STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2004
v	No. 249891 Wayne Circuit Court
DEMOND ANTHONY HARRIS, Defendant-Appellant.	LC Nos. 03-001951-01 03-001952-02

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. This case is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Complainant testified that on two occasions defendant pointed a gun at him and that defendant and Stephen Jones drove him to an ATM and a bank and forced him to withdraw and surrender money. Complainant maintained that subsequently defendant stabbed him and that defendant and Jones beat him because he had reported their actions to the police.

Defendant moved for a new trial or an evidentiary hearing, alleging that trial counsel rendered ineffective assistance by failing to call Jones as a witness. In an unsigned affidavit, Jones asserted that he and defendant drove complainant to an ATM and a bank, but denied that he and defendant robbed complainant. Jones further averred that he and complainant fought after he learned that complainant had contacted the police and that the complainant was inadvertently cut by a knife during a scuffle that resulted from complainant first drawing a firearm. The trial court denied the motion because the affidavit was unsigned. The affidavit, now signed by Jones and notarized, is attached to defendant's appellate brief.

On appeal, defendant asserts that he was denied effective assistance of counsel where his attorney failed to call Jones as a witness.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The failure to call a witness can constitute ineffective assistance only if the failure deprived the defendant of a substantial defense, and 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; 554 NW2d 899 (1996).

Considering the questionable circumstances surrounding Jones' affidavit, along with the fact that the record contains no insight from defendant's trial counsel by way of affidavit or appearance and testimony at the hearing that could have been compelled through subpoena, we cannot conclude that counsel's performance was deficient, that defendant was denied a substantial defense, nor that defendant has overcome the strong presumption that counsel's performance constituted sound trial strategy.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly