

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 17, 2013

v

MICHELLE YVETTE COLSTON,

Defendant-Appellant.

No. 306459
Wayne Circuit Court
LC No. 11-004901-FC

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial convictions of armed robbery, MCL 750.529; larceny in a building, MCL 750.360; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a 4th habitual offender, MCL 769.12, to concurrent terms of 9 to 15 years' imprisonment for each of the armed robbery and larceny in a building convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Because defendant was not denied the effective assistance of counsel, we affirm.

Defendant's convictions arise from the robbery of sixty-five year old Laurence Leach at his home on March 18, 2010. According to Leach, he had known defendant for over a year and a half and had given her money in the past to help her out. On March 18, 2010, defendant came to his home late at night and requested money and he told her "no." Leach testified that she left, and then came back less than an hour later, claiming she had misplaced her cell phone in his home. Defendant searched an area that had contained a handgun registered to Leach and when defendant left, Leach noticed that the handgun was missing. Leach testified that defendant came back a third time the next morning, and he confronted her about the missing gun. Defendant then let an unknown male into Leach's home, who pointed Leach's stolen gun at him. Defendant stood against the front door to prevent Leach from leaving while the man proceeded to take a television, cash, a watch, and Leach's cell phone. According to Leach, the man placed the items in a car, and he and the defendant left in the car together.

On appeal, defendant argues she was denied effective assistance by her trial counsel when counsel failed to advise defendant to testify on her own behalf. Additionally, defendant argues her trial counsel was ineffective for failing to request a downward departure from the sentencing guidelines due to defendant's advanced age and mental issues. We disagree.

Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). The trial court’s factual findings, if any, are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made.” *Dendel*, 481 Mich at 130 (quoting *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002)).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

“Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court will not substitute its judgment for that of counsel in matters of trial strategy. *People v Fike*, 228 Mich App 178, 183; 577 NW2d 903 (1998). “Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). “[T]he failure to call a witness 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). A defense is substantial only if it would have affected the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant has failed to show she received ineffective assistance of counsel from her trial counsel in this matter. Defendant’s argument on this issue is somewhat unclear. Defendant argues both that her trial counsel “refus[ed] to allow her to testify,” and that trial counsel “failed to counsel Defendant to testify on her behalf.” However, there is no evidence in the record to support either argument. Defendant stated on the record that counsel explained to her that she had a choice whether to testify and then clearly waived her right to testify. When questioned by the court, she stated as follows:

Q. You had an opportunity to speak with Ms. Longstreet this morning?

A. Yes.

Q. And you [sic] she explained to you that you have a choice, you may take the stand or you may choose not to take the stand. Has that been explained to you?

A. Yes.

Q. And it is your choice, Ms. Colston to not take the stand?

A: Right.

Defendant's clear statements indicate she waived her right to testify. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985).

Even if defendant did not waive her right to testify, defendant failed to establish a prima facie case of ineffective assistance of counsel. Defendant argues that her trial counsel's decision not to introduce evidence, through her, that she was a prostitute, hired by the victim, constitutes ineffective assistance. This claim is meritless; counsel's decision not to present defendant as a prostitute is within the "wide discretion" afforded trial counsel in executing trial strategy. *Odom*, 276 Mich App at 415. And, counsel's decision not to call defendant to the stand to profess this fact would not deprive defendant of a substantial defense. Revealing that defendant was a prostitute, and that the victim had called on her for her services, does nothing to alter the operative facts concerning her armed robbery. The overwhelming evidence against defendant, including her written admission that she took the gun from the victim's house and gave it to the principal prior to the robbery, suggests that counsel's omission of defendant's status as a prostitute would not have changed the trial's outcome. Defendant has failed to carry her heavy burden to rebut the presumption of effective assistance.

Defendant also fails on her claim of ineffective assistance based on her trial counsel's failure to request a downward departure from the sentencing guidelines. Generally, a court must impose a sentence within the applicable sentencing guidelines range. MCL 769.34(2). However, a court may depart from the sentencing guidelines if the court "has a substantial and compelling reason for that departure" and states that reason on the record. MCL 769.34(3). A substantial and compelling reason for departure is "an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases." *People v Young*, 276 Mich App 446, 449-450; 740 NW2d 347 (2007) (citing *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003)) (internal quotation marks omitted).

Defendant argues that her "minimal participation in the armed robbery," "advanced age," and "severe mental illness issues" mandate that defendant's trial counsel argue for a downward departure. Even looking past the absence of any legal authority in defendant's brief supporting her argument,¹ defendant fails to produce any substantial and compelling reason that would support a downward departure.

First, defendant's theft of the victim's gun, her presence during the robbery, her provision of the gun to the principal for use during the theft, her opening of the victim's door for the principal, and her direction of the principal to the victim's bedroom, among other facts, certainly

¹ A defendant's failure to cite any supporting legal authority constitutes abandonment of the issue. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

render her more than a “minimal” participant in the armed robbery—she was an integral part of the commission of the crime.

Second, neither defendant’s age of 50 years, nor her mental illness, are substantial and compelling reasons that could justify a downward departure. Though age and health may be objective and verifiable, they are not of considerable worth in deciding the length of defendant’s sentence in this case. *See Daniel*, 462 Mich at 7 (age is explicitly mentioned in the nonexhaustive list of factors that could be substantial and compelling reasons). Defendant’s age of 50 is certainly not notably advanced, and she will possibly be released in her early 60s. Moreover, defendant’s mental illness is of undocumented severity—there is nothing in the record corroborating the existence or extent of this illness, rendering it unverifiable. And, importantly, trial counsel did not ignore defendant’s mental illness, but presented it to the court during sentencing. The court took note of the fact that defendant had been diagnosed with some mental health issues before sentencing defendant to the minimum under the guidelines range.

Third, defendant has a long history in crime—25 prior offenses—suggesting a futility of rehabilitation, which is the focus of downward departures. *Daniel*, 462 Mich at 7 n 8. Defendant has failed to show trial counsel’s failure to request a downward departure constituted ineffective assistance.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto