

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 12, 2013

v

VINCENT LECURTIS MOORE,
Defendant-Appellant.

No. 306669
Wayne Circuit Court
LC No. 10-010389-FC

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. Defendant was sentenced to life in prison for the felony murder conviction and 15 to 30 years in prison for the armed robbery conviction. We affirm.

Defendant argues that his trial attorney rendered ineffective assistance of counsel. We disagree.

Defendant preserved this issue by moving for a new trial in the court below. However, because no *Ginther*¹ hearing was conducted, we review defendant's claim for errors apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

To establish that defense counsel was ineffective, the defendant must prove that "(1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). A defendant must also establish that the proceedings were fundamentally unfair or unreliable. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, "[t]here is . . . a strong presumption of effective assistance

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

of counsel when it comes to issues of trial strategy” because “many calculated risks may be necessary in order to win difficult cases.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). We will not “second-guess matters of strategy or use the benefit of hindsight” to evaluate the defense counsel’s performance. *Id.*

I. DEFENSE COUNSEL’S MENTAL CAPACITY

Defense counsel’s behavior at trial did not fall below an objectively reasonable standard. Defendant argues that counsel’s behavior during trial indicates that he was not mentally fit to try the case. However, upon reviewing the entire record, we conclude that defense counsel’s behavior was clearly a trial strategy. Defense counsel used drama, outrage, and persistence in an attempt to sway the jury. For example, he declared several times that the court was violating his and his client’s constitutional rights. Defense counsel and the trial court told the jury that this was his style. Despite defense counsel’s dramatic performance, he thoroughly cross-examined the prosecution’s witnesses. He made long and passionate opening statements and closing arguments on defendant’s behalf. He argued a strong theory of the case, namely that the prosecution’s key witness, Heather Farnsworth, was lying about defendant taking the money after the shooting. In fact, defense counsel’s strategy was at least partially successful because the jury acquitted defendant on the premeditated murder and felony-firearm charges.

Defense counsel’s behavior did not likely affect the outcome of the trial. First, many of counsel’s outbursts were not in the presence of the jury. Defense counsel’s threatening statements, and the record the prosecution created about these outbursts, were both outside the presence of the jury. Additionally, defense counsel’s arguments with the trial court usually occurred outside the presence of the jury. Therefore, these outbursts could not have affected the jury’s decision. Second, defense counsel warned the jury that he would be dramatic and outlandish during trial. Therefore, the jury was less likely to have been distracted or swayed by counsel’s behavior. The trial judge also explained that defense counsel had a different courtroom style. Finally, defense counsel told the prospective jurors that he would excuse them if they could not handle his “big mouth.” Defendant has failed to establish that counsel was unfit or that his trial antics resulted in constitutionally deficient representation.

II. CONFLICT OF INTEREST

Nor can defendant show that his attorney rendered ineffective assistance of counsel due to an alleged conflict of interest. As a preliminary matter, defendant argues that it is unnecessary for him to prove prejudice when he alleges a conflict of interest that resulted in ineffective assistance of counsel. However, our Supreme Court has held that an alleged conflict of interest does not create automatic prejudice. Instead, “[p]rejudice is presumed only if the defendant demonstrates that counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his lawyer’s performance.”” *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998) (citations omitted). The *Smith* Court found that defense counsel’s performance was effective, reasoning that defense counsel “vigorously pursued his objections” and there was no actual conflict of interest presented on the record. *Id.* at 558.

In the present case, the trial court’s threat of holding defense counsel in contempt of court did not create an actual conflict of interest. A conflict of interest is defined in relevant part as an

“incompatibility between one’s private interests and one’s . . . fiduciary duties.” Black’s Law Dictionary (9th ed). Defense counsel stated that he refused to cross-examine Farnsworth further because he was afraid the court would hold him in contempt. However, defense counsel could not have reasonably believed that the trial court would hold him in contempt for continuing his cross-examination of Farnsworth. First, the trial court threatened to hold defense counsel in contempt of court if he continued his *disrespectful* and *distracting* behavior. Second, the trial court made it extremely clear that it would not hold counsel in contempt for cross-examining the prosecution’s witnesses or otherwise representing defendant. Additionally, the trial court gave defense counsel ample opportunity to cross-examine Farnsworth before he decided to refuse to continue the cross-examination.

Lastly, we note that defense counsel was a strong advocate for defendant throughout the proceedings. “[T]here is no automatic correlation between an attorney’s theoretical self-interest and an ability to loyally serve a defendant.” *Id.* at 557. Despite defense counsel’s multiple promises to refuse to speak until the trial court upheld his client’s and his own rights, he continued to voice his strong objections and opinions a short time after this refusal. In fact, throughout the entire trial, defense counsel vigorously objected to and argued every point. The trial court commented that it believed that defense counsel’s “paraphrasing and saying [he] was keep[ing his] silence” was “inherently” inaccurate. On the record before us, we perceive no ineffective assistance of counsel.

Affirmed.

/s/ Kathleen Jansen
/s/ William C. Whitbeck
/s/ Stephen L. Borrello