STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2005
v	No. 254264 Ottawa Circuit Court
MICHAEL SCOTT JARDINE, a/k/a MICHAEL SCOT JARDINE, Defendant-Appellant.	LC No. 03-027288-FH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of larceny from a building, MCL 750.360, for which he was sentenced to eighteen months' probation. This case arises from the theft of a movie projector from the Kirkoff Center at Grand Valley State University. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(A) and (E).

Defendant's sole argument on appeal is that the trial court abused its discretion when it denied his motion for a new trial. We disagree. This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the ruling made. *People v Rice* (*On Remand*), 235 Mich App 429, 439; 597 NW2d 843 (1999).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law that is reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). 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).

With respect to counsel's performance and whether it was deficient, the performance is measured against an objective standard of reasonableness with consideration of the circumstances and prevailing professional norms. *Pickens, supra* at 303, 327. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Rice, supra* at 445.

Defendant specifically asserts that trial counsel was ineffective because he failed to establish that there was a more viable suspect in the theft than defendant. It is true that trial counsel did not specifically assert in his closing argument that a second, more viable suspect existed. However, trial counsel explicitly asked the officer in charge of the investigation why the other man was not included in the photographic lineup shown to the four main witnesses. After the officer asserted that the other man was not included because he did not fit the witnesses' description of the suspect, trial counsel then elicited testimony from the officer that the second man did match the witnesses' description in some respects:

> *Q*. [Referencing the witnesses' description of the suspect contained in the officer's incident report] White male, mid 40s, gray hair, facial hair. Correct? That was described?
>
> *A*. Some had him with facial hair. Some didn't.
>
> *Q*. Okay. Well, from the police report, it indicates, it says . . . white male, mid 40s, gray hair, facial hair. Is [the second man] . . . a white male?
>
> *A*. Yes.
>
> *Q*. Looks like he was in his mid 40s, maybe 30s?
>
> *A*. 30s, yes.
>
> *Q*. Did he have gray hair?
>
> *A*. I don't believe so.
>
> *Q*. You don't believe so. He had facial hair?
>
> *A*. I think he had a mustache.

Q. Okay. That's facial hair, isn't it?

A. Yes.

Q. Well, that pretty well fits the description except for maybe the gray hair, which you don't remember.

Trial counsel further elicited testimony from a woman who works the service desk at the university bookstore that defendant was in the store at 5:59 p.m. This was juxtaposed with evidence that the university's Public Safety department was contacted at 6:00 p.m. regarding the stolen projector. Clearly, counsel attempted to establish that the second man was a more viable suspect in the theft than was defendant. Moreover, contrary to defendant's assertions, trial counsel did contend in his closing argument that defendant could not have committed the theft because he was in the bookstore at the time the robbery occurred. As a result, we conclude that defendant has failed to establish that counsel's performance was deficient.

Moreover, defendant has failed to demonstrate that, but for counsel's alleged error, there is a reasonable probability that the trial outcome would have been different. In light of the arguments actually made by counsel and the testimony counsel elicited at trial, we believe that defendant has failed to demonstrate that there is a reasonable probability that any further emphasis and argument on the issue would have altered the outcome of the bench trial.

For both of these reasons, we conclude that the trial court did not err in ruling that a new trial was unwarranted on the basis of ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter