STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2012
v	No. 302942 Genesee Circuit Court
CHRISTOPHER ANTHONY BARYLSKI, Defendant-Appellant.	LC No. 10-027400-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 306650 Genesee Circuit Court
CHRISTOPHER ANTHONY BARYLSKI, Defendant-Appellant.	LC No. 10-027400-FH

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree child abuse, MCL 750.136b(3), and domestic violence, MCL 750.81(2). He was sentenced to 24 months' probation, with the first 300 days to be served in jail. Defendant now appeals as of right from those convictions in Docket No. 302942. After defendant filed his claim of appeal, he was convicted of violating his probation and his probation was revoked. He was then resentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 36 to 180 months for the child-abuse conviction and 93 days for the domestic-violence conviction. In Docket No. 306650, defendant appeals as of right from the judgment of sentence entered after his probation revocation. We affirm in both appeals.

Defendant's convictions arose from his abuse of his two-year-old son in the lobby of a scrap-metal business in Genesee Township on July 14, 2010. The principal witnesses against defendant were John Banner, the owner of Genesee Recycling, and Samantha Banner, John's employee and daughter-in-law. Both witnesses testified that while defendant was waiting in the

lobby for payment, he became upset with his two-year old son and slammed the child on a countertop and against some bulletproof glass, causing the child's head to hit the glass, and also backhanded the child's face, causing his head to hit a speaker box. The witnesses observed minor injuries to the child that included two bumps on the child's head, a small cut, and minor bruising on the child's face. Defendant denied that the incident occurred and argued that a surveillance videotape of the lobby did not depict any harmful interaction between him and his child. The videotape shows defendant and his son in the lobby, but the child was outside the purview of the mounted cameras at the time of the alleged abuse. The defense presented the child's mother, who is also defendant's fiancée, who testified that the child's minor injuries occurred during a bath the previous day. Although defendant has filed two separate appeals, which have been consolidated, he raises the same two issues in each appeal.

I. PERJURED TESTIMONY

Defendant first argues that he is entitled to a new trial because the prosecutor presented perjured testimony in support of the convictions. We disagree. Defendant raised this issue in a motion for a new trial, which the trial court denied. We review the trial court's decision for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost***,** 278 Mich App 341, 379; 749 NW2d 753 (2008).

"[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment" of the United States Constitution. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Thus, a prosecutor may not knowingly use false testimony to obtain a conviction and must correct false evidence when it is presented. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). The prosecutor has a constitutional duty to inform the trial court and a criminal defendant when a government witness offers perjured testimony. *Id*. Absent proof that the prosecutor knew that trial testimony was false, reversal based on a prosecutor's presentation of it is unwarranted. *People v Herndon*, 246 Mich App 371, 416-418; 633 NW2d 376 (2001).

As an initial matter, the record does not support defendant's claim that the trial court did not watch the videotape that defendant presented in support of his motion for a new trial. The record of the hearing shows that the parties and the court viewed the videotape, and the court referenced that fact in its ruling when it stated, "We watched the video tape." Further, we agree with the trial court that there is no basis in the record for concluding that the witnesses committed perjury, much less that the prosecutor knowingly presented false testimony. As the trial court aptly explained, the videotape does not support defendant's perjury claim because there are portions when the child is outside the purview of cameras.[1] At best, the missing portions provided an evidentiary basis to argue that the incident did not occur. However, defendant's arguments that the witnesses' testimony was either inconsistent with what was *not* shown on the videotape, or was not believable, involve questions of witness credibility, which is

[1] Due to the position of the cameras and the glare on a glass barrier, it is not possible to see the entire area during the entire time of the incident.

a matter for the jury to resolve. During trial, the jury heard the witnesses' testimony and viewed a version of the same video. The jury was aware that the alleged abuse was not captured by the surveillance cameras, and it had the opportunity to evaluate the credibility of the witnesses' testimony knowing that the video did not depict the alleged abuse. John and Samantha Banner both explained their vantage points during the incident, and John testified regarding the positioning of and issues with the company's mounted surveillance cameras. The jury was also aware from the evidence that the child's injuries were considered minor, and it heard the responding officer's testimony that the child did not have any significant markings. Finally, the jury heard the mother's testimony regarding how the child was injured, including the mother's belief that defendant did not cause any of the minor markings on the child.

In conclusion, there is no indication that the prosecutor engaged in any misconduct by knowingly presenting or allowing perjured testimony. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial. In addition, defendant has not provided any basis for this Court to dismiss the order revoking his probation.

II. ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to properly prepare for trial, failing to request discovery, failing to call witnesses, and failing to have defendant testify at trial. A claim alleging the denial of the effective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and any findings of fact by the trial court are reviewed for clear error. *Id*. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness and that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702; 645 NW2d 294 (2001). The defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A. TRIAL PREPARATION

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

The record does not support defendant's assertion that defense counsel was unprepared to try the case. First, defendant has not provided factual support for his claim that defense counsel visited him for only 18 minutes before trial and was therefore unprepared. Defense counsel's questions, remarks, and arguments throughout trial demonstrate that he was familiar with the case and prepared for trial. Defendant argues that defense counsel was not prepared to challenge the alleged perjured testimony of John and Samantha Banner because counsel did not view the

surveillance videotape before trial. However, as discussed in section I, *supra*, the videotape does not support defendant's claim that John and Samantha Banner offered perjured testimony. Defendant also has not demonstrated what defense counsel could have done differently that would have favorably altered the case had he requested and obtained his fiancée's police statement earlier. According to the typewritten summary of a police interview, defendant's fiancée initially stated that defendant must have caused the marks on the child's face, but, shortly thereafter, she explained that they were likely caused by falling out of a bathtub. At trial, defendant's fiancée testified that defendant did not cause any of the marks on the child's face and explained that the marks were caused by an allergy to bubble bath. The police officer testified at trial that the fiancée, during the interview, did bring up the bubble-bath theory at a later time.[2]

Defendant also does not indicate what additional rational argument defense counsel should have made. To the extent that defendant relies on the fact that defense counsel's argument was not successful, nothing in the record suggests that defense counsel's presentation of the defense was unreasonable or prejudicial. Counsel's decisions about what evidence to present and how to argue the evidence were matters of trial strategy. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). 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 Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

B. FAILURE TO CALL WITNESSES

Defendant further argues that defense counsel was ineffective for failing to call as witnesses other employees who were present, the responding paramedics, or other bystanders who appeared in the videotape. Defendant has not overcome the strong presumption that counsel chose not to call these witnesses as a matter of trial strategy. *Rockey*, 237 Mich App at 76. Further, defendant has not provided any witness affidavits or identified any other evidence of record establishing that these witnesses were available to testify at trial and would have provided favorable testimony. Absent such a showing, defendant has not established that he was prejudiced by defense counsel's failure to call the proposed witnesses.

[2] Defendant mentions the portion of the interview summary in which the police officer stated to the fiancée that "bruises were present at the time of the assault" and "[b]ruises would not have appeared that quickly." The fiancée replied that "the child fell out of the [bathtub], and struck his forehead on the toilet." Defendant argues on appeal that this exchange reveals that the police officer admitted that defendant "could not have caused any harm to his son . . . ." We disagree that this limited questioning by the police officer constituted an admission that defendant could not have harmed his son during the incident on July 14, 2010.

C. FAILURE TO CALL DEFENDANT AS A WITNESS

A criminal defendant has a fundamental constitutional right to testify at trial. US Const, Am XIV; Const 1963, art 1, §§ 17, 20. The decision to testify or not to testify is a strategic one "best left to an accused and his counsel." *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *People v Bonilla–Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "If the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). "[I]f defendant . . . decides not to testify or acquiesces in his attorney's decision that he not testify, the right will be deemed waived." *Id*. (internal citation and quotation marks omitted).

There are no grounds to conclude that counsel's performance deprived defendant of his constitutional right to testify. There is no indication in the record that defendant expressed a desire to testify to counsel. After the prosecution rested, the trial court advised defendant of his right to testify or not testify, and explained that he would be allowed to discuss his choice with counsel and that "it cannot be [counsel's] choice. It has to be yours alone." After defendant was afforded an opportunity to speak with counsel, defense counsel stated, "I've spoke[n] with my client, Judge, and I think we've indicated and in your instruction to him [sic] his rights, and it's my understanding that he's not going to take the stand in this case."

The record does not disclose what advice defense counsel may have given regarding whether defendant should testify, but defendant never expressed disagreement with counsel's statement that he did not wish to testify, and defendant does not claim that he was ignorant of his right to testify or that defense counsel coerced him into not testifying. The decision whether to call defendant as a witness was a matter of trial strategy, and defendant has not identified or offered any evidence to overcome the strong presumption of sound strategy. *Rockey*, 237 Mich App at 76.

We affirm defendant's convictions in Docket No. 302942 and affirm his probation revocation and sentences in Docket No. 306650.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray