STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 17, 2016
v	No. 332946 Wayne Circuit Court
JONATHAN DAVID HEWITT-EL, also known as JONATHAN DAVID HEWITT, Defendant-Appellee.	LC No. 10-002907-01-FC

Before: JANSEN, P.J., and MURPHY and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and armed robbery, MCL 750.529. He was sentenced, as a third habitual offender, MCL 769.11, to 7 to 20 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, 3 to 10 years' imprisonment for the felon-in-possession conviction, two years' imprisonment for the felony-firearm conviction, and 171 months to 25 years' imprisonment for the armed robbery conviction. This Court affirmed defendant's convictions and sentences. *People v Hewitt*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2011 (Docket No. 299241). The Michigan Supreme Court denied leave to appeal. *People v Hewitt*, 490 Mich 974 (2011). Defendant filed a motion for relief from judgment in the trial court. Defendant also filed a supplemental motion for relief from judgment. The trial court granted defendant's motion for relief from judgment. The prosecution appeals by leave granted.[1] We reverse.

This case arises from the robbery of James Lemon at his home in Detroit on February 14, 2010. The underlying facts of this case are as follows:

[1] *People v Hewitt-El*, unpublished order of the Court of Appeals, entered June 7, 2016 (Docket No. 332946).

> The victim, James Lemon, testified that defendant called him on February 14, 2010, about coming over to visit. Defendant later arrived at Lemon's house, accompanied by a man he introduced as Terry. Lemon testified that Terry pulled a gun on him and defendant demanded Lemon's money. When Lemon tried to escape through a window, defendant told Terry to shoot Lemon and shots were fired. Lemon was shot as he went through the window.
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> Defendant denied being at Lemon's house. According to defendant, Lemon had a drug habit and defendant had previously introduced Lemon to a dealer named Steve, whom Lemon knew as Terry. According to defendant, on the day of the offense, Lemon called defendant at home looking for drugs and defendant told him to call one of the people defendant had introduced him to. Defendant stated that Lemon later called him back to report that he had spoken to Terry, who was on his way to Lemon's house. Defendant testified that later in the month after the offense, a man named Craig called and "asked about the whereabouts of the guy Terry and [said] that if I didn't give Mr. Lemon the full name and address of Terry, then he would hold me responsible, seeing I'm the one who introduced them." [*Hewitt*, unpub op at 1 (alteration in original).]

At the beginning of trial, defendant requested substitution of counsel based on disagreements over the investigation and presentation of alibi witnesses. The trial court denied the request. As noted, defendant was convicted in a jury trial, and this Court affirmed his convictions.

Defendant, *in propria persona*, then filed a motion for relief from judgment pursuant to MCR 6.500 *et seq*., in the trial court. In the motion and in his brief in support, he asserted that trial counsel was ineffective for failing to investigate and call witnesses, and failing to file a motion to suppress evidence of his prior convictions. He also asserted that appellate counsel was ineffective for failing to raise meritorious issues on direct appeal. At a *Ginther*[2] hearing, the court heard testimony from appellate counsel, Daniel J. Rust, trial counsel, David Cross, the doctor who treated defendant following a car accident, Dr. Dawit Teklehaimanot, defendant's physical therapist, Bejoice Thomas, defendant's son and potential alibi witness, Leon Hewitt, defendant, and another potential alibi witness, Mark McCline.

The trial court entered an order granting defendant's motion for relief from judgment.[3] In so doing, it provided the standards for granting a motion for relief pursuant to MCR 6.508(D), and stated that a defendant can demonstrate good cause for failing to raise an issue on direct

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] The trial court had initially entered an ordering granting defendant a new trial on November 3, 2015, but this Court vacated the order and remanded to the trial court for reconsideration of the motion for relief. *People v Hewitt-El*, unpublished order of the Court of Appeals, entered December 21, 2015 (Docket No. 330403). The order stated, "In its November 2015 opinion, the court did not apply the standards for ruling on a motion for relief from judgment under MCR 6.500 *et seq*." *Id*.

appeal by proving ineffective assistance of appellate counsel. With regard to defendant's appellate attorney, the court stated:

> Notwithstanding the presumption of effectiveness afforded to appellate counsel, by failing to "address the merits" of Defendant's central argument on appeal, appellate counsel was ineffective. Consequently, this "abandoned" claim resulted in absolute prejudice to Defendant. Thus, Defendant has established "good cause," which would excuse his apparent failure to raise the above-mentioned issues on appeal and "actual prejudice," via the ineffective assistance of appellate counsel.

With regard to the underlying issue of trial counsel's conduct, the court concluded that trial counsel's performance fell below an objective standard of reasonableness when he failed to call and investigate potential alibi witnesses, failed to file a motion to suppress defendant's prior convictions under MRE 609, and failed to buttress defendant's defense of physical impossibility by presenting the testimony of Dr. Teklehaimanot and Thomas. Further, it determined that, but for trial counsel's errors, there is a reasonable probability that the outcome of trial would have been different. Accordingly, the court granted defendant's motion for relief from judgment.

This Court reviews a trial court's decision to grant a motion for relief from judgment for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes, or makes an error of law." *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010) (citations omitted). A trial court's findings of fact with regard to its decision to grant a motion for relief from judgment are reviewed for clear error. *McSwain*, 259 Mich App at 681. "[F]indings of fact are clearly erroneous 'if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made.' " *Id*. at 682, quoting *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

"A defendant in a criminal case may move for relief from a judgment of conviction and sentence," and motions for relief from judgment are governed by MCR 6.500 *et seq*. *Swain*, 288 Mich App at 629. Under MCR 6.508(D), a defendant bears the burden of establishing entitlement to relief from judgment. MCR 6.508(D); *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). MCR 6.508(D) provides, in pertinent part:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
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> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
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> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(*i*) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

* * *

(*iii*) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

* * *

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

We first note that several of defendant's claims were decided against defendant in a prior appeal. On direct appeal, defendant argued that the trial court should have granted his request for substitute counsel because trial counsel refused to call proposed alibi witnesses, among other reasons. In rejecting the claim, this Court evaluated whether testimony from potential alibi witnesses would have been beneficial to defendant and concluded that defendant failed to demonstrate the existence of any bona fide dispute with trial counsel over the use of alibi witnesses at trial. Specifically, with regard to defendant's fiancée at the time of the incident, Sheila Jackson, this Court stated that defendant failed to establish what testimony Jackson would offer and noted that trial counsel indicated that Jackson would not be an alibi witness based on his conversations with her. *Hewitt*, unpub op at 2. This Court stated, "There is nothing in the record to show what information Jackson could have offered," and pointed out that defendant testified that he was home alone during the time Lemon called him to report that Terry was on his way over. *Id*. at 2-3. This Court concluded, "Without any evidence to show exactly what time the robbery occurred and whether Jackson could place defendant at home (or elsewhere) at that time, Jackson could not provide defendant with an alibi." *Id*. at 3. Accordingly, we conclude that this Court previously decided the issue with regard to Jackson's alibi testimony. However, this Court did not discuss the proposed alibi testimony of McCline and Leon, and, therefore, this Court did not previously decide the issue with regard to these alibi witnesses.

In addition, we conclude that this Court already decided the issue regarding the admission of defendant's prior convictions under MRE 609. At trial, Cross elicited testimony from defendant, on direct examination, that defendant had prior convictions. Then, on cross-examination, the prosecutor asked defendant if he had previously been convicted of crimes involving dishonesty, a false statement, or theft. After additional questioning by the prosecutor, defendant explained that he had five prior convictions for armed robbery. With regard to defendant's claim that trial counsel was ineffective to failing to file a motion to have the trial

court determine whether the prior convictions were admissible under MRE 609, this Court concluded that defendant abandoned the claim on appeal. *Hewitt*, unpub op at 4. Further, this Court went on to explain that the failure to request a limiting instruction with regard to the admission of the prior convictions did not prejudice defendant

> given Lemon's unwavering testimony that defendant, a person he knew and who had visited his house in the past, committed the offenses with Terry, and defendant's nonsensical testimony that even though Lemon identified him as one of the two robbers at the scene, he subsequently threatened to falsely implicate defendant unless he disclosed Terry's whereabouts. [*Id*.]

Although the above discussion pertained to defendant's argument that trial counsel should have requested a limiting instruction, this Court's reasoning applies to the underlying issue of the admission of the prior convictions under MRE 609. By pointing out that a limiting instruction with regard to the admission of the prior convictions would not have affected the outcome of the trial, this Court effectively concluded that the admission of defendant's prior convictions did not affect the outcome of the trial because of the victim's unwavering identification testimony and defendant's untenable defense. See *id*. Accordingly, we conclude that defendant's ineffective assistance argument regarding the failure to file a motion to preclude admission of the prior convictions was decided against defendant in the prior appeal.

However, this Court did not address defendant's remaining claims. Therefore, with regard to these claims, defendant had to demonstrate good cause for failing to raise the issues included in his motion for relief in a prior appeal and actual prejudice because of the irregularities alleged in the motion. See MCR 6.508(D)(3). "The requirement of 'good cause' can be established by proving ineffective assistance of counsel." *Swain*, 288 Mich App at 631. When, as in this case, the defendant does not raise the issue in his first-tier appeal, "[a] defendant may establish good cause for not raising an argument for relief sooner by showing that his appellate attorney rendered ineffective assistance by failing to raise the issue in a proper post-trial motion or first-tier appeal." *People v Gardner*, 482 Mich 41, 50 n 11; 753 NW2d 78 (2008). The test to establish ineffective assistance of appellate counsel is the same as the test that applies to claims of ineffective assistance of trial counsel. *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). To establish actual prejudice, a defendant has to demonstrate that, but for the alleged error, he would have had a reasonably likely chance of acquittal, or "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(*i*) and (*iii*).

The prosecution argues, on appeal, that the trial court abused its discretion when it granted defendant's motion for relief from judgment because defendant failed to establish good cause and actual prejudice. Specifically, the prosecution argues that the ineffective assistance claims defendant raised in support of his motion for relief lack merit. We agree.

Claims of ineffective assistance of counsel are mixed questions of law and fact. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). This Court reviews a trial court's findings of fact for clear error, and reviews questions of constitutional law de novo. *Id*. The defendant must establish a factual predicate for the ineffective assistance of counsel claim.

People v Hoag, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, the trial court held an evidentiary hearing over three days to review the ineffective assistance claims defendant made in his motion for relief from judgment.

For a successful claim of ineffective assistance of counsel, the defendant must show: "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. The effective assistance of counsel is presumed, and the defendant has the burden to prove ineffective assistance. *People v Roscoe*, 303 Mich App 633, 644; 846 NW2d 402 (2014). Further, the defendant must overcome the strong presumption that defense counsel's alleged actions were sound trial strategy. *Trakhtenberg*, 493 Mich at 52.

To support his motion for relief from judgment, defendant first argued that he was denied the effective assistance of counsel when trial counsel failed to investigate or call potential alibi witnesses. In its opinion granting defendant's motion for relief, the trial court considered the alibi potential of Jackson and McCline, and concluded:

> Counsel could have with reasonable diligence utilized his power to subpoena certain witnesses on Defendant's behalf. Moreover, it appears that Jackson's testimony that Defendant was at home during the time that the crime occurred would have been corroborated by McCline's testimony. Consequently, when viewed in context, Counsel's refusal to utilize the resources that were at his disposal to advocate for Defendant resulted in performance that indeed "fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different."

The trial court did not discuss Leon or his potential benefit to defendant as an alibi witness.

"[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight." *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). Failing to call a witness to testify only amounts to ineffective assistance of counsel if it deprives a 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) (citation omitted). " '[F]ailure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome.' " *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (citation omitted).

Contrary to the trial court's determination, we find that defendant cannot show trial counsel's performance fell below an objective standard of reasonableness with regard to investigating and calling alibi witnesses. Defendant fails to establish that trial counsel's failure to call Leon and McCline was objectively unreasonable. Although Leon testified at the *Ginther* hearing, and stated in his affidavit, that he informed trial counsel he could serve as an alibi witness for defendant, trial counsel testified that neither defendant nor anyone else told him about Leon. In addition, trial counsel said that he did not recall the name Mark McCline. The

credibility of this testimony is bolstered by the fact that defendant failed to mention McCline by name at trial when requesting substitution of counsel, or as part of his motion for relief from judgment and brief in support. McCline confirmed, in his testimony at the *Ginther* hearing, that he was never approached by an attorney and only spoke with Jackson about the possibility of testifying on defendant's behalf at trial.

In its opinion, the trial court found that Jackson was in contact with McCline and his wife, Kelly, and that had trial counsel spoken with Jackson more thoroughly, he may have discovered McCline's potential to serve as an alibi witness. However, even if these allegations constituted errors by counsel, the errors would not have deprived defendant of a substantial defense or altered the outcome of trial.

Both at trial and at the *Ginther* hearing, trial counsel said that defendant provided him with partial names and no contact information for some potential alibi witnesses. In addition, based on the record and the testimony provided at the *Ginther* hearing, defendant's alibi defense, had it been presented, would not have been credible. Leon and McCline both testified that they were with defendant at his apartment on the afternoon of February 14, 2010. Leon said that he arrived at the apartment between 12:30 p.m. and 12:45 p.m., while McCline said he arrived between 12:00 p.m. and 12:30 p.m. However, when asked, at trial, where he was when he received the second phone call from Lemon between 12:00 p.m. and 12:30 p.m. that day, defendant testified that he was home, and that no one else was with him. He confirmed that Lemon called him at approximately 12:30 p.m. Leon's account of the day in his affidavit also differed from his testimony at the *Ginther* hearing. In his affidavit, Leon said that he arrived at defendant's apartment a little bit after 1:00 p.m., rather than between 12:30 p.m. and 12:45 p.m., and that Jackson came over to see what he and defendant were doing. However, at the *Ginther* hearing, Leon admitted that he did not actually see Jackson that day, but that defendant informed him Jackson had pulled up to the apartment when he and defendant were outside. Thus, defendant's claim that trial counsel was ineffective for failing to investigate and call alibi witnesses lacks merit and, in turn, appellate counsel was not ineffective for failing to raise the claim on direct appeal. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

Defendant's next claim that he was denied the effective assistance of counsel when trial counsel failed to call Dr. Teklehaimanot and Thomas to testify at trial also lacks merit. Again, decisions regarding whether to call witnesses are presumed to be matters of trial strategy, and failing to call witnesses only amounts to ineffective assistance if it deprives defendant of a substantial defense. See *Payne*, 285 Mich App at 190. In its opinion granting defendant's motion for relief, the trial court found that trial counsel did not present the testimony of either medical witness at trial and concluded, "[B]y failing to properly use collateral evidence of Defendant's limited physical ability as provided by [Dr. Teklehaimanot], Counsel failed to add objective facts to buttress Defendant's defense of physical impossibility." However, defendant failed to overcome the presumption that trial counsel's decision not to call these medical witnesses amounted to sound trial strategy.

At the *Ginther* hearing, when asked why he did not contact Dr. Teklehaimanot to testify at trial, trial counsel said he did not think defendant's physical condition had any relevance to

defendant's alibi that he was not at Lemon's house on the day of the crime. Further, trial counsel testified: "Well, I'm not sure what the point of the physical condition would have been. It certainly was not an alibi. . . . And as I, and as I said, I can't recall exactly at this moment, but I believe that Mr. Hewitt, when he testified, indicated that he had had [sic] an injury." It appears, from this testimony, that his trial strategy was to focus on defendant's assertion that he was not at Lemon's house on February 14, 2010, rather than defendant's theory of physical impossibility. This Court should not second-guess trial counsel's reasonable trial strategy with the benefit of hindsight. See *Dunigan*, 299 Mich App at 589-590.

Further, even assuming trial counsel's performance was objectively unreasonable when he failed to present medical testimony, the error did not deprive defendant of a substantial defense, and no reasonable probability exists that, but for the error, the outcome of trial would have been different. Neither witness would have testified that defendant lacked the physical ability to leave Lemon's house through a window. At the *Ginther* hearing, when asked if defendant could have stepped over a 1-foot tall window frame, Dr. Teklehaimanot said he presumed that defendant could. When asked if defendant could escape from a window that was 2 feet above the ground, even if he had to swing his legs over the window ledge, Dr. Teklehaimanot responded that it was possible. When asked if the pain for a prior car accident prevented defendant from moving his legs over a 1 or 2 foot obstacle, Dr. Teklehaimanot responded, "I never restricted him from that." Thomas, when posed with a similar question, said he would not feel comfortable answering. In addition, defendant testified at trial that he suffered from limited mobility at the time of the incident because of injuries sustained in a car accident on November 26, 2009. Trial counsel also stated, in his closing argument, that the person who committed the robbery would have had to jump out of a window and run away, and contended that defendant's injury made him physically incapable of doing so. Thus, defendant had the opportunity to present his defense of physical impossibility, and he fails to establish prejudice. Accordingly, defendant fails to establish that his trial counsel rendered ineffective assistance or that appellate counsel was ineffective for failing to raise the issue in the prior appeal. See *Ericksen*, 288 Mich App at 201.

Finally, on appeal, defendant argues that trial counsel was ineffective for failing to request dismissal of the felon-in-possession charge because Terry, and not him, possessed the gun during the robbery, and there is no evidence on the record that Terry was a felon at the time. In granting leave to appeal, this Court limited the appeal to those issues raised in the prosecution's application and supporting brief. See *People v Hewitt-El*, unpublished order of the Court of Appeals, entered June 7, 2016 (Docket No. 332946). Although defendant raised the issue in a supplemental motion for relief from judgment, the trial court did not rule on the issue in its order granting defendant's motion for relief from judgment, and the prosecution did not raise this issue in its application for leave to appeal. Thus, the issue is not properly before this Court as it is outside the scope of this appeal. See *id*.

For the reasons discussed, defendant fails to establish that trial counsel was ineffective. Thus, defendant also fails to establish good cause or actual prejudice with regard to appellate counsel's failure to raise the issues in the prior appeal. Therefore, the trial court abused its discretion when it granted defendant's motion for relief from judgment because defendant failed to demonstrate both good cause and actual prejudice for entitlement to relief under MCR 6.508(D).

Reversed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Michael J. Riordan