

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 26, 2014

v

WALLACE EDWARD BIGGER,

Defendant-Appellant.

No. 313830
Antrim Circuit Court
LC No. 12-004510-FH

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of conspiracy to deliver 450 to 999 grams of narcotics, MCL 750.157a and MCL 333.7401(2)(a)(ii), one count of conducting a criminal enterprise, MCL 750.159i(1), one count of maintaining a drug house, MCL 333.7405(1)(d), and three counts of delivering less than 50 grams of narcotics, MCL 333.7401(2)(a)(iv). We affirm.

I

At trial, a number of witnesses testified that they either purchased narcotics from defendant, or sold narcotics for him, and that they referred to defendant as “the old man.” Other witnesses, including Christine Potrafke, testified that they bought narcotics from individuals who referred to their supplier as “the old man.” Defendant’s wife testified that she gave defendant some of her prescription morphine to sell, and that she had observed individuals discussing money and narcotics with defendant.

II

Defendant first argues that trial counsel was ineffective because he had a conflict of interest. In a pretrial motion for trial counsel to withdraw from the case, defendant asserted that trial counsel’s law partner represented a prosecution witness, Potrafke, in making a plea agreement to charges that were substantially related to defendant’s case and that resulted in her decision to testify against defendant. At the motion hearing, trial counsel stated on the record that he believed no conflict existed. When the trial court pressed trial counsel regarding whether he could “vigorously” cross-examine Potrafke, he explained he would not be “going light on” anyone. Finding no actual conflict, the trial court denied the pretrial motion to withdraw.

Whether counsel was under an actual conflict of interest is a factual question, which is reviewed for clear error. MCR 2.613(C). “[T]he right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Generally, under the *Strickland* standard, a defendant alleging ineffective assistance of counsel must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052, 80 L Ed 2d 674 (1984).

Defendant argues that trial counsel’s partner’s continuing duties to Potrafke following her plea agreement are imputed to trial counsel because of the partner’s and trial counsel’s shared practice and trial counsel violated the rules of professional conduct by successively representing defendant in this case where Potrafke agreed, in her plea agreement, to testify as an adverse witness. See MRPC 1.7(b), MRPC 1.9, and MRPC 1.10(a). Successive representation occurs where defense counsel has previously represented a codefendant or trial witness. “The fear in successive representation cases is that the lawyer will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information.” *Moss v United States*, 323 F3d 445 (CA 6, 2003).¹

Our United States Supreme Court has explained that, even if an attorney violates professional norms, the representation may not rise to a constitutional violation of the right to counsel. *Burt v Titlow*, ___ US ___; 134 S Ct 10; 187 L Ed 2d 348 (2013) (“a lawyer's violation of ethical norms does not make the lawyer per se ineffective.”). Importantly, trial counsel thoroughly cross-examined Potrafke regarding her plea agreement, which was the sole source of the alleged conflict. Trial counsel elicited testimony that, by pleading guilty and agreeing to testify against defendant, Potrafke would serve no more than 20 years in prison even though, as originally charged, she had faced up to 124 years in prison. Moreover, in light of the overwhelming testimonial evidence against defendant and the fact that Potrafke’s testimony was merely cumulative, defendant cannot show that, but for trial counsel’s successive representation, the outcome of the trial would have been different.²

Defendant argues that *Strickland* should not apply to test whether his right to counsel was violated, and instead this is one of the rare situations where prejudice is presumed. In certain Sixth Amendment contexts, including concurrent representation of multiple clients with actual conflicting interests, the likelihood that the verdict is unreliable is so high that the court will discharge a defendant’s *Strickland* obligation to demonstrate a probable effect on the result of the case and instead presume prejudice. *Mickens v Taylor*, 535 US 162, 166; 122 S Ct 1237; 152 L Ed 2d 291 (2002). Where a defendant alleges his or her attorney actively represented conflicting

¹ While the decisions of federal circuit courts are not binding, they may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

² Although defendant poses an alternative line of cross-examination that trial counsel could have utilized regarding conflicting testimony about when Potrafke met the dealer who defendant supplied, “[d]ecisions regarding how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

interests, the defendant must show an actual conflict before prejudice will be presumed. “ ‘An ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.’ ” *Id.*, quoting *Holloway v Arkansas*, 435 US 475, 482; 98 S Ct 1173; 55 L Ed 2d 426 (1978); see also *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998).

In *Glasser v United States*, 315 US 60, 72-75; 62 S Ct 457; 86 L Ed 680 (1942), an attorney trying to diminish the jury’s perception of the guilt of one of his clients failed to cross-examine a prosecution witness whose testimony linked his other client (the defendant) to the crime and failed to object to inadmissible evidence. Because the attorney’s “struggle to serve two masters [could not] seriously be doubted,” the defendant was entitled to a new trial. *Id.* at 75-76.

It remains an open question whether a presumption of prejudice should apply to successive representation claims rather than *Strickland*. See *Mickens*, 535 US 176. But we need not reach that question because, regardless, defendant cannot establish an actual conflict here. Unlike the attorney in *Glasser* whose performance was adversely affected by concurrent representation, trial counsel here evaluated the potential conflict between his representation of defendant and his law partner’s previous representation of Potrafke, trial counsel advised the trial court that no conflict existed, and then trial counsel “vigorously” cross-examined Potrafke. See *Holloway v Arkansas*, 435 US 475, 485; 98 S Ct 1173; 55 L Ed 2d 426 (1978) (“An “attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.”). Again, one of trial counsel’s main lines of inquiry was the possible effect Potrafke’s plea agreement—the only source of the potential conflict—had on her truthfulness at trial. The trial court did not clearly err in finding that no actual conflict existed, and we conclude defendant was not denied the constitutional right to counsel.

III

In his Standard 4 brief, defendant asserts that he was denied his right to a fair trial. Although defendant’s arguments are somewhat unclear, it appears that he claims his due process rights were violated by the admission of perjured testimony and that trial counsel was ineffective by failing to request a *Walker*³ hearing and failing to call 20 witnesses defendant suggested. These arguments were not raised below, and are reviewed for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In passing, defendant also asserts that appellate counsel provided ineffective assistance by failing to raise the issues he raises in his Standard 4 brief.

Regarding his assertion of perjured testimony, defendant fails to establish a factual predicate for his claim that any perjury was admitted. Therefore, he cannot demonstrate plain error. *Id.*

³ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Regarding his assertion that trial counsel was constitutionally ineffective for failing to request a *Walker* hearing, such a hearing involves a defendant's claim that he made an involuntary statement to the police. *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Because defendant has not alleged that he made an involuntary statement to the police, however, any request for a *Walker* hearing by trial counsel would have been futile. See *People v Gaines*, ___ Mich App ___; ___ NW2d ___ (2014) (an attorney cannot be ineffective for failing to raise a futile objection).

Regarding his assertion that trial counsel was constitutionally ineffective for failing to call 20 witnesses at trial, defendant fails to identify any of these witnesses and explain their proposed testimony. Therefore, defendant again fails to satisfy his burden of establishing a factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Last, regarding defendant's challenge to appellate counsel's representation, he fails to show that any of the issues he raises in the Standard 4 brief have merit and, in any event, because he raised the issues in the Standard 4 brief and presented them to this Court, defendant could not establish that appellate counsel's failure to raise the issues prejudiced him. *People v Lopez*, ___ Mich App ___; ___ NW2d ___ (2014) (where a defendant raises a trial attorney's ineffective assistance of counsel in a Standard 4 brief, any possible error committed by the appellate attorney by failing to raise that issue is cured).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens