STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 5, 2013
v	No. 311414 Delta Circuit Court
ANDREW JOHN ROMASHKO, Defendant-Appellant.	LC No. 12-008545-FH

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a second habitual offender, MCL 769.10, to 51 months to 30 years' imprisonment. We affirm.

I. BASIC FACTS

Defendant was found guilty of stealing medical marijuana plants from Jeffery Koos's home on November 7, 2011. Koos was a licensed medical marijuana patient. Dani Beauchamp, Koos's fiancé, saw an individual that she viewed on the security monitor. The individual was in the basement area near the marijuana plants. Beauchamp ran to the back of the home and discovered defendant at the top of the basement steps carrying a small green plant. Koos and his friend, Ron Micheau, chased defendant from the home, but were unsuccessful in catching him. Defendant's ex-girlfriend, Kathline Gurlea, testified that she overheard defendant and his brother, Josh LaLonde, discuss their plan to rob Koos. According to Gurlea, defendant called her and admitted that witnesses saw defendant steal the marijuana. In addition, defendant and LaLonde returned to her apartment and "unloaded their pockets with tons of marijuana." On the other hand, defendant denied breaking into Koos's residence and stealing marijuana. Specifically, defendant testified as follows on direct examination:

> *Q.* Now, at any time did you break into the Koos residence?
>
> *A.* No.
>
> *Q.* Okay. You don't know his—okay. So you didn't—so that evening you did not break into the Koos residence?

A. No.

Q. You did not steal marijuana on that . . . night from him?

A. No.

Defendant claimed that he went to the residence on November 7, 2011, to trade some Ritalin for Suboxone.[1] Defendant left after the deal fell through.

Before trial, the parties stipulated that the prosecution would not introduce testimony regarding a July 4, 2011, incident in its case-in-chief. As a result of defendant's testimony above, Koos testified on rebuttal that someone broke into his residence on July 4, 2011, and stole marijuana plants. However, he acknowledged never reporting the incident to the police. Gurlea also testified on rebuttal that she awoke from a nap on July 4, 2011, to find defendant "throwing pot all over" her and covering her bed with marijuana. Defendant told her that he got the marijuana by breaking into the Koos's residence. Defendant requested permission to call a surrebuttal witness to refute the testimony about the July 4, 2011, break-in. Defendant did not specify who he planned to call as a witness, or provide an offer of proof. The trial court denied defendant's request, finding the matter "fully litigated."

II. SURREBUTTAL TESTIMONY

Defendant argues that the trial court abused its discretion in denying his request to present surrebuttal testimony. We disagree.

This Court reviews a trial court's decision regarding surrebuttal testimony for an abuse of discretion. *People v Katt*, 248 Mich App 282, 301; 639 NW2d 815 (2001). An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). Whether a defendant was denied the constitutional right to present a defense is a question that we review de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

A criminal defendant's constitutional right to present a defense is not absolute. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). Rather, it must be balanced with the court's legitimate interest in regulating the criminal trial process. *Id.* Michigan has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials," and such rules "do not abridge a defendant's right to present a defense." *Id.* "Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (internal quotation marks omitted). However, the trial court may refuse to allow a defendant to produce surrebuttal testimony if that defendant has already presented

[1] Suboxone is a prescription drug used to treat opioid addiction. See *Physicians' Desk Reference* (2006).

sufficient evidence on the matter, and further proofs are not necessary for the resolution of the issues. *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985).

Here, defendant presented evidence during his testimony, and during the cross-examination of Koos and Gurela, in an attempt to question their credibility. Defendant denied that he stole marijuana from Koos's home. Instead, defendant contended that he left Koos's home after a failed drug exchange. Defendant testified that he knew that Koos grew marijuana in his home, but did not know where the plants were located. During cross-examination of Koos in rebuttal, Koos admitted that he never reported the July 4, 2011, incident to police. In addition, defendant cross-examined Koos regarding Koos's consumption of marijuana and Suboxone, which defense counsel characterized as having "mind-altering effects." Further, defendant explained that his breakup with his ex-girlfriend had been "very bad." On cross-examination, Gurlea admitted that she had been in rehabilitation treatment for using Suboxone, although she also indicated that she was not taking any illicit substances on November 7, 2011. Thus, defendant already presented sufficient evidence on the matter, and further proofs were not necessary to the resolution of the issues. See *Solak*, 146 Mich App at 675.

Moreover, defendant failed to identify the specific alibi witness and the substance of their testimony. Rather, defendant argues on appeal, as he did in the trial court, that he should have been allowed to present surrebuttal evidence because the evidence of the alleged July 4, 2011, break-in was "highly prejudicial." "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims[.]" *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (original citation omitted). The assertion that the weight of the evidence would have been undermined because the credibility of the rebuttal witnesses would have been compromised by unspecified surrebuttal evidence is completely speculative. Therefore, the trial court did not abuse its discretion in denying defendant's request to present surrebuttal testimony. See *Katt*, 248 Mich App at 301.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his trial counsel provided ineffective assistance. We disagree.

To properly preserve an ineffective assistance of counsel claim, a defendant must move for a new trial or seek an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). Defendant did neither. Therefore, the issue is unpreserved.

This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *Id*. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). The trial court's findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Effective assistance of counsel is presumed. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). 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 that "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 Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). 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.

We agree with defendant that his trial counsel's assistance fell below an objective standard of reasonableness. The parties stipulated before trial that the prosecution would not introduce testimony regarding the July 4, 2011, incident in its case-in-chief. However, defense counsel specifically asked defendant, "Now, at any time did you break into the Koos residence?" Defendant responded, "No." This assertion permitted the prosecution to raise the alleged July 4, 2011, break-in through rebuttal testimony.

Nonetheless, defendant has not demonstrated prejudice under the second prong of *Strickland*. Defendant testified that he knew that Koos grew marijuana in his home even though defendant did not know the location of the plants within Koos's home. Moreover, several eyewitnesses testified that they saw defendant in Koos's home. Koos and Micheau testified that they saw defendant in the back of the house after Beauchamp saw defendant at the top of the basement steps carrying a small green plant. All three witnesses testified that defendant ran when Koos and Micheau confronted defendant. Gurlea testified that defendant and LaLonde discussed their plans to steal the marijuana plants in her presence. Similarly, Gurlea saw defendant return to her home with pockets full of marijuana. 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.

Affirmed.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly