

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 18, 2017

v

JEROME CHRYST ROSBARSKY,

Defendant-Appellant.

No. 331653 & 332251
Eaton Circuit Court
LC Nos. 15-020223-FC &
15-020224-FC

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from his jury-trial convictions of two counts of armed robbery, MCL 750.529. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to serve two concurrent terms of 35 to 90 years' imprisonment. We affirm.

I. BASIC FACTS

Two employees of a Payless ShoeSource testified that on May 2, 2014, their store was robbed at gunpoint. They described the suspect as a male clad in jeans and a hooded sweatshirt wearing sunglasses and a bandana over his face. The employees of a Game Hits video game store and a Little Caesars pizzeria respectively testified that a similarly dressed person robbed their stores at gunpoint on May 17, 2014. An employee of the pizzeria reported that the suspect fled the scene in a brown or tan four-door Chevrolet. Defendant was pulled over by a Lansing police officer on May 17, 2014 in a gold colored Chevrolet Cavalier following the Little Caesars robbery, and a pat-down search yielded "wadded up" cash in defendant's pants pocket. On May 20, 2014, an Eaton County Sheriff's Deputy performed a traffic stop on a gold colored Chevrolet Cavalier, and found defendant driving the vehicle, along with passenger Ashley Erickson inside. At trial, Erickson identified defendant, who was her mother's boyfriend, as the armed robber for all three robberies, and admitted that she assisted him by keeping watch over the targeted locations in advance and then driving the getaway car.

II. MISTRIAL

Defendant contends that the trial court abused its discretion when it denied his motion for a mistrial after a witness mentioned that defendant had previously spent time in prison. A trial

court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich App 508, 513-514; 603 NW2d 802 (1999). Further, "a mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). "[A]n unresponsive, volunteered answer to a proper question is not grounds for granting a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

In the instant case, the prosecution asked witness Daryl Smith how well he knew defendant, and Smith replied that defendant lived with him for a while, before adding that he knew that defendant had been to prison once but did not know the reason for the incarceration. Defendant subsequently moved for a mistrial, but the trial court denied the motion on the grounds that Smith's response to the prosecutor's question was benign where it could be characterized as nonresponsive, rather than elicited by the prosecution. The trial court also noted that a curative instruction could be provided. The trial court gave defense counsel the option of having the jury receive an immediate curative instruction, but defense counsel opted for a curative instruction included with the final instructions to the jury. The trial court provided the following instruction, to which defense counsel and the prosecution agreed: "There was testimony from Daryl Smith about defendant's past. You are not to consider this as evidence."

The trial court correctly determined that the testimony about defendant's time in prison was nonresponsive and volunteered in response to the prosecution's proper question to Smith about how well he knew defendant. See *Haywood*, 209 Mich App at 228. Further, the improper testimony did not impair defendant's ability to receive a fair trial where it was mentioned only once, and the error complained of was not "so egregious that the prejudicial effect can be removed in no other way." *Lumsden*, 168 Mich App at 299. Indeed, the trial court issued a curative instruction, and "[i]t is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (citation omitted).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that he received ineffective assistance from trial counsel.¹ "[A] defendant must move in the trial court for a new trial or an evidentiary hearing to preserve the defendant's claim that his or her counsel was ineffective." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). In this case, defendant did not move in the trial court for a new trial or an evidentiary hearing, leaving the issue of whether his trial counsel was ineffective unpreserved.

¹ For clarity of analysis, in this portion of our opinion we will refer to defense counsel as "trial 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 (2002). However, where there has been no motion for a new trial or evidentiary hearing on the issue of ineffective assistance of counsel in the trial court,² our review is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

“To prove that [trial] counsel was not effective, the defendant must show that (1) [trial] counsel’s performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel’s deficient performance prejudiced the defendant.” *Heft*, 299 Mich App at 80-81 (footnote and citations omitted). “The defendant was prejudiced if, but for [trial] counsel’s errors, the result of the proceeding would have been different.” *Id.* at 81 (footnote and citation omitted). “The defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy.” *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

