

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 21, 2013

v

ERIC SCOTT GENTRY,

No. 311741
Washtenaw Circuit Court
LC No. 11-000074-FC

Defendant-Appellant.

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant, Eric Scott Gentry, appeals as of right his jury trial conviction of unarmed robbery, MCL 750.530. The trial court sentenced defendant to two years of probation. We affirm.

I. FACTUAL BACKGROUND

The victim was sitting at a bus stop when defendant approached him and offered to sell him Xanax. The victim declined the offer and said that he did not have any money, but defendant insisted that the victim owed him \$60. The victim did not know defendant and did not owe him \$60.

Because the victim was feeling paranoid, he stood up and backed away from defendant. Defendant pursued the victim with his hands raised, so the victim struck defendant across the neck with his cane. Defendant rushed at the victim, and the victim lost his balance and fell. Defendant grabbed the victim's cane and hood, began to jerk the victim, and kicked him in the head and body. When a woman in a car drove by, defendant told her that the victim was a crackhead who had robbed defendant of \$60 and that she should call the police. Defendant eventually let the victim rise. The victim gave defendant \$11 and defendant left.

The victim waited for the police to arrive and described defendant to the officer. The police eventually showed the victim a photo array of possible suspects, and the victim immediately identified defendant as his attacker. At the time of incident, a telephone call from what sounded like an intoxicated white male was made to the police department. The caller said that someone stole money from him and hit him with a cane. The telephone number from the caller did not match defendant's number.

Joy Julien, a worker at the dry cleaners across the street, was an eyewitness to the robbery. She testified that she saw defendant and the victim arguing and heard defendant say that the victim owed him money. Julien testified that defendant hit the victim a couple of times, that the victim fell, and it was not until the victim was on the ground that he hit defendant with his cane. While Julien acknowledged that the police report indicated that she had said a customer had told her about the fight, that she could not identify defendant, and that the victim struck defendant first with his cane, Julien testified that the police report was not accurate.

After the prosecution rested, defendant called Alena Hamlin, a traumatic brain injury specialist, to testify about her involvement with defendant after an automobile accident. Hamlin explained that she was responsible for defendant and was involved in his medical case management and his daily activities. She testified that she never witnessed defendant engage in activities like fast running or walking, and that he had difficulty when lifting one of his children. She also testified that she did not think defendant could jerk 250 pounds even a half of foot, which was the victim's weight at the time of the accident.

The jury found defendant guilty of unarmed robbery and he was sentenced to two years probation. Defendant now appeals.

II. EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Defendant contends his trial counsel provided ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246, 249 (2002). "[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

B. Background Law

"A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden." *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). A defendant first "must show that counsel's performance was deficient." *Id.*, quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In other words, defendant must show that "counsel's performance fell below objective standards of reasonableness[.]" *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). A "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463 Mich at 600. "Second, the defendant must show that the deficient performance prejudiced the defense" meaning that there is a reasonable probability "that, but for counsel's error, the result of the proceeding would have been different." *Id.*, quoting *Strickland*, 466 US at 687.

C. Investigation & Defense Theory

Defendant first argues that defense counsel was ineffective for failing to adequately investigate and explore possible testimony from injury specialist Alena Hamlin and the defense theory that physical limitations rendered defendant incapable of committing the crime. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses."

People v Chapo, 283 Mich App 360, 371; 770 NW2d 68 (2009). However, the failure “to interview witnesses does not itself establish inadequate preparation.” *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). “It must be shown that the failure resulted in counsel’s ignorance of valuable evidence which would have substantially benefited the accused.” *Id.*

In the instant case, nothing in the record indicates that counsel behaved objectively unreasonable. Defendant argues that further investigation would have revealed that defense counsel’s theory, namely, that defendant’s physical limitations rendered him incapable of committing the alleged acts, was designed to fail. He contends that his counsel should have discovered through further investigation that Hamlin was unable to testify regarding his physical limitations. However, defense counsel succeeded in eliciting testimony from Hamlin, a traumatic brain injury specialist, that she had never seen defendant run, walk fast, or do a push up or sit up. She also testified that defendant had difficulty when physically lifting or holding one of his children. She further testified that based on her personal observations, she did not think defendant could “snatch” or “jerk” 250 pounds, the victim’s weight, a foot or half a foot on the ground. Therefore, contrary to defendant’s argument, defense counsel successfully presented evidence of defendant’s physical limitations, which could support a finding that defendant had not committed the alleged acts. Because counsel succeeded in presenting this evidence to the jury, defendant has failed to demonstrate that any change in counsel’s behavior would have altered the outcome of the trial. *Carbin*, 463 Mich at 599.

Defendant, however, contends that an effective attorney should have pursued a different defense theory at trial with a focus on the alleged exculpatory evidence of a 911 call from an intoxicated white male claiming to be the victim of the crime. An initial flaw with this argument is that it rests squarely within the realm of trial strategy, and “we will not second-guess strategic decisions with the benefit of hindsight.” *People v Dunigan*, 299 Mich App 579, 590; 831 NW2d 243 (2013).

Furthermore, trial counsel did present evidence of this defense theory. Defense counsel specifically elicited testimony from the officer that the phone number of the intoxicated white man, who called claiming to be the victim of a crime and to being struck by a cane, was not defendant’s phone number. Defense counsel also emphasized this point during closing arguments as indicative of defendant’s innocence. While defendant now argues that counsel should have emphasized this evidence more, “[a] difference of opinion regarding trial tactics does not amount to ineffective assistance of counsel.” *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987). Because evidence of this defense theory was presented to the jury, we find that a different result was not reasonably probable. *Carbin*, 463 Mich at 599.

D. Impeachment

Next, defendant argues that trial counsel’s failure to impeach the victim based on prior convictions of possession of a controlled substance and uttering and publishing constituted ineffective assistance of counsel. Even assuming that counsel behaved objectively unreasonable, reversal is not warranted. Defendant has not established a reasonable probability that but for counsel’s alleged errors, the result of the proceedings would have been different. *Carbin*, 463 Mich at 599. Even if trial counsel had attempted to impeach the victim, Julien, an unrelated

third-party, independently testified that she saw defendant and the victim arguing over money, saw defendant strike the victim, and saw defendant walk away after the confrontation ended. While Julien did not see an exchange of money, defendant is not arguing that the perpetrator did not take money but only that he is not the perpetrator. Julien testified that defendant was the man she saw arguing and attacking the victim. Therefore, defendant has failed to demonstrate that a different result was reasonably probable. *Carbin*, 463 Mich at 599.

E. Witnesses

Finally, defendant argues that defense counsel provided ineffective assistance of counsel when failing to call an expert witness on eyewitness identification. Decisions regarding what witnesses to call and what questions to ask are “presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks and citation omitted). “[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.*

Here, defense counsel conducted a thorough cross-examination of Julien, an eyewitness, repeatedly questioning her about changing her story from what was reported in the police report. Defense counsel also questioned Julien about her description of the perpetrator’s physical appearance, which did not match the description of defendant that defense counsel elicited from Hamlin. Defense counsel likewise cross-examined the victim about his description of the perpetrator, in an attempt to undermine the identification of defendant. Counsel also referenced these discrepancies in closing arguments to emphasize that the eyewitnesses lacked credibility.

Because defense counsel presented evidence to dispute the eyewitness testimony, we do not find that the failure to call any expert on this matter deprived defendant of a substantial defense. *Dixon*, 263 Mich App at 398. This is especially true in this case, as the reliability of Julien’s eyewitness testimony was readily apparent because defense counsel repeatedly questioned her about her testimony conflicting with the police report. Moreover, defendant has not overcome the strong presumption that defense counsel’s decision not to call an expert witness was sound trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999) (“[t]rial counsel may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate.”). Thus, defendant’s claim of ineffective assistance of counsel fails.

III. CONCLUSION

Defendant was not denied the effective assistance of counsel based on defense counsel’s investigation, strategic decisions regarding what witnesses to call, or elicitation of evidence at trial. Because further development of the record to determine if defense counsel was ineffective is unwarranted, we deny defendant’s request to remand for an evidentiary hearing. We affirm.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan