

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JANICE MARIE LESTER,

Defendant-Appellant.

UNPUBLISHED

June 24, 2004

No. 246601

Sanilac Circuit Court

LC No. 02-005508-CH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD CHARLES LESTER,

Defendant-Appellant.

No. 247666

Sanilac Circuit Court

LC No. 02-005507-FH

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In these consolidated appeals, defendant Janice Marie Lester appeals as of right her jury conviction of conspiracy to break and enter, MCL 750.110, and defendant Edward Charles Lester appeals as of right his jury conviction of conspiracy to break and enter, MCL 750.110, and breaking and entering, MCL 750.110. Janice Lester was sentenced to two years' probation and 90 days in jail, and Edward Lester was sentenced to two years' probation and 180 days in jail. We affirm.

Defendants first argue that their attorneys provided ineffective assistance of counsel when they failed to call witnesses to prove defendant Edward Lester's whereabouts at the time of the crime. A defendant must request a new trial or an evidentiary hearing before the trial court to preserve the issue of ineffective assistance of counsel. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Because defendants did not request a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that the representation so prejudiced him that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Proving that counsel's performance fell below an objective standard of reasonableness requires a defendant to show that counsel's performance was so objectively unreasonable in light of existing professional standards that had counsel not erred, the outcome would have been different. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Defendant has the burden of overcoming the strong presumption that counsel's decisions were sound trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Counsel's failure to call a witness is presumed to be trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). This Court does not attempt to second-guess trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). A counsel's failure to call a witness is only considered ineffective assistance if it deprived defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that may have changed the outcome of the trial. *Id.*

Here, a witness testified that defendant Edward Lester was sleeping at the time the crime was committed, and two witnesses testified that defendant Janice Lester was at home at the time of the breaking and entering. Accordingly, defendants' alibi defenses were before the jury and they were not deprived of a substantial defense. Moreover, defendants' mere assertions that their attorneys' omissions harmed them are insufficient to succeed on a claim of ineffective assistance of counsel. Because defendants failed to make an offer of proof showing that additional testimony would have led to a different result, the record does not establish that defense counsels' performance fell below an objective standard of reasonableness or that the representation so prejudiced defendants that they were denied a fair trial. *Pickens, supra* at 338.

Defendant Janice Lester next argues that remand is necessary to establish the probable perjured testimony of a prosecution witness. This issue is unpreserved, and defendant has failed to establish plain error affecting a substantial right. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Although the witness had given inconsistent statements at previous proceedings, there was no evidence that the trial testimony was perjured. Moreover, there is no evidence that the prosecutor allowed perjured testimony to stand uncorrected or that the prosecutor withheld impeachment evidence. Compare *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986). Rather, the prosecutor brought out the inconsistencies during the direct examination.

Defendant Janice Lester next argues that the trial court erred by refusing to appoint substitute counsel. She asserts that counsel was not acting in her best interest but was attempting to scare her into taking a plea. We find no abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Appointment of substitute counsel is warranted only on good cause shown and where substitution of counsel will not unreasonably disrupt the judicial process. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Good cause exists where a legitimate difference of opinion develops between a defendant and her appointed counsel with regard to a fundamental trial tactic. *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972). A mere allegation that defendant has lost confidence in her attorney is not good cause to substitute counsel. *Traylor, supra* at 463. Defendant's allegation that defense counsel did not see things her way is also not

good cause. *People v Meyers (On Remand)*, 124 Mich App 148, 165-166; 335 NW2d 189 (1983). Here, the trial court found that defendant was agitated over advice defense counsel had given her about accepting a plea bargain. But defense counsel's candor regarding the merits of the case is not grounds for substitution of counsel. *People v Shuey*, 63 Mich App 666, 672; 234 NW2d 754 (1975). Accordingly, this issue is without merit.

Defendant Edward Lester argues that because there is no evidence in the record that he was advised of his *Miranda*¹ rights, this case must be remanded for an evidentiary record. He also contends that the prosecutor breached his constitutional right to remain silent by using his refusal to answer questions regarding who had committed the breaking and entering against him. Defendant failed to object to the prosecution's questions during trial. Therefore, this issue is also unpreserved. *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994), citing MRE 103.

The police must advise a suspect *before* custodial interrogation of his right to remain silent. *Miranda, supra* at 465. It is unclear from the record whether defendant had been advised of his *Miranda* rights before the questions were posed, but defendant testified that he was not in custody at the time of the questioning. Therefore, reversal is unwarranted. In addition, defense counsel was not ineffective for failing to object to this questioning because counsel is not required to make meritless objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).