In the instant case, defendant contends that trial counsel was ineffective for his failure to investigate and interview a number of witnesses who allegedly would have testified favorably on behalf of defendant at trial.³ We recognize that the failure to undertake adequate investigation will constitute ineffective assistance “if it undermines confidence in the trial’s outcome[,]” and failure to call a witness constitutes ineffective assistance of counsel if the defendant is deprived of a substantial defense. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (citation omitted). However, trial counsel’s decisions regarding whether to call or question a specific witness are presumed to implicate trial strategy. *People v Putnam*, 309 Mich App 240, 248; 870 NW2d 593 (2015). There is no indication in the existing record that trial counsel failed to undertake an adequate investigation in the course of representing defendant in the trial court. To the extent that defendant asserts that trial counsel ought to have investigated numerous witnesses, defendant bases this argument on bare allegations in his handwritten affidavits submitted with his motion to remand, which were not part of the lower court record. See MCR 7.210(A) (“Appeals to the Court of Appeals are heard on the original record.”); *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008) (declining to consider affidavits submitted with a defendant’s motion for remand where an evidentiary hearing was not held in the trial court). In any event, even considering the content of defendant’s affidavits, we conclude that defendant’s claims are without merit. Defendant bears the burden of establishing the factual predicate for a claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In this case, defendant’s affidavits provided only his own assertions and bare allegations that certain potential witnesses would have testified favorably to him at trial. Notably, defendant has not proffered affidavits from the potential witnesses specifically elucidating the substance of

² Defendant did move this Court for remand to hold an evidentiary hearing, but this Court denied the motion. *People v Rosbarsky*, unpublished order of the Court of Appeals, entered September 16, 2016 (Docket Nos. 331653 & 332251).

³ Specifically, defendant names Kadera Jackson, Ian McDaniels, Kimberly Goodwin and Sheila Smith.

their proposed testimony. Therefore, defendant has simply not established the factual predicate to support his claim.

Defendant also asserts that trial counsel was ineffective because he withdrew an objection to certain other-acts evidence the prosecution sought to introduce at trial. The record confirms that the prosecution filed a notice of intent to introduce under MRE 404(b)⁴ evidence relating to defendant's alleged robbery of a Little Caesar's pizzeria. The prosecution asserted that evidence of defendant's role in that robbery, for which he was not facing charges at the time of trial, was admissible where it could be used, among other things, to prove defendant's identity, and show his similar "preparation, scheme, plan, or system in doing an act[.]" Trial counsel initially moved the trial court to exclude this evidence, but at the motion hearing conceded that the proposed evidence was admissible. Trial counsel explained that he had mistakenly believed that the evidence related to a pizzeria robbery that occurred "years ago[.]" but now understood that the witness offering this evidence was going to testify that she helped defendant rob the pizzeria in question only 30 minutes after one of their robberies for which defendant faced charges at trial. Defense counsel conceded that the evidence was admissible under MRE 404(b) in light of this timing, and there being "an identity issue[.]"

Defendant contends that trial counsel's concession constituted ineffective assistance because trial counsel should have argued that the evidence relating to the pizzeria robbery should have been excluded under MRE 403, which provides that even relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice" We note that defendant cannot establish any prejudice from trial counsel's not having argued the applicability of MRE 403 because the trial court, after accepting trial counsel's concession, referring to the proffered evidence stated, "in terms of scheme or plan and identity, it seems very probative and, certainly, not substantially outweighed into any unfair prejudicial effect [sic]." Accordingly, any argument on the part of trial counsel regarding the applicability of MRE 403 would have been futile. Counsel is not ineffective for declining to advance a futile or meritless argument. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant also asserts that trial counsel had conflicts of interest that rendered his assistance ineffective. In order to establish ineffective assistance on the basis of counsel's conflict of interest, the defendant must show "that an actual conflict of interest adversely affected his lawyer's performance." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998) (citation omitted). Notably, defendant has abandoned this issue on appeal where his brief on appeal does

⁴ MRE 404(b)(1) provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

not offer argument on the merits, or cite pertinent legal authority. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (recognizing that a defendant is required to properly present his issues for appellate review and provide citation of supporting authority). Defendant's brief simply does not explain the nature of the alleged conflict of interest, and none is apparent from the existing record. The only evidence that trial counsel had any conflict of interest comes from assertions in defendant's affidavits, which are not part of the lower court record. MCR 7.210(A); *Horn*, 279 Mich App at 38. Even considering defendant's affidavits, his claim is not persuasive. Defendant asserted that an unexplained "work/personal" relationship trial counsel allegedly had with Erickson's family caused trial counsel to forgo calling as a witness Sheila Smith, who defendant alleges would have testified that Erickson was a liar. Even assuming, without deciding, that this alleged conflict of interest existed, we are not persuaded that any such decision to not call Smith would have prejudiced defendant, because Erickson admitted to instances of untruthfulness during cross-examination at trial.

Defendant also asserted that trial counsel erred in declining to call Kadera Jackson at trial with the explanation that trial counsel had represented her in another matter. Defendant does not explain why an earlier attorney-client relationship created any conflict of interest concerning trial counsel's calling Jackson as a witness in this matter. Moreover, defendant has failed to show any prejudice, having provided no affidavit or other offer of proof regarding what testimony Jackson would have provided. For these reasons, defendant has failed to establish the existence of any conflict of interest that adversely affected trial counsel's performance.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood