STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2007
v	No. 272142 Monroe Circuit Court
BILLY JOE RICE, Defendant-Appellant.	LC No. 05-034907-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals from convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 15 to 40 years on the robbery conviction, to be served consecutively to the mandatory two-year term for felony-firearm. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that he is entitled to a new trial because he received ineffective assistance of counsel. Specifically, defendant says that counsel was ineffective for failing to call a witness to testify about the unreliability of eyewitness identification. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001) (citations omitted).]

The decision to call an expert witness is a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

"Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record here shows that the jury was made keenly aware that identification was the key issue and that they would have to determine whether the prosecutor's witnesses were credible regarding their identification testimony. This was accomplished through the cross-examination of the prosecution witnesses regarding the description of the suspect and subsequent identification of defendant, the presentation of alibi testimony, the closing arguments, and the instructions on judging the credibility of witnesses in general and the reliability of witness identification testimony in particular. Therefore, the failure to call an expert to testify about the unreliability of eyewitness identification did not deprive defendant of a substantial defense, and trial counsel was not ineffective for failing to present "expert testimony that [the jury] may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

Defendant also avers that the verdict was against the great weight of the evidence. The trial court's ruling on a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *People v Ross*, 145 Mich App 483, 494; 378 NW2d 517 (1985).

On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction if the court believes the verdict has resulted in a miscarriage of justice. MCR 6.431(B). A motion for a new trial may be granted where the verdict was manifestly against the clear weight of the evidence, i.e., the evidence so clearly weighed in the defendant's favor that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). In reviewing a motion for a new trial on the ground that the verdict was against the great weight of the evidence, the judge must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds by *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Generally, a verdict may be vacated only when it is not reasonably supported by the evidence and was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998); *DeLisle*, *supra* at 661. The resolution of credibility questions is within the exclusive province of the jury, *DeLisle*, *supra* at 662, and this Court may not resolve them anew. *Gadomski*, *supra*. In short, "unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Lemmon*, *supra* at 645-646 (internal quotation marks and citation omitted).

The robbery occurred at a market in Monroe. Sue Shahin, the clerk, and Lois Calvin, a customer, provided descriptions of the suspect that were more or less consistent but did not exactly fit defendant. Calvin assisted in the creation of a composite sketch that was not an exact likeness of defendant. Nevertheless, both women identified defendant at a photographic showup,

in a corporeal lineup, and at trial. Calvin testified that, to her, defendant "looks like the same person exactly" and noted that he had the same distinguishing facial mark she had seen on the robber. Defendant and his witnesses testified that defendant could not have committed the crime because he had difficulty walking and was at home in Flint at the time of the robbery. There were no exceptional circumstances that would necessitate rejection of Shahin's and Calvin's testimony, and thus the credibility of the witnesses was a question of fact for the jury, not the trial court, to determine. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial. See *McCray, supra* at 638.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder