reasoned that evidence of Edwards's prior violent actions toward people other than defendant would not have been admissible to show that he was acting violently toward defendant at the time of the incident. Counsel's not futilely attempting to admit evidence does not demonstrate ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant argues that trial counsel was ineffective for failing to call Julie Anderson-Peek and Patrick Tuggle as witnesses. The record discloses that trial counsel spoke to both Anderson-Peek and Tuggle before trial but decided not to call them as witnesses. Decisions regarding what witnesses to call are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, the admissibility of the witnesses' proffered testimony was questionable. Pursuant to MRE 404(b), evidence of Edwards's bad acts would not have been admissible to prove his character in order to show that he acted in conformity therewith. Moreover, trial counsel determined that Anderson-Peek was not credible. Defendant has not shown that counsel's failure to call these witnesses was an error "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," *Strickland*, 466 US at 687, or that there was a reasonable likelihood of a different outcome if counsel had called them.

Defendant argues that trial counsel was ineffective for failing to investigate and present evidence regarding battered spouse syndrome (BSS). At the conclusion of the evidentiary hearing, the trial court concluded that counsel was aware of BSS, but did not believe that the facts supported it. The court also concluded that the syndrome would not have advanced the case. Defendant's attempt to gain a new trial on this basis is deficient because she did not present expert testimony regarding BSS that addresses the uniqueness of a specific behavior brought out at trial. *People v Christel*, 449 Mich 578, 591; 537 NW2d 194 (1995). To establish that counsel's failure to present evidence concerning BSS was a serious error and that a different outcome was reasonably probable but for that error, it was incumbent upon defendant to present evidence from an expert to address whether the facts were compatible with BSS, and, if so, to relate BSS to defendant's specific behavior. By not presenting such testimony, defendant failed to establish the factual predicate for her claim, and she has not shown a reasonable probability that but for counsel's alleged error, the result of the proceeding would have been different. *People v Ackerman*, 257 Mich App 434, 455-456; 669 NW2d 818 (2003).

Defendant lastly argues that trial counsel "abandoned his client's position" when he stated in closing argument, "I'm not sure who to believe. Something happened, but we're not sure what." The statement was made in the context of attacking the adequacy of the police investigation and the heavy burden of proof prosecution must meet to establish guilt. Considered in context, the statement was a proper, strategic attempt to argue that there was reasonable doubt about actually occurred, which required the jury to find defendant not guilty.

For these reasons, defendant was not denied the effective assistance of counsel at trial.

II. TRIAL COURT'S CONDUCT

Defendant argues that the trial court made erroneous findings of fact and that its comments and questions show that it was biased against defendant.

This Court may not set aside the trial court's findings unless they are clearly erroneous. MCR 2.613(C). This Court must also give due regard to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id*. To obtain relief on the basis of a claim of bias or prejudice premised on a judge's comments at trial, a defendant must show "that the trial judge's views controlled his decision-making process." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153-154; 486 NW2d 326 (1992). "Where a judge forms

opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

The trial court did not clearly err in determining that defendant's account of how Edwards was burned with the hot water was unclear. She testified that she threw the water on Edwards, but also testified that she did not have a conscious recollection of grabbing the handle of the water pot. When asked if her testimony was that her hand "inadvertently" hit the water pot, causing the water to splash on Edwards, defendant responded, "It splashed on both of us." After defendant testified that her left hand hit the water pot, the trial court asked, "Hit the pot or it grabbed the pot? Which was it? Or hit and accidentally grabbed the pot, or can you tell us?" Defendant responded, "I don't, I don't know if I – it was an accidental [sic] or not." She testified that the water splashed "[d]own his right side," and when asked what part, she responded, "I just knew on his shoulder. And, and, and maybe a little bit on his back." Later, when the court asked how the water got up far enough to hit Edwards on the shoulder, defendant responded, "I don't know if it did." The court then stated that it thought defendant had just said that the water hit Edwards on the shoulder, and defendant responded, "I said the back of him." The trial court ultimately found that defendant's trial testimony was not credible. Giving due regard to the trial court's special opportunity to judge the credibility of the witnesses who appeared before it, we find no clear error in the trial court's determination that defendant's testimony was not credible.

We also disagree with defendant's contention that the trial court's questions and comments exhibited bias. The transcript shows that the trial court merely attempted to clarify the apparent shifts in defendant's accounts. Because this was a bench trial, there was no concern that the court's comments could influence a jury's evaluation of defendant's credibility. *In re Forfeiture of $1,159,420*, 194 Mich App at 153-154. The record does not establish that the trial court's views controlled its decision-making process. *Id*. The court's comments and questions show skepticism and incredulity, not "deep-seated . . . antagonism such that the exercise of fair judgment is impossible." *Wells*, 238 Mich App at 391.

We affirm.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey