STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES CALVERT,

Defendant-Appellant.

UNPUBLISHED
December 11, 2003

No. 242187
Wayne Circuit Court
LC No. 01-001260-01

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to three to ten years' imprisonment for the assault with intent to commit murder conviction, two to ten years' imprisonment for the assault with intent to do great bodily harm conviction, one to four years' imprisonment for the felonious assault conviction, and two year's imprisonment for the felony-firearm conviction. We affirm.

Defendant's sole issue on appeal is that his trial attorney failed to provide him with effective assistance of counsel by not calling defendant to testify at trial where self-defense was the only defense. We disagree.

A trial court's decision to deny a motion for new trial is reviewed for an abuse of discretion. *People v Blair*, 44 Mich App 469, 471; 205 NW2d 183 (1973). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[A] trial court's findings of fact are reviewed [by this Court] for clear error." *Id.* "Questions of constitutional law are reviewed by this Court de novo." *Id.*

To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for

counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), citing *Strickland*, *supra* at 689-694. Decisions regarding whether to call a witness are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 74 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call . . . [a] witness[] deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant alleges that trial counsel failed to provide effective assistance of counsel by failing to call him to testify in his own defense. This Court has held that a criminal defendant has a constitutional right to testify at trial. *People v Simmons*, 140 Mich App 681, 683-84; 364 NW2d 783 (1985). Defendant was advised, on the record, of his constitutional right to testify and decided not to take the witness stand. This Court has held that if the defendant decides not to testify, the right will be deemed waived. *Simmons*, *supra* at 685. The record below does not indicate that defendant let either the trial court or defense counsel know that he wished to testify after the waiver on the record. Therefore, we hold that defendant waived his right to testify.

Defendant claims that his counsel mistakenly advised him not to testify because self-defense was his only defense. Defendant's decision not to testify was clearly a matter of trial strategy, which we will not second guess. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Furthermore, there is nothing in the record to indicate that defendant's attorney did not adequately present defendant's defense. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defense counsel questioned the tactics used by the police officers numerous times throughout the trial and focused on the fact that the police snuck up on defendant's vehicle at 2:00 a.m., in plain clothes with their guns in hand. In addition, defense counsel indicated that the police officers could have reasonably appeared as car jackers or robbers to someone in defendant's situation. Defense counsel also stated, in his closing argument, that defendant acted out of self-defense to protect his own life. Defendant provides no evidence that his counsel's performance fell below an objective standard of reasonableness nor has defendant provided any evidence that his counsel's performance prejudiced his defense so as to deny him a fair trial. We hold, therefore, that the trial court did not abuse its discretion in denying defendant's motion for a new trial or *Ginther* hearing.

Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc*, *supra* at 579.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell