

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE JOSEPH WEATHERS,

Defendant-Appellant.

UNPUBLISHED

September 13, 2007

No. 271367

Oakland Circuit Court

LC No. 2006-206665-FH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of installing or using a device for eavesdropping in a private place, MCL 750.539d. Defendant appeals as of right, and we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged and convicted following the discovery of a VCR and camera in the victim's bedroom. Three days after the discovery, defendant went to the victim's house and took the VCR and camera. The VCR and camera were recovered from the Salvation Army, where defendant worked part-time. Defendant, a close family friend, had a key to the victim's house and watched the house when her family was on vacation.

Defendant claims on appeal that, throughout the proceedings below, he was denied the effective assistance of counsel. Because defendant did not move for a new trial or for a *Ginther*¹ hearing, our review of defendant's claims are limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish a claim for ineffective assistance of counsel, a defendant must show "that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *Id.* A defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Sabin (On*

¹ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

Second Remand), 242 Mich App 656, 659; 620 NW2d 19 (2000). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Matuszak, supra* at 58. Further, defendant must show that counsel's deficient performance was prejudicial "to the extent that, but for counsel's error, the result of the proceedings would have been different." *Mack, supra* at 129.

Defendant first argues that defense counsel was ineffective because he was unprepared to argue the motion to suppress the videotape of his interview with Detective Frank Bonnette. It is undisputed that counsel failed to comply with the pretrial order, which required that all motions in limine be heard at least 14 days prior to trial. Nonetheless, defendant has not shown that counsel's performance relating to the motion to suppress was, in any manner, deficient. *Mack, supra* at 129. Because counsel was not given the videotape of defendant's interview until the day before trial, counsel moved to suppress the videotape at the first available opportunity which happened to be the first day of trial. Counsel's conduct in moving to suppress on the first day of trial thus did not fall below an objective standard of reasonableness. Moreover, defendant complains that his trial counsel was ineffective for failing to support his motion with citation to relevant authority. On appeal, however, defendant has not provided us with any authority to support his suggestion that suppression was warranted. Accordingly, defendant has failed to establish that the motion to suppress would have had merit if properly supported. Defendant has not met his burden of showing that, but for counsel's failure to cite supporting authority, the outcome of the suppression motion would have been different. Therefore, defendant has not established his claim of ineffective assistance of counsel. *Mack, supra*.

Defendant also argues that defense counsel was ineffective because, at the time of jury selection, defense counsel was unaware whether he would call any witnesses. Although counsel stated that he did not know whether he would call any witnesses at trial, this statement does not establish that counsel was unprepared for trial. Counsel may not have known what witnesses he would call because he was unsure of what evidence the prosecution would present. In addition, counsel may not have wanted to name witnesses to the jury venire if he was unsure whether they would be called at trial. On the record before us, we cannot conclude that defense counsel's statement was not sound trial strategy. Accordingly, defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy when he stated that he did not know, at the time of jury selection, if he would be calling any witnesses. *Sabin (On Second Remand), supra* at 659.

Defendant next argues that defense counsel was ineffective for failing to use all his peremptory challenges during jury selection. Generally, counsel's decisions relating to jury selection are a matter of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Defendant has failed to set forth the identity of any jurors he believes should have been excused by counsel. Thus, defendant has failed to establish the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not established that defense counsel's failure to use all peremptory challenges fell below an objective standard of reasonableness. *Mack, supra*.

Defendant finally argues that counsel failed to aggressively advocate for him during the second day of trial because counsel made few objections, had short cross examinations, and did not call him or any other witness to testify. Decisions on what evidence to present and whether to call or question witnesses are matters of trial strategy. *People v Dixon*, 263 Mich App 393,

398; 688 NW2d 308 (2004). “[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.*

Defendant has failed to set forth any objections that counsel should have made, any questions that counsel should have asked witnesses on cross examination, or any witnesses that counsel should have called to testify. Thus, he has not met his burden of establishing the factual predicate for these claims of ineffective assistance of counsel. *Hoag, supra.* In addition, with respect to his claim that defense counsel should have called defendant to testify, we conclude that counsel was not ineffective. Defendant, after being advised of his right to testify, stated that he chose not to testify. Because defendant chose not to testify, we cannot conclude that counsel’s failure to call defendant as a witness constitutes ineffective assistance of counsel. *Mack, supra.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto