

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY EUGENE POSEY,

Defendant-Appellant.

UNPUBLISHED
February 25, 2014

No. 311606
Wayne Circuit Court
LC No. 12-002266-FC

Before: MURPHY, C.J., and M.J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was acquitted of a carjacking charge, MCL 750.529a. Defendant was sentenced to 126 to 240 months' imprisonment for the armed robbery conviction, two years' imprisonment for the felony-firearm conviction, and one to five years' imprisonment for the felon-in-possession conviction. We affirm.

This case arises from an armed robbery in which: the victim was sitting in his parked vehicle; defendant and another man, both of whom the victim knew, opened the vehicle's front doors and placed drawn guns to the victim's head; defendant took cash, a chain, and a ring directly from the victim; and the perpetrators eventually fled in the vehicle, leaving the victim behind. On appeal, defendant argues that his trial counsel rendered ineffective assistance when he called only one alibi witness. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move, in the trial court, for a new trial or a *Ginther*¹ hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Failure to do so limits this Court's review to errors apparent on the record. *Id.* Because defendant did not file a motion for a new trial or an evidentiary hearing regarding his claim of ineffective assistance of counsel, our review is limited to the record.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

We review de novo the constitutional question whether defendant was denied his Sixth Amendment right to effective assistance of counsel; however, underlying factual findings are reviewed for clear error. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the well-established principles applicable to an ineffective assistance claim:

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test. First, the defendant must show that counsel's performance was deficient.² This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and internal quotation marks omitted.]

“Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Of course, the trial strategy must be sound, and “a court cannot insulate the review of counsel’s performance by [simply] calling it trial strategy.” *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). “Initially, a court must determine whether the strategic choices were made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* (internal quotation marks, alteration, and citation omitted). “In general, 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 (citation omitted). “‘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), quoting *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant has not shown that he was deprived of a substantial defense. In fact, defendant admits that one alibi witness “was able to establish [that] [d]efendant was . . . at an after[-]hours club during the time of the offense.” Defendant’s trial counsel also called to the stand defendant’s girlfriend, who testified that she spoke to defendant by telephone around the time of the robbery, that she heard loud music in the background, and that defendant was

² Establishing deficient performance requires a showing that counsel’s “representation fell below an objective standard of reasonableness[.]” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

intoxicated when he returned, implying that defendant was still at a club when the victim was robbed, consistent with defendant's alibi. Defendant himself testified that he was with friends on Belle Isle, at an after-hours club, and at a restaurant on the evening and early morning in question. Defendant has not overcome the presumption that his attorney's choice of witnesses constituted sound trial strategy.

Moreover, defendant simply sets forth the list of names contained on defendant's alibi notice, claiming that the named persons should have been called to testify. Two of the six individuals named in the alibi notice testified on defendant's behalf, as alluded to above. With respect to the other four individuals, defendant fails to present any affidavits indicating that they were prepared to testify in support of defendant's alibi. Indeed, defendant's brief does not even state who these individuals are in relationship to defendant and the circumstances surrounding the events that unfolded, nor does defendant even make an assertion regarding their expected testimony; we simply have a list of names. Defendant thus fails to satisfy his burden of establishing the factual predicate for his ineffective assistance claim. *Carbin*, 463 Mich at 600. And he entirely fails to establish the requisite prejudice. *Id.*

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause