

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN GRIGGS,

Defendant-Appellant.

UNPUBLISHED
December 16, 2004

No. 247708
Wayne Circuit Court
LC No. 02-013089-01

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84 and possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 25 to 120 months’ imprisonment for the assault conviction, and 2 years’ imprisonment for the felony-firearm conviction. Defendant appeals as of right arguing that the trial court erred when it took testimony without defendant present at a motion before the trial court where defendant sought a new trial or a *Ginther*¹ hearing, that he was denied the effective assistance of counsel at trial, and finally that the trial court abused its discretion when it allowed the prosecutor to ask defendant how he would hide a weapon. Because we find none of defendant’s arguments persuasive, we affirm.

Defendant was involved in a shooting that occurred during the early morning hours of July 26, 2002 on Lyndon in Detroit. Both the victim, Keno Winbush, and his sister, Lokia Winbush, testified at trial that defendant shot the victim in the leg after they had a brief confrontation outside of the Winbush residence. Defendant testified on his own behalf at trial where he denied shooting the victim, and implicated Alton Hubbard, an associate who was with defendant when the shooting occurred.

Defendant first argues that the trial court erred when it took testimony without defendant present at a motion before the trial court where defendant sought a new trial or a *Ginther* hearing. This Court reviews a trial court’s decision to grant or deny a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

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

The record reveals that at defendant's motion for either a new trial or a *Ginther* hearing, coincidentally, defendant's trial counsel entered the courtroom. The trial court asked defendant's counsel to answer a few questions on the record in order to assist the court with the determination regarding whether it should grant defendant's motion for a new trial or for a *Ginther* hearing. The trial court clearly enunciated on the record that it was not holding a *Ginther* hearing, but was rather entertaining testimony to aid in its decision to grant or deny defendant's motion for a *Ginther* hearing or new trial. Later, after the prosecutor began cross-examining defendant's trial counsel, the trial court immediately stopped the prosecutor from beginning a line of questioning that would have required defendant's attendance because the substance would have been appropriate for a *Ginther* hearing.

Defendant argues now on appeal that he was denied his constitutional rights to confrontation and due process when the trial court held a "de facto" *Ginther* hearing outside of defendant's presence. Clearly, a defendant has a right to be physically present at his trial. MCL 768.3; *People v Krueger*, 466 Mich 50, 51; 643 NW2d 223 (2002). And if this had been a *Ginther* hearing where testimony was taken on the merits of the issue of ineffective assistance, defendant's presence would have been required. However, our review of the record reveals that contrary to defendant's characterization of the hearing at issue as a de facto *Ginther* hearing, in actuality, the trial court merely took testimony to assist it in its determination whether to grant a *Ginther* hearing where the merits would then be reached. As such, defendant's rights were not violated and the trial court did not abuse its discretion.

Next, defendant argues that he was denied his right to effective assistance of counsel at trial when counsel failed to make timely objections on several occasions during trial. Because an evidentiary hearing was not conducted, our review is limited to the mistakes apparent on the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"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). To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra*, at 600. In addition to showing counsel's deficient performance, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra*, at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Carbin, supra*, at 600. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland, supra*, at 694.

Defendant states that his counsel was ineffective for failing to object to the prosecutor's elicitation of prior consistent statements from Keno and Lokia Winbush. MRE 801(c) defines

hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” However, MRE 801(d) provides that certain statements are not considered to be hearsay, and therefore are not barred by the general prohibition against hearsay. MRE 802. Among these are prior consistent statements. A prior consistent statement is admissible if four requirements are met: (1) the declarant testifies at trial and is subject to cross-examination, (2) there is an express or implied charge of recent fabrication or improper influence or motive of the declarant’s testimony, (3) the statement is consistent with the declarant’s challenged in-court testimony, and (4) the prior consistent statement was made prior to the time that the supposed motive to falsify arose. MRE 801(d)(1)(B); *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

Defendant’s claim of error fails because defendant has mischaracterized the testimony. A review of the record reveals that the prosecutor did not improperly attempt to elicit prior consistent statements from Keno and Lacia Winbush. The testimony in question, when read in context, showed merely that the line of questioning related to the fact that the witness had properly told the police that they had previously had the wrong person in court and that the witness would not identify the wrong individual.

Defendant claims that his counsel was ineffective for failing to object when the prosecutor questioned defendant about his pre-arrest silence. In particular, defendant asserts that it was error for defendant’s counsel not to object when the prosecutor asked defendant why he did not go to the police and report the name of the shooter. Again, defendant mischaracterizes the evidence, because during direct examination defendant testified that he did not call the police because he feared for his life. Because a defendant’s prearrest silence is admissible for impeachment purposes, the prosecutor’s reference to defendant’s pre-Miranda silence to impeach his exculpatory testimony was proper questioning. *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999). Therefore, because no misconduct occurred, defense counsel properly did not object.

Defendant also claims that his counsel was ineffective when his counsel did not object to harassing and confusing questions during defendant’s cross-examination. Defendant specifically argues that his counsel erred when he did not object to speculative questions regarding how defendant would hide the weapon if he had it, when the prosecutor brought up an irrelevant second arrest, and when the prosecutor questioned defendant regarding an alleged alias. In fact the record reveals that defense counsel did in fact object to the prosecutor’s line of questioning regarding hiding an assault rifle by wrapping a towel around it on the grounds of relevance, but the objection was overruled. Therefore, contrary to defendant’s argument, defendant’s trial counsel did object on the record.

In any event, the record does not establish that counsel was ineffective for any of these reasons. Counsel’s decisions with regard to these matters all involved matters of trial strategy and defendant has not overcome the presumption of sound strategy. Ineffective assistance of counsel will not be found merely because a strategy backfires. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant has not demonstrated that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Carbin, supra*, 463 Mich at 600.

Finally, defendant argues that the trial court abused its discretion when it allowed the prosecutor to ask defendant how he would hide a weapon, referring to a specific line of questioning where the prosecutor asked if defendant would ever attempt to hide an assault rifle by wrapping it in a towel. We review a trial court's decision to admit evidence for an abuse of discretion, and we review de novo preliminary questions of law involved in that decision. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found when an unprejudiced person, considering the evidence on which the trial court based its decision, would conclude that there was no justification or excuse for the ruling. *People v Gonzalez*, 256 Mich App 212, 217-218; 663 NW2d 499 (2003).

During trial, as noted above, defendant's trial counsel did object to the line of questioning at issue on the grounds of relevance. On appeal, defendant raises the same argument. Normally, relevant evidence is admissible, and irrelevant evidence is not. MRE 402. If it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence, then the evidence is relevant. MRE 401. To be material and relevant, evidence does not need to relate to an element of the charged crime or an applicable defense, but may concern the relationship of the elements of the charge, the theories of admissibility, and the defenses. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996).

After reviewing the record, we conclude that the trial court did not abuse its discretion in allowing the line of questioning. During his testimony, defendant claimed that when the victim came out of the house, he had an assault rifle wrapped in a towel in an attempt to conceal it. The record reveals that the prosecutor was challenging the veracity of this statement when the prosecutor attempted to elicit testimony from defendant regarding whether wrapping an assault rifle in a towel was a reasonable manner of concealing it. And in doing so, the prosecutor asked defendant if he would have attempted the same methodology. We conclude that the trial court did not abuse its discretion in allowing the testimony because it was relevant under MRE 402.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio