STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2010
v	No. 284564 Wayne Circuit Court
DARIUS SIMS, Defendant-Appellant.	LC No. 07-010549-FC

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 13 to 22 years' imprisonment for his second-degree murder conviction and to two years' imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises from the March 18, 2006, shooting death of Jujuan Gardner at the Forest Park Apartments in Detroit, Michigan. At trial, two eyewitnesses, Joshua Dykes and Demarco Jones, testified that at approximately 7:30 p.m., they saw Gardner, defendant and Dejuan Kelly conversing outside of Dykes's apartment. Dykes and Jones each saw defendant remove a handgun from the pocket of his hooded sweatshirt and give it to Kelly. Moments later, Dykes and Jones heard multiple gunshots. Defendant and Kelly ran from the scene, and Gardner ultimately died from gunshot wounds. Kelly was initially charged with the shooting, and his jury trial took place in November of 2006. Kelly was ultimately acquitted. Defendant was subsequently arraigned on the instant charges in June of 2007. Defendant was originally represented by two other attorneys before retaining the attorney who ultimately represented defendant at trial.

On appeal, defendant first argues that his trial counsel was ineffective for failing to call his second attorney and Kelly as witnesses. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the constitutional right to effective assistance of counsel." *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* (citations omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving

otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, defendant must show that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "[C]ounsel's failure to call a particular witness is presumed to be trial strategy." *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). "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." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

At a remand evidentiary hearing, defendant's second attorney testified that when she represented defendant, she interviewed Jones in September of 2007, and he told her that he did not witness the shooting, but learned of the circumstances of the shooting from another boy. Jones also told her that he provided this information to the prosecutor, but that she threatened him with criminal charges if he did not testify. When trial counsel was retained, defendant's second attorney relayed to him her conversation with Jones. The second attorney testified that trial counsel said he would be in touch with her in the future to testify for defendant. Similarly, at a separate evidentiary hearing, trial counsel testified that he wanted to call the second attorney as a witness to elicit the above information. Yet, he failed to subpoena her or identify her on the witness list. He claimed that he had been in contact with her before trial, that he saw her the morning of trial, and that he assumed she would be in the courthouse when he needed her. However, he could not find her and was forced to present his case without her testimony. Trial counsel further testified that failing to call the second attorney as a witness was not a matter of trial strategy. The second attorney's testimony at the evidentiary hearing, however, contradicted trial counsel's testimony. She testified that she had recently undergone surgery and was at home recovering at the time of the trial. Thus, she could not have seen trial counsel that morning in the courthouse. She further indicated that she did not talk to trial counsel at any point after their initial conversation. On this record, the trial court found that trial counsel was an unreliable witness, rejected his testimony, and concluded that his decision not to call the second attorney was a trial strategy.

We agree that counsel was not ineffective for failing to call the second attorney, but for a different reason. See *Tipton v William Beaumont Hosp*, 266 Mich App 27, 37-38; 697 NW2d 552 (2005). Trial counsel successfully achieved his objective of discrediting Jones through Johnson's testimony that Jones said he did not witness the shooting and did not know what happened on the day of the shooting, and that Gardner's father paid Jones and Dykes to testify against defendant. Thus, the second attorney's testimony would have been cumulative, and we cannot conclude that the outcome of trial would have been different but for trial counsel's alleged failure to call the second attorney. *Frazier*, 478 Mich at 243.

Similarly, based on the record, trial counsel's decision not to call Kelly was likewise a trial strategy. At the evidentiary hearing, both trial counsel and Kelly testified that Kelly arrived at the courthouse to testify for defendant, but trial counsel chose not to call him because he wore a "loud" yellow shirt, which trial counsel believed would not have "looked very good at all" in a courtroom. There is no question that trial counsel made a strategic choice not to call Kelly on

account of his clothing. Although trial counsel appeared to later regret the decision, we will not second-guess his strategic choice. *Avant*, 235 Mich App at 508.

