

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW EMMANUEL MACON,

Defendant-Appellant.

UNPUBLISHED

January 21, 2010

Nos. 286662; 286663; 286665

Ingham Circuit Court

LC Nos. 07-001436-FC;

07-001437-FH;

07-011438-FC

Before: Bandstra, P.J. and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of two counts of first-degree premeditated murder, MCL 750.316(1)(a), one count of assault with intent to murder, MCL 750.83, one count of torture, MCL 750.85, and one count of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to two terms of life imprisonment without parole for the murder convictions, concurrent 75 to 125 years in prison each for the assault and torture convictions, and a term of 26 years and 8 months to 40 years in prison for the home invasion conviction. Defendant now appeals as of right. We affirm.

I. Facts

The murder victims in this prosecution were Sandra Eichorn and Karen Delgado-Yates. Delgado-Yates was also tortured by defendant before she died. Linda Jackson was assaulted by defendant, who broke into her home after the two had had a conversation through Jackson's back door. Defendant was scared away by Jackson's dog before any further violence could be inflicted on Jackson.

II. Ineffective Assistance of Counsel

Defendant claims he was deprived of effective assistance of counsel when his trial counsel made declarations during opening argument about what the evidence in the case would show, and then failed to call any witnesses or present any evidence, and rested immediately after the prosecution's case. We disagree.

A. Standard of Review

“A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. The trial court’s factual findings are reviewed for clear error, and its constitutional determinations are reviewed de novo.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (citation omitted).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different. [*Id.* (citations omitted).]

B. Analysis

In opening argument, counsel indicated he would be presenting evidence and witnesses establishing that defendant’s brother murdered Eichorn and assaulted Jackson, and that another man murdered Delgado-Yates. “Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is accordingly a strong presumption of effective assistance of counsel.” *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008) (citation omitted). “The defendant also must overcome the presumption that the challenged action was trial strategy.” *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Decisions on whether to call or question witnesses are presumed to be matters of trial strategy that will not be second-guessed on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). Failure to present evidence only rises to ineffective assistance if defendant is deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

While defense counsel did elicit testimony from the prosecution’s witnesses addressing some of the matters he raised in his opening, it is true that defense counsel did not follow through in presenting all the evidence to which he referred in his opening statements. However, defense counsel is permitted to make changes in trial strategy and evolve his tactics as the trial progresses so long as it does not deprive defendant of a substantial defense. Moreover, toward the end of the trial, counsel announced that he would not call as witnesses the two men he claimed had committed the crimes and that he had discussed this matter with defendant. Therefore, defendant was on notice of that fact and presumably understood and agreed with that decision. *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551, 560; 160 L Ed 2d 565, 578 (2004) (observing that counsel is required to consult with the defendant regarding important decisions, such as the general defense strategy).

In light of the evidence against defendant, placing witnesses on the stand to elicit certain circumstantial evidence, including weak or incredible evidence like defendant's dislike of bike riding or that he returned to his house pantless on August 28, could have weakened defendant's case. Pursuing a defense that focused on the inconsistencies in the prosecution's case and arguing a lack of sufficient evidence tying defendant to the crime, rather than presenting circumstantial evidence linking others to the crimes, could certainly be a legitimate trial strategy. This Court affords deference to strategic judgments. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

Additionally, although a complete concession of guilt does constitute ineffective assistance of counsel, *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994), trial counsel subjected the prosecutor's case to meaningful adversarial testing. He presented arguments in both opening and closing, and cross-examined 21 out of 23 witnesses that the prosecution called to testify. Counsel's cross-examination of the prosecution witnesses included challenges to the accuracy of DNA evidence, the timing of Delgado-Yates' death, the accuracy of the cell phone tower records, and Jackson's identification of defendant. Counsel made a compelling attempt to link a series of inconsistencies in the record and to argue that defendant was not conclusively placed at the scene by such evidence. This does not amount to a complete concession of guilt or a deprivation of a substantial defense.

Moreover, even if defendant's trial counsel had presented the evidence he mentioned in opening, the outcome of the case would likely have been the same in light of the overwhelming evidence against defendant, particularly the DNA evidence. Defendant has not established that he was denied the effective assistance of trial counsel.

Affirmed.

/s/ Richard A. Bandstra

/s/ David H. Sawyer

/s/ Donald S. Owens