

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS WADE DEMMY, JR.,

Defendant-Appellant.

UNPUBLISHED

January 27, 2011

No. 290073

Wayne Circuit Court

LC No. 08-011985-FH

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree fleeing and eluding a police officer, MCL 257.602a(2), and reckless driving, MCL 257.626. He was sentenced to six months' incarceration for the fleeing and eluding conviction and 93 days' incarceration for the reckless driving conviction, the sentences to be served concurrently. Defendant appeals his convictions as of right. We affirm.

Defendant's sole claim on appeal is that defense counsel's failure to secure expert testimony on the inherent unreliability of eyewitness identification compromised his right to a fair trial and constituted ineffective assistance of counsel warranting reversal of his convictions. We disagree.

Defendant preserved his claim by moving for a new trial and requesting an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Whether defendant was denied the effective assistance of counsel presents a constitutional question subject to de novo review. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). "A defendant that claims he has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Sabin*, 242 Mich App at 659. "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Id.* Further, a counsel's "failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

Because defense counsel was able to effectively challenge the strength and reliability of the eyewitness identifications and vigorously pursue a theory of mistaken identity through presentation of a strong alibi defense, defendant failed to demonstrate that he could not safely proceed to trial without expert testimony on the inherent unreliability of eyewitness identification. MCL 775.15. The prosecution's case depended largely on testimony by two civilian witnesses and a police officer, who unequivocally identified defendant as the perpetrator. The record revealed that defense counsel vigorously defended the case by putting forth a defense of mistaken identity. Counsel presented and thoroughly questioned six alibi witnesses, who gave detailed and consistent testimony that corroborated defendant's testimony that he was at a family gathering several hours away from the scene at the time of the offense, thoroughly cross-examined the eyewitnesses in an attempt to discredit their opportunity and ability to observe the perpetrator, attempted to challenge the thoroughness and timeliness of the police investigation, and presented a strong closing argument that defendant could not have committed the crime. Under these circumstances, defendant was not denied his right to present a substantial defense by defense counsel's failure to secure expert testimony on the unreliability of eyewitness identification nor was defense counsel's performance "objectively unreasonable" to constitute ineffective assistance. *Dixon*, 263 Mich App at 398; *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Sabin*, 242 Mich App at 659. To the contrary, the record revealed that counsel thoroughly prepared, investigated, vigorously pursued, and presented a defense of mistaken identity. Defense counsel's decision not to present an identification expert to discredit the eyewitness identifications is "presumed to be a permissible exercise of trial strategy," *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999), and the fact that the trial strategy adopted by defense counsel ultimately failed does not constitute ineffective assistance. *Kevorkian*, 248 Mich App at 414-415. As this Court noted in *Cooper*, 236 Mich App at 658, defense counsel "may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate."¹

Because defendant has failed to show that counsel's decision was objectively unreasonable, and in light of the strong alibi defense presented by defense counsel, we find that the absence of expert testimony about the inherent unreliability of eyewitness identification did not prejudice defendant so as to deprive him of a fair trial. *Pickens*, 446 Mich at 302-303. We thus find his claim of ineffective assistance to be without merit.² Consequently, we also find

¹ Defense counsel's testimony at the post-conviction hearing that he felt that expert testimony on eyewitness identification was not necessary and such testimony would be a waste of the jurors' time indicates that counsel made a strategic decision not to present expert testimony.

² Any claim that defense counsel was ineffective because counsel did not present a videotape of the police chase must also fail because defendant failed to present any evidentiary support for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). There is nothing in the record to indicate that a videotape of the police chase existed at the time of the trial. To the contrary, the record shows that defense counsel inquired about the existence of a videotape of the chase and

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that the trial court did not abuse its discretion in denying defendant's post-trial motion to appoint an expert witness on identification for defendant to assist him in establishing prejudice from defense counsel's alleged ineffective decision. See *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003).

Affirmed.

/s/ Kathleen Jansen

/s/ Donald S. Owens

/s/ Douglas B. Shapiro

(...continued)

requested production of any police video, but was informed repeatedly by the prosecution that it did not exist.