Next, defendant argues that trial counsel's ability to represent him was limited as a result of a conflict of interest because trial counsel previously represented Kelly. "To establish a conflict of interest claim, a defendant must demonstrate that an actual conflict of interest existed and that it negatively affected his attorney's performance." *People v Smelley*, 285 Mich App 314, 334; 775 NW2d 350 (2009), vacated in part on other grounds 485 Mich 1023 (2010). To support his argument, defendant contends that trial counsel's representation violated MCR 6.005(F), and MRPC 1.7(b). We disagree. Trial counsel also represented Kelly in a jury trial that concluded in November of 2006. Defendant was not arraigned until June 25, 2007. Therefore, it is clear that defendant and Kelly were neither jointly charged nor tried. Thus, MCR 6.005(F) was not implicated.[1] Moreover, nothing in the record suggests that any conflict actually arose. The mere fact that trial counsel previously represented Kelly does not itself imply a conflict. In fact, defendant fails to demonstrate or articulate how trial counsel's representation was limited. Thus, we find no violation of MRPC 1.7(b). Rather, the conflict is purely theoretical, and does not amount to an "actual" conflict that affected trial counsel's performance. *Smelley*, 285 Mich App at 334. Trial counsel's conduct did not fall below the objective standard of reasonableness. *Gonzalez*, 468 Mich at 644.

Finally, defendant argues that trial counsel was ineffective because the prosecutor demanded that he be arrested on an outstanding warrant for unpaid child support. Defendant argues that the possibility of arrest created a conflict of interest between trial counsel and the prosecutor that impeded trial counsel's ability to effectively represent defendant throughout trial. We disagree.

In *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), the Supreme Court held that a conflict of interest is not presumed, even "whenever an attorney is being prosecuted in the same county as a criminal defendant whom he represents." Rather, a defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* (quotation omitted). "[T]here is no automatic correlation between an attorney's theoretical self-interest and an ability to loyally serve a defendant." *Id.* at 557. Thus, although the defense counsel had indeed been charged with a felony, nothing in the record suggested that he "actively lessened his defense as a result of his pending felony charge" and the evidence did not establish "an actual conflict of interest on the record." *Id.* at 558.

Here, at an evidentiary hearing, trial counsel testified that on the Friday after the first day of trial,[2] a former prosecutor told him that the prosecutor in this case had an arrest warrant and was going to have trial counsel arrested. Trial counsel claimed that he then spent the entire weekend believing that he might be arrested in his home, which detracted from his trial

[1] As MCR 6.005(F) was inapplicable, we likewise reject defendant's irrelevant argument that his wavier to the alleged conflict of interest was inadequate.

[2] The trial began on a Thursday, December 13, 2007, but did not continue on Friday, and instead resumed on Monday, December 17, 2007.

preparation. When he returned to the courthouse the following week, a bailiff told him that the prosecutor had previously entered the courtroom and demanded that the trial court have trial counsel arrested on the warrant. As a result, trial counsel sat through trial believing he might be arrested if he aggravated the prosecutor or the trial court. Thus, he was less aggressive, less zealous, and a more timid lawyer. He was unable to object or argue the case as he would have liked. In contrast, the prosecutor testified that she became aware of an arrest warrant for trial counsel, but she did not prepare it, execute it, or demand his arrest. She did not want him to be arrested, as it would have delayed the trial. Similarly, the bailiff testified that trial counsel's version of events was untrue. He testified that he told trial counsel about the possibility of an arrest warrant, but assured him that no one would be arrested in the courtroom. He testified that trial counsel appeared calm, and said he had already scheduled a hearing on the matter, but was unaware of the warrant. The trial court flatly rejected trial counsel's testimony on the matter at the evidentiary hearing, again finding him to be an incredible witness. We defer to this determination. MCR 2.613(C); *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997). The trial court also concluded that the record contradicted trial counsel's testimony. It specifically found that trial counsel's behavior was unchanged after the alleged demand for his arrest, and that he zealously represented defendant. Thus, no conflict existed. Our review of the record supports this conclusion. Nothing in the record indicates that trial counsel, at any point, backed down from the trial court or the prosecutor, that he refrained from objecting, or that he did not impeach witnesses for fear of being arrested. To the contrary, the record is replete with examples where he engaged in zealous advocacy. Thus, we conclude that defendant has failed to prove the existence of an actual conflict of interest that actively lessened trial counsel's defense. *Smith*, 456 Mich at 558. Trial counsel's conduct did not fall below the objective standard of reasonableness. *Gonzalez*, 468 Mich at 644.

In sum, we find that the three claims of ineffective assistance of counsel are without merit.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood