STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARTEZ KEITH HOWARD,

Defendant-Appellant.

UNPUBLISHED
February 3, 2009

No. 282318
Wayne Circuit Court
LC No. 07-004018-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon in a motor vehicle (CCW), MCL 750.227, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to time served for the marijuana conviction, and concurrent prison terms of one to five years for the CCW conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The sole prosecution witness, Detroit Police Officer Jesse Johns, testified that he and his partner stopped a vehicle that was being driven by defendant at approximately 1:20 a.m. on January 2, 2007, because the left taillight was not working. Defendant was unable to produce a driver's license or registration for the vehicle. Officer Johns observed the handle of a gun in plain view inside the vehicle, partially stuffed in a "folded up" armrest in the center of the backseat. During a search of the trunk, 41 individual baggies containing marijuana were seized.

On appeal, defendant argues that the trial court erred in denying his motion for a new trial on the ground that he was denied his constitutional right to testify. We review a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). The trial court's factual findings are reviewed for clear error. *Cress*, *supra* at 691. Constitutional issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A trial court may order a new trial on any ground that would support appellate reversal or because it believes that the verdict resulted in a miscarriage of justice. MCR 6.431(B). "A

defendant's right to testify in his own defense stems from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." *People v Boyd*, 470 Mich 363, 373; 682 NW2d 459 (2004). The right to testify is also entrenched in the Michigan Constitution, Const 1963, art 1, §§17, 20. *People v Simmons*, 140 Mich App 681, 683; 364 NW2d 783 (1985). At the same time, the selection of defense witnesses, if any, is a strategic decision to be made by counsel. *Id.* at 684. The right to testify will be deemed waived if a defendant decides not to testify or acquiesces in trial counsel's decision that he not testify. *Id.* at 685. A trial court is not required to obtain an on-the-record waiver of the right to testify from the defendant. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).

> A defendant who wants to testify can reject defense counsel's advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel. At base, a defendant must "alert the trial court" that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct. Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so. [*United States v Webber*, 208 F3d 545, 551 (CA 6, 2000), cert den 531 US; 121 S Ct 197; 148 L Ed 2d 137 (2000) (citations omitted).]

See also *United States v Blum*, 65 F3d 1436, 1444 (CA 8, 1995) (an accused desiring to exercise the constitutional right to testify must act affirmatively and express a desire to do so to the court at an appropriate time, or a knowing and voluntary waiver of the right will be deemed to have occurred).

In this case, after the trial court found defendant guilty, defendant's father interjected and complained that he had not been called as a defense witness and that trial counsel did not allow "us" to testify, contrary to statements that counsel purportedly made in the hallway, but defendant himself did not express at trial either a desire to testify or dissatisfaction that he was not called to testify. Because the right to testify is personal to the defendant, *Webber*, *supra* at 550-551, we reject defendant's argument that his father's remarks overcome the presumption of a waiver. Based on the trial record, waiver may be presumed from defendant's failure to testify. At most, defendant untimely asserted his right to testify in his motion for a new trial. Unpreserved issues are reviewed for plain error, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), but because a waiver can be presumed here, we find no plain error. Cf. *United States v Kamerud*, 326 F3d 1008, 1017 (CA 8, 2003) (no plain error where the defendant did not act affirmatively to express a desire to testify at an appropriate time).

Furthermore, the evidence presented at the evidentiary hearing on defendant's motion for a new trial does not present any basis for disturbing the trial court's denial of the motion. Defendant's testimony indicated that he informed trial counsel on the date of trial that he wanted to testify and that trial counsel replied, "All right." Defendant indicated that he would have testified that he drove off in the vehicle while waiting for his father, who had left in a van to find a phone number to call a tow truck company, and, after purchasing gasoline for the vehicle, picked up the marijuana that was later found by the police in the trunk. Defendant indicated that he would have testified that he did not know a gun was in the vehicle.

Defendant's father testified that he informed trial counsel that it was his understanding from discussions with defendant's former attorney that he was supposed to testify at trial and that trial counsel's responded, "Okay" or "No problem." Defendant's father was later told not to worry and, "I got this judge in my pocket," but was not called to testify. Defendant's father indicated that he would have testified that the vehicle was towed to a mechanic's garage for repairs approximately two months before January 1, 2007. On the evening of January 1, he and defendant went to the garage without checking to see if it was open. They found the mechanic at the garage. Defendant's father left to get the phone number to call a tow truck company so that he could have the vehicle, which had not yet been repaired, towed to his home. Before doing so, he told the mechanic to place a gun, which the mechanic offered to sell to him, in the vehicle. According to defendant's father, defendant was not present when he discussed the gun with the mechanic. He told defendant to wait for him at the garage, but found that defendant, the vehicle, and the mechanic were gone when he returned.

Trial counsel testified that defendant's father informed him that he was available to testify but, after hearing the proposed testimony, decided not to call him as a witness because it would have had a negative impact on the defense. He did not recall details of his conversation with defendant, but indicated that it was his practice to engage in a dialog with clients regarding their desire to testify. He recalled defendant saying that he did know that the gun was in the vehicle, but did not remember defendant saying that he wanted to testify. Had defendant made such a statement, trial counsel would have told defendant that doing so would be a huge mistake and engaged in a dialog with him "about what would happen if he were to testify and all the holes that would be filled in in this case if he were to testify, and that's a dialog I believe I would have remembered." Trial counsel testified that he decided not to call defendant as a witness because his testimony would have weakened the defense that the prosecutor failed to prove defendant's knowledge of the gun or marijuana.

Based on trial counsel's testimony, the trial court concluded that trial counsel did not refuse to allow defendant to testify. It found that the testimony of defendant and his father was not credible. An appellate court gives deference to the trial court's assessment of the credibility of witnesses who appear before it. *Cress, supra* at 694; see also *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Giving appropriate deference to the trial court's findings, we conclude that trial counsel did not improperly refuse to allow defendant to testify. Although trial counsel did not remember all of the details of his conversation with defendant, his testimony does not establish that he would have refused a demand by defendant to testify, despite advice to the contrary.

Because defendant failed to substantiate his claim that he was denied the right to testify, the trial court did not abuse its discretion in denying a new trial on this ground. Moreover, even if defendant was denied the right to testify, a deprivation of that right is subject to a harmless error analysis. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532-533; 560 NW2d 651 (1996). Further, because the claim itself was not timely raised, defendant must show that his substantial rights were affected by the error, i.e., that the error affected the trial's outcome. *Carines, supra* at 763. Considering that the same judge who presided at the bench trial had an opportunity to hear defendant's proposed testimony at the evidentiary hearing, and found that testimony lacking in credibility, it is clear that defendant's failure to testify did not affect the trial court's verdict.

Defendant also raises an independent claim of ineffective assistance of counsel, arguing that he was prejudiced by trial counsel's failure to call him and his father as witnesses because their testimony would have demonstrated that he had no knowledge of the gun in the vehicle. A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *LeBlanc, supra* at 579. Defendant must show that trial counsel's performance was both deficient and prejudicial. *People v Carbin,* 463 Mich 590, 600; 623 NW2d 884 (2001). "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 600. Trial counsel's failure to call a witness warrants relief only if it deprives the defendant of a substantial defense. *Simmons, supra* at 685. "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly,* 186 Mich App 524, 526; 465 NW2d 569 (1990).

It is clear from the trial court's findings following the evidentiary hearing that the proposed testimony provided by defendant and his father would not have made a difference in its verdict. To the contrary, following the evidentiary hearing, the trial court stated, "While I was convinced beyond a reasonable doubt of the defendant's guilt at the time I found him guilty, I am even more convinced today after hearing Mr. Pinkston's story and his son's which just defy credibility." Giving deference to the trial court's findings and its opportunity to preside at both the bench trial and the posttrial evidentiary hearing, we conclude that defendant's ineffective assistance of counsel claim cannot succeed. Accordingly, we affirm the trial court's denial of defendant's motion for a new trial on this ground.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra