

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TALLEON STEPHON BRAZIL,

Defendant-Appellant.

---

UNPUBLISHED

July 14, 2011

No. 297094

Wayne Circuit Court

LC No. 09-017370-FC

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of two counts of carjacking, MCL 750.529a, and one count each of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to prison terms of 15 to 40 years for each carjacking conviction, one to five years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied the effective assistance of counsel by defense counsel's moving to admit a DVD containing a surveillance video and by counsel's failure to call an eyewitness identification expert. We disagree. Because defendant did not move for a new trial or a *Ginther*<sup>1</sup> evidentiary hearing, this Court's review is limited to mistakes apparent on the existing record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). We review de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim. *Id.*

"To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability [exists] that the outcome of the proceeding would have been different but for trial counsel's errors." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Petri*, 279 Mich App at 411. "Decisions regarding what evidence to present and

---

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court does not substitute its judgment for that of counsel regarding matters of trial strategy, nor does it assess counsel’s performance with the benefit of hindsight. *Petri*, 279 Mich App at 411.

Here, defendant has not overcome the presumption that defense counsel’s motion to admit a DVD containing a surveillance video was sound trial strategy. Although the DVD ultimately turned out to contain video appearing to show defendant in a store where one of the complainants claimed to have seen the perpetrator shortly before the crime occurred, defense counsel moved to admit the DVD at an earlier point when the parties and the officer-in-charge thought that it did not contain video of that time period. Only later, after the DVD was admitted, did the officer-in-charge find the video appearing to show defendant inside the store. Thus, viewed without the benefit of hindsight, defense counsel’s motion to admit the DVD was a reasonable strategic choice to suggest that the prosecution had not established that defendant was in the store at the time the complainant claimed.

Although defendant suggests that defense counsel should have reviewed the contents of the DVD before moving for its admission, no basis exists in the record to conclude that defense counsel failed to do so. The officer-in-charge testified that the video apparently showing defendant was contained inside what appeared to be a Word document icon. Defense counsel may have reviewed the DVD and made the same mistake as the officer initially did in assuming that what appeared to be a Word document icon did not contain any video.

Defendant also contends that defense counsel should have requested a mistrial or taken further action to minimize the damage resulting from the video. “A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant ‘and impairs his ability to get a fair trial.’” *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009), quoting *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Defendant has not established that the discovery of the video on the DVD after its admission was an error or irregularity that impaired his ability to get a fair trial. Defense counsel was not ineffective for failing to file a meritless motion. *People v Unger*, 278 Mich App 210, 255; 749 NW2d 272 (2008). Moreover, defense counsel competently attempted in her closing argument to minimize the damage resulting from the video by noting that the person appearing to be defendant in the video was wearing a different color shirt than what one of the complainants had said defendant was wearing. No basis exists to question defense counsel’s strategic choices regarding the video.

Similarly, defense counsel was not ineffective for failing to call an expert witness in the area of eyewitness identification. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy and this Court will not review defense counsel’s decisions with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant has not proven that counsel's failure to call an expert witness in the area of eyewitness identification constituted deficient performance. Defense counsel effectively cross-examined the complainants regarding the discrepancies in their descriptions of the assailant, including regarding his teeth and hairstyle. Counsel also emphasized these discrepancies in her closing argument. Defense counsel could have reasonably concluded 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." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Defendant has failed to overcome the strong presumption that defense counsel's declination to present an expert on eyewitness identification was sound strategy. For the same reason, defendant has not demonstrated a reasonable probability that the outcome of the trial would have been different if such an expert had testified.

In his standard 4 supplemental brief, defendant argues that he was denied the effective assistance of counsel by defense counsel's failure to move for a new trial based on an allegedly coerced juror and based on an audiotape that supposedly exonerated defendant. Defendant also contends that defense counsel was ineffective for failing to call a witness who allegedly saw the crime from across the street. We disagree.

Defendant has not established that defense counsel was ineffective for failing to move for a new trial on the ground that a juror was coerced. "Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). Once a jury has been polled and discharged, the jurors may not challenge mistakes or misconduct inherent in the verdict. *Id.* "Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by third parties." *Id.* Here, defendant has presented no affidavit from the juror in question or any other proof to support his claim that the juror was coerced. Moreover, the record contains no evidence of an extraneous or outside error that influenced the jury verdict. Thus, no ground existed for granting a new trial on this basis, and defense counsel was not ineffective for failing to file a meritless motion. *Unger*, 278 Mich App at 255.

Next, defense counsel was not ineffective for failing to move for a new trial on the basis of an audiotape that allegedly exonerated defendant. A new trial may be granted on the basis of newly discovered evidence where a defendant shows that:

(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cox*, 268 Mich App 440, 450; 709 NW2d 152 (2005).]

Here, the record provides no basis to conclude that defendant could have satisfied the requirements for granting a new trial based on newly discovered evidence. The alleged audiotape is not part of the lower court record. Further, no evidence has been presented regarding the contents of the tape or when and how it was discovered. The trial court stated that the tape could not be authenticated, and defendant has offered no reason to conclude otherwise. Thus, defendant has not established that he was entitled to a new trial on the basis of the

audiotape or that defense counsel was ineffective for failing to move for a new trial on that ground.

Finally, the record does not support defendant's contention that defense counsel was ineffective for failing to call a witness who allegedly observed the crime from across the street. The witness's purported statement is not part of the lower court record, and thus, cannot be used in evaluating defendant's ineffective assistance of counsel claim. *Petri*, 279 Mich App at 410. Moreover, it is not clear whether the complainants' testimony would necessarily conflict with the alleged witness's description of the assailant. Therefore, defendant has not established that defense counsel's performance was deficient for failing to call the alleged witness or that a reasonable probability exists that calling the witness would have led to a different outcome.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Amy Ronayne Krause