

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLOWE L. TIPTON,

Defendant-Appellant.

UNPUBLISHED

March 30, 2001

No. 220270

Wayne Circuit Court

LC No. 99-001200

Before: Markey, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279. Defendant was sentenced to five years' probation, with the first six months to be served in the county jail. We affirm.

Defendant argues on appeal that he was denied the effective assistance of counsel because his appointed trial counsel made several errors during trial. Defendant first raised these allegations in a motion for a new trial, which the trial court denied. When we review a claim based on ineffective assistance of counsel, we presume defendant's counsel was effective, and "defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). Defendant must not only demonstrate that his counsel's performance was deficient, but also that defendant was prejudiced by the deficiency. *Id.* at 662. Accordingly, he must show that but for his counsel's mistake, the factfinder would not have convicted him. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Snider* 239 Mich App 393, 424; 608 NW2d 502 (2000).

Defendant first complains that his trial counsel failed to call the victim's son and three police officers to testify. He also contends that his trial counsel should have admitted evidence that he filed a police report regarding the incident that is the basis for his conviction. All these alleged mistakes are matters of trial strategy. This Court will not substitute its judgment for a defendant's trial counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Each witness that defendant's attorney waived was prepared to testify that defendant pushed the victim through the glass in her front door, causing severe cuts to her face and hand. Defendant seems to suggest that this testimony, together with minor inconsistencies in the victim's statements to police, would operate to undermine the victim's credibility. The only inconsistencies between the victim's statements to police were

minor details. In fact, the investigator on the scene gave a more damaging description of the events that sent the victim through the window than she gave in her own testimony. We see nothing to rebut the presumption that defendant's counsel decided, as a matter of trial strategy, that the witnesses would not help defendant's case. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999).

Defendant also argues that his counsel was ineffective because she failed to introduce evidence that he filed a police report following the incident underlying his conviction. Defendant concludes without any supportive argument that the information would have substantially benefited his case. However, defendant's counsel expressed well-founded concerns that defendant's filing a police report undermined his claim that the incident was an accident. Therefore, if such a police report exists, the decision not to admit it was one of trial strategy. *Stanaway, supra*; *Avant, supra*.

Next, defendant claims that he was denied a fair trial when his trial counsel failed to present a theory of self-defense. In general, defense counsel is not ineffective for failing to present a defense that is not supported by the facts of the case. *People v Bryant*, 129 Mich App 574, 582; 342 NW2d 86 (1983). The trial court, which decides issues of credibility, was unconvinced by defendant's contention that he told his attorney that the victim had a knife. MCR 2.613(C); see, also, *People v Sharbnaw*, 174 Mich App 94, 105; 435 NW2d 772 (1989); *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). Defendant's attorney testified that the first time she heard about any knife was during defendant's cross-examination, and defendant himself testified that he could not be certain that he had told her about the knife. We believe that defendant's counsel offered effective assistance in regard to this claim. In her closing argument, she incorporated defendant's testimony about the victim reaching for a knife and argued that the circumstances did not warrant a conviction for assault with intent to do great bodily harm. Based on the circumstances, we cannot find defendant's attorney's performance deficient simply because she failed to advance a theory of self-defense on direct examination.

Finally, defendant contends that his counsel was ineffective because she admitted in her closing argument that defendant committed an act of domestic violence. Defendant relies entirely on *People v Schultz*, 85 Mich App 527; 271 NW2d 305 (1978), for the proposition that his attorney's statements denied him a fair trial. In *Schultz*, this Court found the defendant's counsel's closing statements to be "tantamount to pleading defendants guilty." *Id.* at 531-532. This Court distinguished the attorney's admission that the defendants had robbed a bank and had no defense to cases in which an attorney admits guilt to a lesser included offense in the hopes that the trier of fact "will convict of the lesser offense instead of the greater." *Id.* at 532. In the instant case, unlike the attorney in *Schultz*, defendant's attorney made no concession that defendant committed the highest crime with which he was charged. In fact, she argued that defendant did not intend to harm the victim. Furthermore, defendant's counsel did not tell the court that defendant committed the lesser included offense of domestic violence; rather, she argued that there was a generally violent situation in the house, pointing out that the victim and her son were hitting defendant. Taken in its entirety, the closing argument focused on the theory

that defendant and his victim accidentally fell through a glass window during a generally violent situation. Therefore, we find no deficiency in defendant's counsel's performance.

We affirm.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Brian K. Zahra