STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME HOLMES,

Defendant-Appellant.

UNPUBLISHED
June 2, 1998

No. 200218
Marquette Circuit Court
LC No. 95-031265 FH

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of assault on a prison employee, MCL 750.197c; MSA 28.394(3), and his subsequent plea of guilty to habitual offender third offense, MCL 769.11; MSA 28.1083. He was sentenced to four to eight years' imprisonment. We affirm.

Defendant asserts five separate claims of ineffective assistance of counsel. When examining the record to determine the effectiveness of counsel, this Court recognizes that a trial attorney must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). We "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In order to establish ineffective assistance, the defendant must show that trial counsel's performance was objectively deficient to an extent that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. *Strickland*, *supra* at 687; *Mitchell*, *supra* at 164. The defendant must also show that the deficient performance prejudiced the defense. *Id*. To establish prejudice, the defendant must show that there was a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Mitchell*, *supra* at 164-165.

A

Defendant first argues that he received ineffective assistance because his trial counsel failed to obtain information regarding prisoner grievances filed against the officers that testified at

trial. He asserts that pursuant to the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, these officers' personnel files could have been obtained and examined for potential impeachment evidence that may have proved beneficial in a case based heavily on the credibility of witnesses. However, we conclude that these records were not obtainable. Under the FOIA, a public body must disclose all public records that are not specifically exempt under the act. MCL 15.233(1); MSA 4.1801(3)(1). However, MCL 15.243(1)(t)(ix); MSA 4.1801(13)(1)(t)(ix) exempts the personnel records of law enforcement agencies "[u]nless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance[.]" This exemption has been interpreted to mean that material is not exempt merely by virtue of its location in a file labeled "personnel"; rather, the material must be examined to determine whether its exemption would effectuate the policies that the Legislature intended. *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 220; 514 NW2d 213 (1994). In this particular instance, the public's and defendant's interests in obtaining this information is to fully guarantee that he is given a fair trial and the opportunity to fully cross-examine the witnesses testifying against him. The public interest in nondisclosure would be potential breaches in prison security as defendant and other prisoners could request grievance and disciplinary information regarding prison officials. We note that defendant had the opportunity to cross-examine all witnesses under oath at trial and could have explored whether any had grievances filed against them. Given this alternative, we hold that the public interest in nondisclosure prevails. Thus, counsel did not act unreasonably or fall below a professional standard of performance by not filing an FOIA request for the personnel and/or disciplinary records of the correctional officers who testified at trial.

B

Defendant next argues that he received ineffective assistance because counsel failed to inquire, other than to ask defendant, whether any of the inmates in defendant's cell block saw or heard the incident. A res gestae witness has been described as "an eyewitness to some event in the continuum of a criminal transaction and [one] whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." *People v Baskin*, 145 Mich App 526, 530-531; 378 NW2d 535 (1985), quoting *People v Hadley*, 67 Mich App 688, 690; 242 NW2d 32 (1976). One need not be an actual eyewitness in order to be a res gestae witness if his or her testimony would assist in developing a full disclosure of the facts. *Id*. at 531. The res gestae statute, MCL 767.40a; MSA 28.980(1), requires the prosecution to list on the information names of known res gestae witnesses. *People v Burwick*, 450 Mich 281, 290; 537 NW2d 813 (1995). The prosecution, however, does not have an affirmative duty to discover res gestae witnesses. *Id*. at 298. It should be noted that defendant does not claim that there has been any violation of the res gestae statute, but merely that his trial counsel failed to inquire into the existence of potential res gestae witnesses. The failure to call witnesses can result in ineffective assistance of counsel only if the failure deprived the defendant of a defense that might have made a difference in the outcome of the trial. *People v Bass*, 223 Mich App 241, 252; 565 NW2d 897 (1997), nullified on other grounds and lv gtd 456 Mich 851 (1997). Counsel's failure to call potential res gestae witnesses will be presumed to be sound trial strategy, *Mitchell, supra* at 163, absent a finding that his decision, or oversight as the case may be, deprived defendant of a defense that could have altered the outcome of the trial. In essence, the issue

then becomes whether defendant was prejudiced, the second prong of the *Strickland* test. Defendant's counsel claimed that on more than one occasion he asked defendant whether it was possible that other prisoners may have seen or heard the incident. He claimed that defendant's answer was always unequivocally negative. Corrections officers, on the other hand, indicated that it may have been possible for a number of inmates to see or hear the incident, although it was impossible to determine who could have seen what or if they were even in their cells at the time. No inmate came forth with any information. In light of defendant's continued denial that there were any other witnesses, and the uncertainty that anyone else saw the event, we conclude that defendant has failed to show prejudice.

C

Defendant also argues that he received ineffective assistance because his trial counsel failed to explore a discrepancy between an officer's testimony that he was kicked in the groin and an employee accident report in which he described injuries to his arm. Counsel's decisions regarding the questioning of witnesses are presumed to be trial strategy. *Bass, supra* at 252. To overcome the presumption that counsel's strategy was sound, defendant must show that counsel's omission deprived him of valuable evidence that would have been of substantial benefit. *Id*. at 252-253. Defendant was not prejudiced by counsel's failure to cross-examine the corrections officer on this point. First, regardless of the location of the injury, defendant caused an injury. Second, a number of other officers witnessed the assault and testified to its occurrence under oath. Third, the corrections officer subsequently explained that there was no space on the form labeled "groin" or even "other," implying this was the reason he failed to indicate the groin injury on the form. Thus, the failure to explore this discrepancy did not constitute ineffective assistance of counsel.

D

Next, defendant argues that he received ineffective assistance of counsel because defense counsel failed to object to several objectionable remarks made by the prosecutor. In assessing the remarks of prosecutors, we remain cognizant that they not only have a duty to seek convictions for those guilty of an offense, but also to see that a defendant receives a fair and impartial trial. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). There are a number of tactics that a prosecutor should not resort to, including: (1) civic duty arguments that appeal to the fears and prejudices of jury members; (2) expressions of personal opinion of a defendant's guilt or a witness' truthfulness; or (3) intemperate or prejudicial remarks that denigrate a defendant. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).

Here, after the trial court inquired whether the prosecutor desired to cross-examine defendant, the prosecutor stated: "One moment, your Honor. Your Honor, I'm not going to dignify that with questions. I have nothing." During closing argument, the prosecutor also stated:

> And, yes, as the Canadians say about the United States: It's kind of like sleeping with an elephant; I've been walking around what Mr. Holmes had to say this afternoon. And all I can tell you is, preposterous. Based on the evidence you've been shown, his claims are preposterous.

* * *

> And then there's the stuff about the cameras. There's no cameras there. Now, if you think somehow it should have magically been able to have this on camera and brought to you, then maybe you should find him not guilty. But I submit to you, look at your reason and common sense. I brought you three witnesses, who gave you sworn testimony about what exactly happened on that day.
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> * * *
>
> I submit to you that his statement [defendant's] to you is just as offensive as his conduct to Mr. Bergh. He assaulted him once by kicking him in the groin; he assaulted him and debased him again by spitting on him in the cell; and he debased him a third time by walking in here and telling you that tale. And it's up to you to decide whether or not he gets away with all three.

With regard to the first remark, we note that a prosecutor may argue from the facts of the case that a witness, including the defendant, is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In *Launsburry*, this Court deemed the prosecution's reference to the defendant as a "moron," "idiot," and "coward" improper. However, given the overwhelming evidence of guilt and the isolated nature of the comments, the Court held that the remarks did not rise to the level of error requiring reversal. *Id*. Similarly in this case, even if the remark was improper, it did not rise to the level of error requiring reversal because the remark was isolated and there was overwhelming evidence of defendant's guilt.

With regard to the first and third comments made during closing argument, we note the prosecution is allowed to use emotional language and vigorously articulate its position. *Ullah, supra* at 678. Moreover, the prosecution may argue from the facts that a witness, including the defendant, is unworthy of belief. *Launsburry, supra* at 361. In making these comments, the prosecutor was merely asking the jury to examine and compare the testimony given by the officers and defendant and realize that someone was not telling the truth. Thus, these comments were proper and counsel's failure to object to them did not constitute ineffective assistance of counsel.

Finally, with regard to the second comment made during closing argument, it could be argued that the prosecutor cited facts not in evidence when he made this remark. The record indicates that there were indeed cameras situated throughout the prison. Upon further analysis, however, it appears that the prosecutor was referring to a corrections officer's testimony that there were no videotapes of the incident. The prosecutor correctly noted that there were no tapes to be viewed by the jury. Thus, this comment was not a reference to facts not in evidence and counsel was not ineffective in failing to object to it.

E

Finally, defendant argues that counsel's failure to request a jury instruction consistent with the defense strategy and to detail the defense strategy in his closing argument constituted ineffective assistance. The trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995); *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Counsel pointed out that the defense theory and the strategy was to give defendant the opportunity to deny that the assault ever took place and to describe a different incident where he was the victim of an assault, thereby creating a credibility contest between the officers and defendant. Notably, the trial court gave an instruction that the status of law enforcement officers should not serve as a factor in assessing credibility. Thus, there was no apparent prejudice and counsel's failure to request a jury instruction on the defense theory did not constitute ineffective assistance of counsel.

Affirmed.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck