

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 19, 2012

v

JUSTIN ESTEL REDMOND, a/k/a JUSTIN
ESTEL REDMAN,

No. 304536
Calhoun Circuit Court
LC No. 2011-000252-FH

Defendant-Appellant.

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant Justin Estel Redmond of breaking and entering a motor vehicle causing damage in violation of MCL 750.356a(3). Defendant contends that he wanted to testify on his own behalf and could have provided an innocent explanation for his actions. He challenges counsel's failure to present him as a witness and the trial court's failure to make a record establishing that he waived his right to testify. The trial court was not required to make such a record and there is no evidence supporting that counsel precluded defendant from testifying. Accordingly, we affirm.

I. BACKGROUND

In the early morning hours of December 26, 2010, Peter and Jesse Ramon discovered two men clad in "winter gear" in their driveway, rifling through their vehicles. The seat-moving mechanism on Jesse's van was damaged during the offense. Peter startled the trespassers and they left on foot, running through the snow. Investigating officers followed a trail of footprints from the damaged van to defendant's back door. Defendant permitted the officers to enter his house and conduct a search. The officers found two sets of men's "winter gear" in the basement that were still damp. They also found a backpack containing a "gift set" with a whiskey bottle and two glasses. As the Ramons had yet to report any items missing from their vehicles, the officers did not take the backpack or its contents into evidence. Shortly thereafter, Jesse informed the officers that a whiskey gift set was missing from his van. The officers returned to

defendant's home and he again permitted them entry to search the residence. By that time, the backpack and its contents were no longer under the basement stairs.¹

At the one-day jury trial, the prosecution presented the testimony of Peter and Jesse Ramon and the officers who investigated the scene. An officer testified that he found the backpack and whiskey gift set during the first search of defendant's home and that those items were gone by the time of the second search. On cross-examination, defense counsel highlighted that neither Peter nor Jesse saw the perpetrators' faces and that the investigating officers did not collect physical evidence at the scene of the motor vehicle entry. In closing, defense counsel argued that the prosecution presented nothing more than items "that belonged in [defendant's] house"—his coat, shoes, and hat. Counsel contended that the prosecutor was unable to prove defendant broke and entered the Ramons' vehicles as he could not present into the record the backpack, whiskey gift set, or any fingerprint evidence.

II. ANALYSIS

Defendant contends that his trial counsel was ineffective for failing to present a viable defense and denying him the right to testify at trial. Although not raised as a separate issue on appeal, defendant also contends that the trial court allowed the deprivation of his right to testify by failing to make a record of his waiver.

Because defendant did not request a new trial or an evidentiary hearing, review of his ineffective assistance claim is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish an ineffective assistance claim, a defendant must show that "(1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). "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 Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

A criminal defendant has a constitutional right to testify in his own defense. *Rock v Arkansas*, 483 US 44, 51-53; 107 S Ct 2704; 97 L Ed 2d 37 (1987); *People v Boyd*, 470 Mich 363, 373; 682 NW2d 459 (2004). "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), citing *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). "If the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objections." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). "[I]f defendant . . . decides not to testify or acquiesces in

¹ Defendant's friend, Jordan Smith, was inside the home during both searches and was also arrested in connection with this offense. There is no record information regarding the resolution of the charges against Smith.

his attorney's decision that he not testify, the right will be deemed waived." *Id.* (quotation marks and citation omitted).

There is no record indication that defendant expressed to his attorney his desire to testify. We cannot discern from the record whether defense counsel advised defendant of his right to testify or the benefits and dangers of taking the stand. As defendant did not request a *Ginther* hearing,² we can only speculate as to whether defendant agreed to counsel's strategy or fought to be called as a witness in his own defense. From the available record, we do know that when the prosecutor rested his case-in-chief, defense counsel immediately asserted, "Defense rests, your Honor." Absent any contrary indication, we must conclude that defendant either willingly decided not to testify at that time or at least acquiesced in counsel's decision, thereby waiving his right. There simply are no grounds to find that counsel's performance deprived defendant of his constitutional right to testify.

Moreover, the decision not to call a specific witness at trial is a matter of strategy and will only be deemed constitutionally deficient if the defendant is denied a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A "substantial defense" is one that "might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). In an affidavit submitted with his appellate brief, defendant asserts for the first time that he would have testified that he and Smith were driving to his house when their vehicle broke down. While walking the remainder of the distance home, Smith decided to "check out" the Ramons' van. Defendant claimed that he continued walking without approaching the van and only started to run when Smith did.

We cannot predict whether the jury would have found defendant's testimony credible. And defense counsel did present a defense. Counsel questioned the investigative techniques of the responding officers and noted the lack of physical evidence tying defendant to the unlawful entry of the van. Counsel is not ineffective merely because that reasonable defense strategy proved unsuccessful. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

We note that this appeal would have been much easier to resolve had the trial court taken the opportunity to question defendant on the record to ascertain whether he personally waived his right to testify. See, e.g., *Banilla-Machado*, 489 Mich at 419-421. However, despite that the right to testify is constitutionally guaranteed, it is well established that the court is not required to make a record of the waiver of that right. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995); *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *Simmons*, 140 Mich App at 684. There also is no procedure dictated by court rule to assure a valid waiver. Compare MCR 6.005(D) (court procedure to accept waiver of right to counsel); MCR 6.402

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

(court procedure to accept waiver of right to jury trial). Ultimately, the trial court's omission did not violate defendant's constitutional right to testify and, although unwise, was not procedurally infirm.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering