

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RICHARD SMIELEWSKI,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2008

No. 278570

Wayne Circuit Court

LC No. 06-014521-01

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529. Defendant was sentenced to 9 to 20 years' imprisonment for the armed robbery conviction, as a fourth habitual offender, MCL 769.12. Defendant appeals as of right. We affirm.

Defendant was convicted of robbing a party store at gunpoint. After arriving on the scene of the robbery, the police followed footprints in the snow to an adjacent alley where they discovered defendant hiding. Defendant began to run when he saw an officer approaching him, but the police caught him before he could escape. The footprints also led the police to a nearby trashcan where they found clothing, gloves, and a gun, all of which matched the description given to them by the store clerk and defendant's accomplice, who was already in custody. In addition, the police noticed that when defendant was apprehended, he was wearing only a t-shirt, despite the cold and snowy weather. At the police station, crumpled up dollar bills fell from the inside of defendant's pants.

Defendant argues that he was denied the effective assistance of counsel at trial. The determination of whether defendant has received ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court must review the trial court's findings of fact for clear error, while reviewing the court's constitutional determinations de novo. *Id.* Defendant filed a motion to remand in this Court for an evidentiary hearing, however, that motion was denied because this Court was not persuaded of the need to remand. Therefore, our review of defendant's claims is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Effective assistance of counsel is presumed and, therefore, defendant carries a high burden of successfully proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Generally, to overcome this presumption, a defendant must establish: (1)

counsel's performance fell below an objective standard of reasonableness pursuant to the prevailing norms of the profession; (2) a reasonable probability exists that, but for counsel's deficiency, the outcome of the proceedings would have been different; and (3) the resulting outcome was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant first argues that his trial counsel failed to properly prepare for trial. He asserts that counsel failed to discuss the case with him before the day prior to trial, which led to various misunderstandings on defendant's part regarding the status of his case. In addition, defendant argues that because counsel did not meet with him sooner, counsel did not learn of potential witnesses who could provide valuable testimony. When claiming ineffective assistance of counsel due to failure to prepare for trial, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The failure to interview witnesses, alone, does not establish lack of preparation. *Id.* at 642. There must be some additional showing that the failure "resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id.*

Defendant presents nothing on appeal to show counsel's preparedness fell below the objective standard of reasonableness. Counsel did meet with defendant on prior occasions, and the trial judge clarified that counsel had been in contact with the court and the prosecutor regarding defendant's case as well. The judge also verified that defendant was aware of all discovery materials relevant to his case. Furthermore, counsel repeatedly assured the judge that he was prepared to try the case, made all necessary and justified objections and, overall, acted as a rigorous advocate for defendant throughout the trial.

Defendant also argues that counsel was not prepared because he did not learn of potential witnesses. Defendant's accomplice testified that before the incident, defendant received a phone call from his brother or father regarding a debt defendant owed. The accomplice testified that defendant held a gun to the store clerk's head, demanding money from the register and from the clerk's pockets. After running from the party store, defendant's accomplice was caught and defendant hid in a nearby alley. Defendant asserts that his father or brother could have testified that they did not call him on the day in question, and that defendant did not owe them any money.

First, the record contains no evidence to show that defendant's brother or father would have testified at all. In addition, there are no affidavits or any offer of proof addressing the substance of the testimony of these witnesses. Defendant simply provides the bare assertion that his father or brother could have testified about not calling him. Furthermore, the testimony of defendant's brother or father would hardly be considered "valuable evidence." Defendant testified on his own behalf that he never received a phone call from his family. The jury was also fully aware that the accomplice's testimony was induced by a plea agreement with the prosecution. Therefore, the jury was free to determine whether they believed this phone call did or did not occur. Regardless of whether the phone call occurred, there is no record evidence to show the testimony would negate the additional evidence presented against defendant, or more importantly, would have affected the outcome of the trial. We conclude that counsel was sufficiently prepared for trial.

Next, defendant argues that counsel's failure to present his father or brother as a witness constituted ineffective assistance of counsel. We have already concluded that defendant has not shown the potential testimony would have substantially benefited his case. Furthermore, the cases defendant relies on are distinguishable. Those cases include situations where potential witnesses were actual eyewitness to the events at issue, or could have provided defendant with a legitimate alibi. See *People v Grant*, 470 Mich 477, 494-495; 684 NW2d 686 (2004); *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990). Here, neither defendant's father, nor his brother, could testify as an eyewitness or could provide defendant with an alibi. Unlike the cases cited by defendant, their testimony would likely have no direct influence over what the jurors believed to be the events of the day in question. The fact that they may or may not have called defendant would not provide defendant with a substantial defense to the evidence against him.

Finally, defendant argues he was denied effective assistance of counsel because counsel failed to object to improper rebuttal testimony presented by the prosecution. Our Supreme Court has held that "[a]s long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Defendant testified that he had nothing to do with the robbery. He explained that he was at a nearby house, buying marijuana, when everyone in the house started running. Defendant asserts that he decided to run with the others from the house, which is why he was in the alley near the store when police saw him. He further testified that he was assaulted by one of the officers when he was put in the squad car, and that he told officers he did not know what they were talking about when they questioned him about where the gun was. The prosecution then called one of the arresting officers to the stand. The officer testified that he did not see anyone else running in the area where defendant was found, that he never assaulted defendant when he put him in the squad car, and that defendant eventually told him that the gun was in a trashcan in the alley.

This Court has held that counsel's failure to raise "futile" objections does not constitute ineffective assistance of counsel. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). It is reasonable to conclude that if counsel had objected to the officer's testimony on grounds that it was improper rebuttal evidence, the trial judge would have overruled that objection because the rebuttal was directly responsive to defendant's own testimony. Therefore, counsel's failure to object to it cannot be deemed ineffective assistance of counsel.

This Court will not substitute its own judgment for defense counsel's trial strategy or use the benefit of hindsight to determine counsel's effectiveness. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant has not shown that the record establishes that counsel's performance fell below an objective standard of reasonableness, and we cannot conclude that counsel's decisions were anything but trial strategy. In light of the evidence against defendant, he has also failed to show that his case was prejudiced by the deficiencies of

counsel that he alleges. Therefore, defendant has not overcome the presumption that counsel's assistance was effective.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Christopher M. Murray  
/s/ Karen M. Fort Hood