

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 149357

ASHLY DRAKE SMITH,

Defendant-Appellant.

Court of Appeals No. 312721
Lower Court No. 12-004553-FC

The People's Appellee's Supplemental Brief
with Appendices A through D

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To be entitled to a new trial based on the claim that trial counsel was ineffective in not calling alibi witnesses, the defendant must establish the counsel had no legitimate strategy in not calling the witnesses and that the testimony of the witnesses would have given the defendant a reasonable probability of being acquitted. Defendant’s trial counsel explained that she felt that the prosecution’s case was sufficiently weak on identification that alibi witnesses were not necessary, a strategy that Defendant agreed with on the record, and the alibi witnesses gave conflicting testimony on a major point, in any event. The trial court did not err in finding that Defendant had not sustained his burden of establishing ineffective assistance of counsel.....	37

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Counterstatement of Jurisdiction

The People accept the Statement of Jurisdiction set forth by Defendant.

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Counterstatement of Question Involved

To be entitled to a new trial based on the claim that trial counsel was ineffective in not calling alibi witnesses, the defendant must establish the counsel had no legitimate strategy in not calling the witnesses and that the testimony of the witnesses would have given the defendant a reasonable probability of being acquitted. Defendant's trial counsel explained that she felt that the prosecution's case was sufficiently weak on identification that alibi witnesses were not necessary, a strategy that Defendant agreed with on the record, and the alibi witnesses gave conflicting testimony on a major point, in any event. Did the trial court err in finding that Defendant had not sustained his burden of establishing ineffective assistance of counsel?

The People answer no.
Defendant answers yes.

Counterstatement of Facts

Defendant was charged with the following offenses: armed robbery, in violation of MCL 750.529, first-degree home invasion, in violation of MCL 750.110a(2), larceny from a person, in violation of MCL 750.360, felon in possession of a firearm, in violation of MCL 750.224f, and felony firearm, in violation of MCL 750.227b. It was alleged that the victim of the armed robbery, first-degree home invasion, and larceny from the person charges was Shawn Kelly.

Following a bench (waiver) trial before the Honorable David J. Allen, Defendant was found guilty as charged.

Waiver Trial

Witnesses

Prosecution

Westland Police Lieutenant Thad Nelson

Westland Police Lieutenant Thad Nelson testified that on January 11, 2012, he was a detective sergeant in the Detective Bureau (Waiver Trial Transcript, 08/20/12, 10). He was assigned to this case the day after it happened (10). The case was a robbery/home invasion case that had occurred on January 11, and he got the case on January 12 (10).

The first thing that he did was to interview the victim (10). From that interview, he was able to establish the identity of the perpetrator (10-11). He obtained a photograph of Defendant from a computer link called Picture Link and placed the photo in a six-photo lineup (11). He had the victim view the photo lineup, and the victim made a positive identification (11). After the victim

positively identified Defendant out of the photo array, he prepared an Investigator's Report and submitted it to the Prosecutor's Office for a warrant request (12).

Defendant was not immediately arrested on the warrant (12). Rather, he was not arrested until March, by Officer Kropodra (12).

On cross-examination, Lt. Nelson was asked if the victim told him that he was a medical marijuana card holder (13-14). Nelson responded that he did (14). In fact, the victim told him that he had a growing operation in the spare room upstairs (14). The victim also acknowledged to him that he had left the front door of his apartment open (14).

He was also aware, from reading the report of the responding officer, that the victim had said that two perpetrators were involved, and that he never saw the second person, but just heard him (14-15). When he himself spoke to the victim, the victim told him that he may have sold marijuana to this second person a couple of times before (14-15). The victim said that he had met this second person through one Terry, who he (the victim) had also sold marijuana to (14-15).

After he spoke to the victim, he (Lt. Nelson) called this Terry on the telephone, having gotten the number from the victim (16). Terry gave him two names for the second unknown person (16). One of the names Terry gave him was "Uncle" (16). As far as a real name for "Uncle," Terry could only give him the name Tim (16). The victim described the second person as being a dark-skinned African-American (16).

Lt. Nelson testified that there was a time discrepancy in the written report of the responding officer (18). At one point in the written report, it said that the incident had occurred at 7:30 p.m. and at another it said that it had occurred at 9:50 p.m. (17-19). Lt. Nelson explained that the discrepancy might be due to the responding officer taking information from the victim that the

incident had occurred at 7:30 p.m. and then putting 9:50 p.m. as the time that it had been reported to have occurred as opposed to listing that time (9:50) as the time that he (the responding officer) actually wrote out the report at the station (20-21).

The victim told him that he harvested marijuana for himself, but admitted that he had sold marijuana to "Unc" or Tim in the past, meaning that he had sold the marijuana illegally (22).

Lt. Nelson testified that the victim reported to him that a little bit of marijuana was taken from him (21). The victim reported that he had pulled out a clear, blue plastic case and had removed a little bit of marijuana, which was what he gave to the robber, after which he was ordered to lie face down (23).

On redirect examination, Lt. Nelson testified that the victim told him that when he gave the robber, that being Defendant, the marijuana, Defendant had a pistol in his hand, which was pointed at him, and that was why he gave Defendant the marijuana (24-25).

Shawn Kelly

Shawn Kelly testified that on January 11, 2012, he was at his home at 34644 Farragut in Westland, where he lived with his brother (Waiver Trial Transcript, 08/20/12, 26). He got robbed at his home on that day (26).

The robbery occurred around 7:20 p.m. (26). He was the only one home at that time (26). His brother was working (27). His brother usually did not get home from work until 8:45 in the p.m. (27). At the time of the robbery, he was just sitting on the couch in his bedroom upstairs, playing a game on his telephone (27; 32). His bedroom door was open (29). He then heard the door downstairs shut (27). This did not alarm him (27). He thought that his brother had gotten

off of work early and was just getting home (27). He had made it a habit to lock the door because of robberies in the area, but on this date, he did not lock the door (27-28).

After he heard the door shut, he heard footsteps coming up the stairs (28). Then, Defendant came into his bedroom with a gun (28). At first, he did not see the gun (29). He just saw Defendant at his bedroom door (29). He recognized Defendant from having seen him before (29). He only knew Defendant by the nickname "Tre" (28). He had seen Defendant around the area before, and he had seen Defendant in a bar that he used to frequent (28). It then dawned on him that there was no reason why Defendant would be in the house (29). So, he asked Defendant what he was doing there, and that was when he saw the gun (29-30). Defendant had the gun pointed at him (28).

The first thing Defendant did was to call his (the witness's) name: Shawn (30). Defendant then said that he was not going to kill him, after which Defendant demanded his money and his weed (30). He grew marijuana at his home for his personal medical use (31). He had a medical marijuana card (31). He had never given marijuana to Defendant before (31). He had sold it before, to a friend who then brought another friend over who also bought it from him (31). The friend of the friend who had bought marijuana from him before he only knew by the nickname "Unc" (31).

When Defendant pointed the gun at him, he put his hands up in the air (32). And when Defendant demanded his money and his weed, he cooperated with Defendant right away (32). His (the witness's) wallet was under the coffee table in his bedroom, and when he went to reach for it, to get out his money to give to Defendant, Defendant told him not to move (32). He told Defendant

that his wallet was underneath the coffee table and that the weed was in a clear blue plastic container sitting next to him (32-33).

Defendant then told him to get up off of the couch and lay face down on the floor (33). Before he laid down on the floor, however, he peeped around Defendant's shoulder and saw that Defendant had a partner (33). This other person was standing in the doorway of the bedroom trying not to be seen (34). He really could not see the other person because it was dark in the hallway outside of the bedroom (34). The other person was a dark-skinned person, and, because of that, this other person blended into the darkness of the hallway (35). So, he never saw the other person (35).

As he was lying on the floor, the other person came into the bedroom (35). He knew this because he could tell by hearing or feeling footsteps and hearing a different voice (35). The voice sounded familiar to him (35). It sounded like Unc's voice (35).

He heard Defendant scurrying around (36). Apparently, he did not have as much weed as Defendant would have liked, because Defendant asked where the rest of it was (36). He told Defendant that he did not have anymore (36). That was when the other person asked where the stuff in the jar was (36). He kept marijuana in a jar, which some of his friends knew about (36). When Unc had come over with his other friend to buy marijuana, he had gotten the marijuana out of the jar that he kept it in (36).

When he told Defendant and the other guy that that was all the marijuana that he had, that is, the marijuana that was in the clear blue plastic container in the bedroom, somebody accused him of lying (37). He swore that that was all that he had (37). He could then hear the two people grabbing things from his bedroom, like his Play Station, and he heard them unplugging and unhooking things (37).

There then came a point when the two men, Defendant and the other man, left his bedroom (37). He noticed that his Play Station, a lap top, an iPad, his wallet, his cell phone, and his marijuana were gone (38). The cell phone had been on the couch where he had been sitting (38).

He laid on the floor until he could not hear any noise and then he went downstairs (38). When he got downstairs, he locked the door and looked out the window to see if he could see anything (38). He did not call the police right away because his phone had been stolen along with the other stuff (38). He and his brother had no land line (39). He waited until his brother got home before he called the police (38).

His brother got home later than usual, at around 9:10 (39). That was when he called the police, and the police showed up some fifteen minutes later, at around 9:30 p.m. (39). The police took a statement from him that night (39).

The next day, he met with Police Sergeant Thad Nelson (40). Sgt. Nelson showed him a photo lineup (40). He identified Defendant's photo out of the lineup (40-41). Before he met with Sgt. Nelson and identified Defendant out of the photo lineup, he had gone onto Facebook and found out Defendant's full name from somebody that he knew who also frequented the bar that Defendant frequented (40-41).

He later posted something on Facebook about Defendant, warning people about what Defendant was out there doing (42). He may have made racial slurs about Defendant on Facebook in the process (42).

On cross-examination, the witness was asked if he knew that Defendant's racial make-up was half Caucasian and half African-American (43). He responded that he believed this was the case (43). He was asked if it were not true that the person who he got Defendant's name from on

Facebook was one Stephanie, who was Defendant's ex-girlfriend (43-44). The witness responded that this was true (44).

The witness was asked if he handed the marijuana to Defendant (47). He responded that he did not (47). He then acknowledged that he may have told the police that he handed the marijuana to Defendant (48).

Also on cross, the witness acknowledged that he told the police that the marijuana that he gave to Defendant he had bought from somebody else (48). He acknowledged that he knew that this was illegal (49).

Further on cross, the witness testified that he went on Facebook to try and get Defendant's name even before his brother got home (50-51). He explained that he had his own lap top that Defendant and the other man did not steal (51). He reiterated that the person who he contacted on Facebook was Stephanie, who was not only Defendant's ex-girlfriend, but was formerly a barmaid at the bar that he had seen Defendant at (52). He also knew Amanda Tony, who was Defendant's current girlfriend, and also a barmaid at the bar (52). He knew that she was Caucasian (52).

The witness testified that it was the next morning, before he talked to Sgt. Nelson, that he went back on Facebook, when he was "kind of heated up," and said some things that had racial overtones about Defendant (52-54). He also acknowledged that in that same Facebook posting, he said that if somebody came back to his house, there might be a bullet waiting for him (54). He testified that he had a gun that was registered (54).

On redirect, the witness testified that at the preliminary examination, he testified that Defendant grabbed the marijuana (59).

On recross-examination, the witness acknowledged that he had private Facebook conversations with Amanda Tony (64). She had sent him a message after she saw what he had posted on Facebook about Defendant (64). In response to her message that it had not been Defendant who robbed him, he wrote that he knew what he saw, but if it was not him, he was truly sorry, but he knew what he saw (64). He explained that he said this because he did not want to be wrong and be falsely accusing somebody (65).

On redirect, the witness was asked why he would say this to Amanda Tony (66). He responded:

THE WITNESS: I was sure, but I did also second guess myself because I wanted to be, you know, I wanted to make sure I had the right guy.

(66).

When asked when it was that he second-guessed himself, the witness responded:

THE WITNESS: You know for a couple of days after that because I wanted to be sure – but you know the more I look back on it I was, you know, I convinced myself I did see what I seen. You know what I mean?

(66).

The witness then concluded his testimony by testifying that he was sure beyond a reasonable doubt that Defendant was one of the robbers (67).

Defense

The defense called no witnesses. In fact, following was the colloquy relative to the defense resting its case without calling any witnesses:

THE COURT: Okay. People have rested. Ms. Reed, what's your pleasure?

MS. REED: Your Honor, I have subpoenaed witnesses on my client's behalf, but after the way the testimony has gone it (sic) [in] and further discussion with my client I am not going to call the witness. Is that okay with you, mister –

MR. SMITH: Yes, ma'am.

THE COURT: Okay.

(Waiver Trial Transcript, 08/20/12, 67-68).

Trial Court's Findings of Fact and Verdict

Following the arguments of counsel, the trial court delivered its findings of fact and verdict the next day:

THE COURT: Good morning. Alright. The Court has had an opportunity to deliberate, think through it, go over it, and let's go through the testimony.

We have Lieutenant Nelson who well, doesn't tell us a whole lot other than he corroborates in a way the story that Mr. Kelly tells us in terms of the identification of Mr. Smith as the person. He also corroborates this whole issue of he had a medical marijuana card, but was otherwise illegally selling marijuana to some other people. He gives us the – really not much, not much in that in terms of his testimony.

The main testimony here is from Mr. Kelly, the complainant, who tells us he was robbed seven, approximately 7:20 p.m. There was a discrepancy in a report from the detective, however, the detective tells us that he just copied that from an incident report, which itself was inconsistent with the narrative which tells the correct time and perhaps had officer transcribed a time when he did the report at 9:50 later on, but at some point Mr. Kelly had told the arriving officers it was 7:20.

He tells us what he was doing. He was in his room. He heard footsteps and he tells us that a person that he had known from around and at a bar comes up and he indicates he wanted money and weed. He had sold marijuana before. And that the gun was pointed. He was told to lie face down.

He tells us later on in his testimony I believe on redirect that he was, he was in fear, which is certainly reasonable under the circumstances. And he tells us about this other person that was there and his conclusions as to who that might be, but at this point somewhat immaterial. He clearly identifies Mr. Smith.

He calls the police at a later point and time, and we had our discussion yesterday about how this Court thought that to be somewhat odd, perhaps even a bit unreasonable. But the Court is not so sure that, that directly bears upon any credibility issues.

Mr. Kelly testifies that he's got no prior conflict with Mr. Smith. And certainly, while this Court can condemn the Facebook postings and really the Court didn't see the Facebook postings, but is led to believe that there are some inappropriate material. And the Court would condemn that. And he does testify as to why he did that. Certainly, the Court doesn't buy that as any excuse for using that language or description. But the Court was able to observe Mr. Kelly's testimony and doesn't necessarily agree that, that rises to the level of calling into question credibility.

And there was some testimony about whether he said he gave it or not. Certainly, gave can be used interchangeably when during the course of a robbery somebody says I gave him the money. That certainly doesn't necessarily indicate that that's done on a voluntary basis. Gave it, he handed. And he tells us that he was one hundred and ten percent sure.

He goes on to tell us about this Facebook posting where he indicates he's pretty sure, but that was in the context of saying that he wanted to be sure, wanted to be correct. Mr. Kelly took great pains to tell us that he didn't want an innocent man to go to prison and he wanted to make sure that the person who he identified, which he did identify here in court and to the police and in the six-pack was Mr. Smith. And accordingly, the Court does find that the People have met their burden beyond a reasonable doubt.

(Waiver Trial Transcript, 08/21/12, 3-6).

Evidentiary Hearing (on Remand from the Court of Appeals)

On June 19, 2013, this Court entered an Order remanding this matter to the trial court for an evidentiary hearing on Defendant's claim that he had been deprived of the effective assistance of counsel at trial, due to trial counsel's failure to subpoena and present alibi witnesses.

On August 8, 2013, an evidentiary hearing was held in the trial court (that now being the Honorable Mark T. Slavens, who took over Judge David Allen's docket), in which testimony was taken, after which the trial court rendered its findings of fact and decision (On August 9, 2013).

Testimony at Evidentiary Hearing on Remand

Susan Reed

Susan Reed testified that she had been practicing law since 1982, and that 90% of her work was criminal law (Transcript entitled "Postconviction Hearing/Motion, 08/08/13, 22). She testified that she represented Defendant in the trial court (22). She testified that she had not reviewed anything for the evidentiary hearing (24).

The charge against Defendant was armed robbery, the allegation being that Defendant and another man had broken into the home, an apartment, and that while the other man stood by the door, Defendant went in and robbed the victim (22-23). The victim really did not see the other man at the

door (25). Her trial strategy was that there had been a relationship between the victim and Defendant's girlfriend prior to Defendant being involved with the woman, and her defense was one of intentional misidentification of Defendant by the victim, due to the victim's racial animosity against Defendant (25).

She did not dispute that she was appointed to represent Defendant sometime in May of 2012, when Defendant was arraigned on the Information in Circuit Court (25). She did not dispute that the first pretrial in the case was on June 4, 2012, nor did she dispute that at that pretrial proceeding on June 4, she stated on the record that she had not yet met with Defendant (26). As far as communicating with Defendant, the witness testified that she would see Defendant in court and she may have visited him in jail at some point (27). She believed that she also had an investigator appointed to meet with Defendant and get information from him (27). When asked if she knew if the investigator met with any alibi witnesses, the witness responded that she believed, although she was not sure, that she got information from her investigator about alibi witnesses (27-28). When asked if she would dispute that the first time she visited Defendant in jail was on the night before trial, the witness responded that that might have been the case (28). She would, however, talk to Defendant during court proceedings, when Defendant would be in the "bullpen" (28).

As far as talking to Defendant's alibi witnesses, she talked to one of them, a man, prior to the actual day of trial (28). She did not recall the name of this person (29). As far as the investigator who she used, the witness testified that she probably used Jackie Goldrum from the Iverson Agency (29). She said that she was saying probably Jackie Goldrum because Jackie Goldrum was the person who she usually used (29). When asked if it were not true that Jackie Goldrum's only role in the case was to serve subpoenas, the witness testified that Goldrum did serve

subpoenas, but as far as talking to witnesses, she thought Goldrum had done this, but it was possible that she had not (29). Her understanding, though, was that Goldrum had talked to the witnesses orally, but had not taken any written statements (30). When asked if the first time that she spoke to the alibi witnesses was on the first day of trial, Ms. Reed responded reiterated that she spoke to a man, a friend of Defendant's, before the trial (31).

The first day of trial was August 20, 2012, and it was a bench trial (31). Ms. Reed testified that the alibi witnesses were subpoenaed and were present in court on the first day of trial (31). When asked at what point it was that she made the decision not use the alibi witnesses, Ms. Reed responded that it was when the victim's testimony came in as it did, about how he had delayed in reporting the crime (32). And she did discuss not calling any of the alibi witnesses with Defendant (32).

Ms. Reed was asked if it were not true that she never filed an alibi notice (32). She responded that that was true (32). She also acknowledged that she never mentioned alibi at any of the pretrials nor did she mention it in her opening statement (32). When asked if she had ever really insisted on presenting an alibi defense, Ms. Reed responded:

A If I had thought it would have helped Mr. Smith, yes. It wasn't – the witnesses, when I talked to the first one and I believe initially in just talking to Mr. Smith in the back, there was no initial mention of alibi. It was only after one of his friends called and said, "Oh yea, we were in and out," – I think it was we were in and out all day or something like that, and Mr. Smith had said that he been about earlier in the day with a friend going around somewhere, but was not back at home allegedly when this, you know, crime occurred. And the person that he was out with earlier in the day fit the description that the complainant had given of the person that was allegedly with Mr. Smith at the time of the –

(33).

She did not recall the name of the friend who Defendant told her that he had been with earlier in the day, but it was not any of the witnesses who showed up at trial (33). She did not get the impression from any of the alibi witnesses that any of them were with Defendant the whole time (34).

Ms. Reed was asked if what she was saying was that her decision not to call any alibi witnesses was based on the weakness of the complainant's identification, and that she did not want to jeopardize an acquittal by putting on alibi witnesses (35). Mr. Reed responded that that was correct (35).

When asked if she had considered moving for a directed verdict at the close of the prosecution's case, Mr. Reed responded that she did not because there had in fact been an identification, so that the question was one of fact for the trier of fact (35).

On cross-examination, Mr. Reed testified that with respect to the alibi, she did talk to the prosecutor about putting on alibi witnesses, and the prosecutor had no objection to her putting on alibi witnesses without having filed a notice of alibi (37). She explained that prosecutors usually liked the defense to put on alibi witnesses (37). And she testified that having done trials before

Judge Allen before, she knew that Judge Allen would not object to her putting on alibi witnesses without having filed a notice of alibi (37-38).

Also on cross, Mr. Reed testified that she talked to Defendant about what his account of that day was (38). Defendant told her that he was at home and that he thought that the complainant was making this up about him of the relationship that the complainant had had with his (Defendant's) girlfriend, and that he denied being involved (38). Defendant told her the he was sick that day, that he had been out earlier with a friend going some places, and that after that he was home sick (38).

Finally, Ms. Reed acknowledged that the trial transcript did indicate that she spoke to Defendant about the prospect of calling his alibi witnesses, and that he went along with her decision not to call them, which he (Defendant) acknowledged on the record (38-39).

On redirect, Ms. Reed testified that with respect to the conversation that she had with Defendant before they went on the record and advised the court that the defense was not calling any witnesses, she gave Defendant her opinion as to what she thought that they should do and Defendant agree with her decision (40).

On recross, Ms. Reed testified that if Defendant had insisted on her calling the alibi witnesses, she would have done so (41).

On examination by the court, Mr. Reed was asked what it was about the purported testimony of the alibi witnesses that she felt would have weakened her case (41). She responded:

A There was – if I remember correctly, there was no one that was going to testify they were there with him consistently for the period of time that this took place. It was more like they were in and out. Some of them lived down the hall from him and said, “Yeah, we knew he was home sick,” or, “I saw him at some point but not another.”

(41).

Ms. Reed testified that had the witnesses told her that they had been with Defendant consistently the whole time, that would have been different, then she would have used them (42). She talked to all four of the witnesses when they were in the witness room, and all four stated that they could not say that they were consistently with Defendant the whole time (42).

On redirect, Ms. Reed testified:

A One other thing is that I do remember there were four witnesses there. I had told three of them I believe from the beginning once they were here and we talked to them that I wasn't going to use them. It was just the gentleman that was left there that was possibly going to be a witness. I find that the more you put witnesses on, as we know everybody remembers things differently and witnesses will tend to testify about what they remember, but it might differ from what one of their friends remembers. And that was a concern at that point that if all four of them got on the stand, then the prosecutor would be able to, you know, show discrepancies in everything they're saying, which that in itself, I think, would weaken the case.

(43).

Ashly Drake Smith (Defendant)

Defendant testified that he had a previous conviction for possession of counterfeit coins, to which he pled guilty sometime around 2002 (Transcript entitled “Postconviction Hearing/Motion,

08/08/13, 46-47). He had another conviction for larceny from a a person, to which he pled guilty in 2010 (47).

He remembered the day of January 11, 2011 (47). He was at the Pine Haven Apartments, which was located at 29855 Cherry Hill in Inkster that day (47-48). He had a two-bedroom apartment there (48). He had two roommates on that day, Timothy Mulroy and Amanda Toney, who was at the time his girlfriend (48). He was acquainted with other neighbors in the apartment building: Sarah Urban, Michael Floyd, Melissa Mulroy, and Tiffany Reed (49). Sarah Urban lived directly across the hall from him, and Melissa Mulroy lived two floors up (49).

He did not know the complainant in this case, although he had seen him before at a bar (50). He did not know the complainant's name, and he had never been to the complainant's home (50). Before this case, he did not know where the complainant lived (50). And he was not at the complainant's home on January 11, 2011 (51).

Where he was on January 11, between 6:30 and 8:30 p.m., was at the Pine Haven Apartments, at his own apartment and at his neighbor's apartment (51). He had been there during the whole course of the day, but the majority of the day he had been at his neighbor's apartment, the neighbor being Sarah Urban (52). During the two-hour time period of 6:30 to 8:30 p.m., he was at Sarah Urban's apartment, although he did go to his own apartment at least one time during that time (52-53). He would go to his own apartment to either use the bathroom or to talk to his girlfriend (53). While he was at Urban's apartment, he just relaxed on the couch because he was sick with the flu (53). In fact, they all had the flu, and he thought that his girlfriend went to the hospital because of the flu (53).

He found out later in the evening of January 11 that he had been accused of robbing the complainant (53). He did not go to the police immediately to deny it because he just thought that somebody was "badgering" his name (53).

On January 11, 2011, he was on probation for his larceny from a person conviction, for which he had to report to his probation officer once a month (54). He actually reported to his probation officer the following day, January 12, but he did not mention anything about his being accused of robbing the complainant (54). Nor did he tell his probation officer about the accusation when he reported to his probation officer in February (55). He thought that the accusation would blow away in the wind (55). But then, two days before he was to report in March, his probation officer informed him that he had violated his probation and needed to turn himself in (55). He thought the violation was for failing to report, but they told him that it was for the robbery (56). He was actually arrested for the robbery on March 15 or 16 (56).

His girlfriend hired a lawyer for him, who represented him in district court at the arraignment (56). But because his girlfriend did not make the payments or something, the lawyer did not show up for the preliminary examination, so he got another lawyer, Mr. Zaranek, who did show up for the preliminary examination, but his girlfriend again quit making the payments (57). So, a couple of months later, he ended up getting Ms. Reed as his attorney (57). This was in May (57).

But Ms. Reed did not come to visit him in jail in May or June or July (57). She did not come and visit him in jail until the night before the trial, and then the visit only lasted 15 minutes (57). The only way that Ms. Reed got the names of his witnesses was when he gave them to her when the case was in court (58).

Defendant was asked if, at the trial, he ever talked to Ms. Reed about whether he was going to present any witnesses (59). He responded that he did, that Ms. Reed asked him if wanted to put witnesses on, and he asked her if she thought that he needed to (60). Ms. Reed responded that she did not think so, because the judge was in his favor and putting on witnesses would only destroy that (60). So, he followed that advice (61).

After he was convicted, and was being sentenced on September 12, 2011, he complained to the judge about Ms. Reed and her failure to put on his alibi witnesses (61).

On cross-examination, Defendant was asked if he ever complained to Judge Allen before the trial about Ms. Reed not visiting him in jail (62). He responded that he did not because he just thought that he would be going home, since he was not guilty, and he also thought that she knew what she was doing (62).

Defendant testified that he felt that had Ms. Reed called his witnesses, the result of the trial would have been different (64). When asked why then he did not insist on Ms. Reed calling his witnesses, Defendant responded that he did not insist because Ms. Reed insisted that the verdict was already going his way and that he should not call any witnesses (64). When asked if Ms. Reed told him that she was not calling his witnesses no matter what, Defendant responded that it was not that way (64). He reiterated that he asked her if she thought that he should call his witness and she responded that she did not think that he should because the verdict was going his way (64).

On redirect examination, Defendant was asked if Ms. Reed said anything to him about the alibi witnesses being weak (66). He responded that she did not (66). When asked if Ms. Reed said anything about the alibi witnesses not being there long enough, Defendant responded that she did not (66). As a matter of fact, she had said they she would use his friend Tim, because he was

dressed properly for the occasion, with a suit on and all, but that she was not going to use the two females (66).

Sarah Urban

Sarah Urban testified that she had known Defendant for almost four years (Transcript entitled "Postconviction Hearing/Motion, 08/08/13, 70). Defendant was good friends with her boyfriend (70).

She was at her apartment, the Pine Haven Apartments, on January 11, 2011 (70). She had a two-bedroom apartment there (71). Her apartment was right across the hall from Defendant's apartment (71). The only other people who lived in her apartment with her were her two daughters: ages one and five (71).

On the above date (January 11, 2011), between the hours of 6:30 and 8:30 p.m., she was in her apartment watching her kids (71). She was not feeling well (71). She had the stomach flu, which was going around the apartment building (71). Also at her apartment between 6:30 and 8:30 were her boyfriend, Melissa Mulroy, and Ashly Smith (Defendant) (72). Defendant may have left to go across the hall to his own apartment to call his girlfriend, but for the most part, they were all in her apartment (72). They watched movies because they were all feeling sick (72). Defendant laid on the couch as they watched movies (72-73). When Defendant would leave to go back to his own apartment, he would only be gone five or ten minutes, just long enough to call his girlfriend or use the bathroom (73).

The reason why she remembered this date was because they were all super sick (73). It was going all around the apartment building (73). She remembered just laying around and eating chicken noodle soup (73-74).

It was around 7:30 p.m. on January 11 that she learned about the accusation against Defendant (74).

Skipping ahead to the trial, she was subpoenaed to appear at trial to testify on Defendant's behalf (74). She had not talked to any investigator prior to coming to court (74). She talked to Defendant's attorney, Susan Reed, on the day of trial, but not before then (74). She recalled that she was wearing black pants, a black shirt, and dress shoes when she came to court, but Ms. Reed did not like the way that she was dressed, and Ms. Reed told her that was the reason that she would not be calling her as a witness (75).

On cross-examination, the witness was asked if on the night of January 11, 2011, her daughters were also sick (76). She responded that they were not (76). When asked if she had any problem with allowing Defendant into her apartment when he was sick and possibly infecting her daughters, the witness responded that her daughters were in the bedroom most of the night that Defendant was there (76).

The witness was asked if, when she learned about the accusation against Defendant that night, she ever went to the police to tell them that Defendant could not have done it because he was at her apartment (76-77). She responded that she did not know where she was supposed to go in that she did not know what city it had occurred in (77).

Finally, the witness was asked why she had not put in her affidavit the time that Defendant had been at her apartment, sick and lying on the couch (78). She responded that she was not sure (78).

On redirect examination, the witness testified that her daughters were not yet sick, but they were getting sick, which was why she was not worried about Defendant or anybody else being in her

apartment (79). She made chicken noodle soup for everybody because everybody was sick (79). That was the purpose for the gathering (79). Also, her friend from upstairs, Melissa Mulroy, was also sick, sicker than her, so she had Melissa's son come down and play with her kids (79). But she then testified that Melissa was also there in her apartment between 6:30 and 8:30 (79).

On recross, the witness was asked if her reason for letting Defendant, a sick person, into her apartment was because her kids were in the other room or if it was because they were already getting sick, she responded that it was the latter (80).

Melissa Mulroy

Melissa Mulroy testified that she had known Ashly Smith for about 15 years (Transcript entitled "Postconviction Hearing/Motion, 08/08/13, 82). Defendant was a friend of her older brother (82-83).

She was home, at her apartment at the Pine Haven Apartments on January 11, 2011 (83). This was the same apartment building that Defendant and Sarah Urban lived in (83-84). She lived in apartment nine (83). She was in her apartment during the morning hours and then she went down to Sarah Urban's apartment (84). She was in Sarah Urban's apartment the whole time between 6:30 and 8:30 p.m. (84). Also there were their (hers and Urban's) children and Defendant (84). Defendant was there most of the time during 6:30 and 8:30 p.m. as well, but he would go back to his apartment across the hall (85). Defendant only went to his apartment one time and stayed there for about 20 minutes (85). Defendant was not feeling well (85).

While she was in Urban's apartment, she sat on the couch (85). Urban made her some chicken noodles soup and she sat on the couch and ate it (85). When asked if Defendant was also on the couch, the witness responded that he was (85).

The reason that this date stood out in her memory was because she was sick herself and she had to call in sick to work (85).

She found out about a week after January 11 that Defendant had been accused of a crime (86). She found out because Defendant told her at that time (86). But her brother had told her that he received a phone call about it the day after January 11 (86).

Skipping ahead to the trial, she did receive a subpoena to testify at trial on Defendant's behalf (86). She spoke to Defendant's attorney, Ms. Reed, on the day of trial, but not before that day (87). Nor did she ever talk to an investigator (87). She was never called as a witness at the trial (87). Ms. Reed never told her why she was not called (87).

On cross-examination, the witness testified that when she was down in Sarah Urban's apartment, her son was down there as well (88). She testified that her son was not ill at the time (88). When asked if she were not concerned about her son being around a sick person, that being Defendant, the witness responded that she was sick and Sarah Urban was helping her (88).

She was asked about how she and Defendant were situated on the couch (88). When asked if Defendant was sitting on the couch, the witness responded that she and Defendant were both kind of lying separate ways (88). They were watching TV and eating soup, but she did not remember what they watched (89).

Finally on cross, the witness was asked if she ever went to the police upon finding out a week after January 11 that Defendant had been accused of a crime, to tell them Defendant could not have done it because he was sick on the couch with her (89). She responded that she did not (89).

On redirect, the witness explained that the reason that she did not go to the police was because she did not take the accusation seriously because she knew that Defendant had been in Sarah Urban's apartment the whole time (90).

On recross, the witness testified that the reason that she did not go to the police was because she did not think anything would come of it, that she did not know if the police were even called, or if there even would be a prosecution (91). Defendant never told her that he had been accused by the police or that the police even had knowledge of it (91).

On redirect, the witness testified that when she had the conversation with Defendant the week after January 11, Defendant was not in handcuffs nor had he been arrested (92). Defendant did not get arrested until two months later, in March (92).

On recross, the witness was asked why she did not go to the police when she learned that Defendant had in fact been arrested (93). She responded that she did not know the procedure for doing that (93).

Timothy Allen Mulroy, Jr.

Timothy Allen Mulroy, Jr. testified that he had known Ashly Drake Smith (Defendant) since the seventh grade (Transcript entitled "Postconviction Hearing/Motion, 08/08/13, 96). They were good friends (97).

The witness testified that between 7:00 p.m. and 8:30 p.m., on January 11, 2011, he was at the Pine Haven Apartments, Apartment 2, located at 29865 Cherry Hill (97). This was where he lived with Defendant (97). He was in his apartment the whole time between 7:00 and 8:30 p.m. (98). When asked if he ever went across the hall to Sarah Urban's apartment, the witness responded, "Probably not" (98). When asked if he saw Defendant in their (his and Defendant's) apartment

between 7:00 and 7:30 p.m., the witness responded that he did (98). Defendant was asleep on the futon (98).

