STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2013
v	No. 308192 Wayne Circuit Court
RORY LEE DILLARD, a/k/a ROY LEE DILLARD, Defendant-Appellant.	LC No. 11-009424-FH

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions 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 three years' probation for the felon in possession of a firearm conviction and two years in prison for the felony-firearm conviction. We affirm.

On August 25, 2011, police officers came to a residence to arrest defendant on a warrant otherwise unrelated to the instant charges. According to the one of the officer's testimony, when they arrested defendant they asked him if anyone else was present in the home who could be a threat and he responded, "my girlfriend and my twelve gauge [shotgun] in the bedroom." The officer testified that he then conducted a "protective sweep" of the house which involved a walk through and observation of items in plain view. No one else was present, but he discovered a shotgun leaning against a wall in the bedroom. Based on that discovery, defendant was later charged with the firearm related offenses that he now appeals.

Prior to trial, defense counsel moved to exclude the shotgun from evidence on the grounds that it was obtained as the result of an unlawful search. The only witness at the suppression hearing was the police officer and the trial court found that the "protective sweep" search was lawful as necessary for the officers' protection incident to the arrest and that the weapon was found in plain view during that sweep. See *People v Lapworth*, 273 Mich App 424, 430; 730 NW2d 258 (2006).

At trial, Jacqueline Waters, defendant's girlfriend of four years testified. She stated that she owned the house at which defendant was arrested and that he sometimes stayed there. She further testified that the shotgun belonged to her and had originally been owned by her deceased

long-term partner. She explained that when home she kept it in her bedroom behind a dresser where it would not be visible and when going out she would place it under her bed. She further testified that she had never seen defendant hold, load, unload or otherwise handle the shotgun although he had once, on her request, put it under her bed. She also testified that she did not know how to "open the action" on the weapon.

On appeal, defendant's sole argument is that his counsel was ineffective in failing to call Waters as a witness at the suppression hearing as her testimony would have revealed that the gun was not in plain view at the time of the officer's observation. Defendant filed a motion with this Court to remand for an evidentiary hearing pursuant to *Ginther*, but this Court denied defendant's motion and so we review the question based on the record as established. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011).

To establish a claim for ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland*, 466 US at 688. The defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999). This Court determines whether, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Vaughn*, 491 Mich at 670, citing *Strickland*, 466 US at 690. Second, the defendant must show that trial counsel's deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 691 Mich at 669, citing *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland*, 466 US at 694.

As a general rule, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Payne*, 285 Mich App at 190.

Defendant's argument fails to satisfy either prong of *Strickland*. Defense counsel did not ignore the search issue. He brought a motion to suppress the shotgun and at the evidentiary hearing counsel cross-examined the police officer, argued that there was no reason to conduct the search because the officers did not hear other footsteps or voices at the location and that the officer's testimony was not credible. In addition, Waters's testimony was unlikely to be dispositive, or even highly probative, as she was not home at the time of the search and lacked personal knowledge of the location of the shotgun at the moment the officer conducted the search or whether defendant had moved it from its usual location. Further, there was other evidence that showed that defendant was more familiar with the shotgun than was Waters. Waters testified at trial that she never loaded or unloaded the weapon and that she did not know how to open the action. However, defendant knew how to unlock the action. The officer testified that after he found the shotgun, he had difficulty unloading it and that defendant said to him, "It's kind of tricky. There's a little lever on the bottom chamber there to open the pump."

In sum, we do not find that the failure to call Waters as a witness at the suppression hearing fell below the standard of competent counsel nor that there was a reasonable probability that, had Waters been called at that time the result of the proceeding would have been different. *Vaughn*, 491 Mich at 669, citing *Strickland*, 466 US at 694.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro