STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2009
v	No. 283640 Calhoun Circuit Court
ANTHONY CLIFFORD GATES, Defendant-Appellant.	LC No. 2007-002155-FH

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, and aggravated stalking, MCL 750.411i. Because the introduction of additional evidence on a collateral point is a strategic decision that will not alone support a claim of ineffective assistance of counsel, defendant has not established error, and we affirm.

Defendant was charged with the above offenses, as well as with interfering with electronic communications, MCL 750.540(5)(a), as a result of an incident at the home of complainant, his former girlfriend, during the early morning hours of April 2, 2007. Complainant testified that defendant entered her home without permission and in violation of a personal protection order (PPO), and threatened her with a knife for a period exceeding one hour. Complainant acknowledged that defendant had been at her home on April 1, 2007, on a pre-arranged errand to collect some personal belongings,[1] and that she and defendant had agreed that he could return on a later date to collect more items. Complainant indicated that defendant agreed that he would telephone to arrange the future visit. Complainant denied that she telephoned defendant early on April 2, 2007, and invited him to her home. Complainant testified that following the incident at her home, she received two letters from defendant.

Defendant testified that he went to complainant's home during the early morning hours of April 2, 2007, but contended that complainant had telephoned him and invited him to come to

[1] The prosecutor did not contend that visit violated the terms of the PPO.

the residence. Defendant acknowledged that he and complainant argued while he was at the residence, but denied that he possessed a knife or that he threatened complainant at any time during the incident. Defendant denied that he possessed a knife,[2] that he threatened complainant at any time during the incident, or that he broke a glass door pane to gain entrance to the home. Defendant further testified that a glass door pane broke when he opened the door to the sunroom.[3] Defendant admitted that he wrote the letters complainant received in April 2007, but asserted that he did not realize that the PPO prohibited him from contacting complainant by letter. The jury acquitted defendant of interfering with electronic communications, but convicted him of first-degree home invasion, felonious assault, and aggravated stalking. Defendant now appeals as of right.

Defendant claims that his counsel was ineffective because he did not subpoena certain telephone records. Defendant did not move for a new trial in the trial court or seek an evidentiary hearing on the issue of ineffective assistance; therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id*. at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Specifically, defendant asserts that he was denied the effective assistance of counsel at trial because defense counsel did not produce complainant's telephone records. Defendant contends that those records would have shown that complainant telephoned him during the early morning hours of April 2, 2007, and thus would have supported his position at trial.

Counsel's decisions regarding what evidence to present are presumed to be matters of trial strategy. *Rockey*, *supra* at 76. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The telephone records, had they been presented, at most would have shown that a call from a number associated with complainant was placed to a number associated with defendant --

---

[2] A sheriff's deputy testified that she retrieved a knife from a location revealed to her by complainant.

[3] Complainant had asserted that she saw glass on the floor shortly after she found defendant in her home.

if indeed such a call was placed -- during the early morning hours of April 2, 2007. The records would not have revealed the parties to the call or the content of the call. Moreover, defendant presented his theory of the case via his testimony and defense counsel's argument. This case presented a credibility contest between complainant and defendant. And, defendant's assertion that if the jury had been presented with telephone records it would have concluded that he was testifying truthfully is based entirely on speculation. Even if the jury had seen such records, and a call was registered, the context of the call would not be revealed. Given defendant's entry into the home through the sunroom with a broken windowpane rather than an entry door, the jury would have been entitled to believe complainant's version of the events. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). We can presume that counsel's decision to not produce complainant's telephone records was a strategic decision, *Rockey*, *supra* at 76, and we decline to disturb it. *Rice*, *supra* at 445.

Defendant has not established prejudice in that he has not shown that but for an error by counsel, it is reasonably probable that the outcome of the proceedings would have been different, *Carbin*, *supra* at 600, or that the result that did occur was fundamentally unfair or unreliable. *Odom*, *supra* at 415. Defendant is not entitled to relief.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering