

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 18, 2013

v

YUL LYNN DUPREE,
Defendant-Appellant.

No. 308411
Wayne Circuit Court
LC No. 11-008861-FH

Before: MARKEY, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to 100 to 240 months in prison. We affirm.

Defendant's sole argument on appeal is that he was deprived of his state and constitutional right to the effective assistance of counsel. We disagree.

Defendant failed to preserve his claim of ineffective assistance of counsel by moving for a new trial or an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Consequently our review is limited to errors apparent on the record. *Id.* at 659. We review a trial court's findings for clear error and the constitutional issue de novo. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

Defendant argues that his trial counsel was ineffective because he failed to call defendant as a witness despite his implicit promise in his opening statement that defendant would testify that he thought the lawn mower was abandoned. Defendant's argument is without merit.

Effective assistance of counsel is presumed. *Johnson*, 293 Mich App at 90. To establish his claim of ineffective assistance of counsel, defendant must show "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Sabin*, 242 Mich App at 659. Defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Id.*; *Johnson*, 293 Mich App at 90. Counsel's performance is reviewed in light of all the circumstances to determine whether the claimed errors were outside a wide range of acceptable professional assistance. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). To demonstrate prejudice, a defendant must show that a reasonable probability exists

that without counsel's errors the result of the proceeding would have been different. *Id.* at 691. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Counsel's decisions regarding what witnesses to call and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to call a witness or present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Russell*, 297 Mich App 707, 720; 825 NW2d 623 (2012). 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).

In this case, defense counsel' performance was not deficient because defendant cannot overcome the strong presumption that counsel's assistance was sound trial strategy. Defense counsel cross-examined Elizabeth Palen, Steve Bruggeman, and Sergeant Jason Hammerle. In his opening statement and closing argument, defense counsel argued the description Bruggeman gave to the police was inconsistent with defendant's appearance. Bruggeman was far away from Palen's home and was not wearing his glasses. In closing argument, defense counsel argued that the individual who allegedly broke into Palen's garage and stole her lawn mower could not have been defendant because Sergeant Hammerle testified that someone who was running away from Palen's home would have traversed the block in a much shorter time than two or three minutes. In addition, defense counsel argued that defendant did not give a reasonable explanation of his presence to Sergeant Hammerle because they did not inform defendant of why he was in custody. According to defense counsel, the individual who purportedly stole the lawn mower probably saw Sergeant Hammerle's vehicle and abandoned the lawn mower. Defendant saw and took the abandoned lawn mower. During closing argument, defense counsel pointed out to the jury that defendant did not have to testify.

Defense counsel did not expressly promise that defendant would testify. By stating that the defense would show defendant thought the lawn mower was abandoned, defendant argues defense counsel implicitly promised defendant would testify. But matters may be proved indirectly. Moreover, defense counsel is permitted changes his strategy as the trial advances so long as the changes do not deprive defendant of a substantial defense. An attorney has a duty to consult with his client about "important decisions" and to keep the defendant informed of important developments in the case. *Strickland*, 466 US at 688. Defense counsel met with defendant before trial and counseled defendant regarding whether he should testify. Defendant agreed at trial that he did not want to testify. This Court will neither substitute its judgment for that of trial counsel in matters of trial strategy nor assess counsel's competence with the benefit of hindsight. *Id.* at 689; *Rockey*, 237 Mich App at 76-77. On this record, counsel's actions did not deprive defendant of a substantial defense; therefore, defendant failed to establish defense counsel's representation fell below an objective standard of reasonableness.

Moreover, even if defense counsel's performance fell below an objective standard of reasonableness, defendant has not demonstrated prejudice. In his closing argument, defense counsel reminded the jury that defendant did not have to testify. In accord, the trial court instructed the jury, "Now every defendant has an absolute right not to testify when you decide

the case must not consider the fact he did not testify. It must not affect your verdict in any way.” The jury could not consider defendant’s failure to testify in rendering its verdict.

In addition, Bruggeman testified that while he was on the front porch of his home smoking a cigarette, he saw an individual crouched between Palen’s vehicle and the garage of 2144 Manchester Boulevard in the city of Harper Woods. Bruggeman’s home was directly across the street from Palen’s and one house to the left. The individual broke into the garage, exited with a lawn mower, and walked down the street with it. Although he was not wearing his glasses and could not give full facial details of the perpetrator, Bruggeman identified the individual as a person wearing a blue, red, and white basketball jersey. Bruggeman informed Palen of the suspected break-in and reported it to the police. Palen noticed the garage door was open about eight inches. The garage door and the side door were closed before Palen entered her home 40 minutes earlier. Sergeant Hammerle responded to the report and observed defendant, wearing a blue basketball jersey, pushing a lawn mower down the street. Defendant was one standard city block away from Palen’s home at this time. The lawn mower that defendant had matched the description Palen gave of hers, and she later confirmed it was her mower. Therefore, defendant has failed to show the existence of a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Vaughn*, 491 Mich at 669, citing *Strickland*, 466 US at 694.

We affirm.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Pat M. Donofrio