The witness testified that he had signed an affidavit in this case, and that he needed to make a correction to it (98-100). The correction he needed to make was that in the affidavit, he said that when a phone call came in from a Mr. Horn, Defendant was sleeping on Sarah Urban's couch (100). He testified that the fact was that Defendant was sleeping on the couch in their (his and Defendant's) apartment when the call came in from Mr. Horn (100). He explained that the reason that the affidavit was wrong was because they had been crunched for time and the affidavit had just been typed up and signed (100).

The witness was asked if, when he saw Defendant, Defendant was in their apartment the whole time between 7:00 and 8:30 p.m. (103). The witness responded that Defendant was in their apartment the whole time from the time that he (the witness) arrived to when he (the witness) got the phone call (103). The witness was asked if he ever witnessed Defendant go across the hall between 7:00 and 8:30 p.m. (103-104). The witness responded that he could not be 100% certain as to whether Defendant ever went across the hall or not (104). He found out about the accusation against Defendant when Nicholas Horn called that night (January 11) (104).

He attended Defendant's trial on August 20, 2012 (105). He had received a subpoena to testify (105). He would have given the same testimony that he just gave in court (105). He was asked if prior to trial, an investigator talked to him (105). He responded that if one had, the conversation would have been brief (105). He was asked if he spoke to Defendant's attorney prior to trial (105). He responded that he believed that he did speak to the attorney briefly on the phone,

and he did speak to her on the day of trial (105-106). The attorney did not call him as a witness (106). When asked if she told him why she did not, the witness responded:

A Yes, she said in her words that it was a slam dunk. It was a legal slam dunk and there was no need for anybody else to come and testify. That she had everything. In her, her legal sense, it was a slam dunk. There was no need, that's what she said.

(106).

On cross-examination, the witness testified that just before 7:00 p.m. on January 11, he had been out to the movies with his girlfriend, Crystal Parker (106). He and his girlfriend got back to his apartment at around 7:00 p.m. (107). When he and his girlfriend came into his apartment, Defendant was on the futon sleeping (107). Then he received a phone call from Nicholas Horn (107). When asked what time the phone call came in, the witness responded that it was sometime between 7:00 and 7:30 p.m. (107). He could not recall the exact time that he got the call (108). He did acknowledge that his affidavit said that he received the phone call from Nicholas Horn at 7:30 p.m. (108).

On examination by the court, the witness testified that he received the phone call from Nicholas Horn sometime between 7:00 and 8:00 p.m. (109). When asked what Horn said to him, the witness responded:

A He said that his friend, Shawn Kelly, had just been robbed by my friend, Mr. Smith, and that he had just talked to him on the phone and that it had just happened within fifteen minutes. I said that, that was impossible because he had been at the house with me for over the last half hour and there was just — it wasn't possible. I put him on the speaker

phone. Crystal Parker was there. She heard what he said. I asked him again to clarify when this had taken place. He said it just had happened. Then I went to Mr. Smith. I asked Mr. Smith –

* * * *

A Mr. Smith was asleep and I woke him up. I said, you know, Nicholas Horn was on the phone. He's saying these accusations. He's saying this. He obviously had just woke up out of a dead sleep and looked at me in just confusion. And honestly, I took what Horn just said – I didn't believe it. I didn't even – it just seemed to be just babble, like, like – once he told me that it just recently had happened, it made no sense and I knew that there was no possible way it could be true.

(109-110).

On continued cross-examination, the witness testified that it was about half an hour after he arrived at his apartment that he received the call from Horn (111). He testified that he told Horn that what Shawn Kelly was saying was impossible because Defendant had been with him the whole time since he had gotten back home at 7:00, that Defendant had been asleep on the futon (111). He did not tell Horn that it could not have been Defendant because Defendant had been lying on Susan Urban's couch, even though that is what his affidavit said (111).

He found out that Defendant had been charged with wrongdoing when Defendant got arrested, three or four months, or maybe even longer, after the incident (114). He did not go to the police to tell that it could not have been Defendant because Defendant was in the apartment sick because nobody ever contacted him (114).

Trial Court's Findings of Fact and Conclusions

Following the arguments of counsel, the trial court rendered the following findings of fact and conclusion:

THE COURT: Okay. Alright. Then the Court, first of all, will make findings of fact with regard to this case. We heard from Susan Reed. She indicated that she is a – the Court will find that she's a licensed attorney with the State of Michigan. That her specialty is as much as you can be specializing in the State of Michigan is ninety percent of her cases are criminal either in the state or federal courts. The other ten percent of her cases is domestic (sic), basically custody, support, divorce cases.

She indicated she's been practicing for thirty-one years since 1982. She had one reprimand with regard to failure to communicate with a client. She communicated she indicated orally with a client, but she did not put it in writing. But that was with regard to a civil case. She indicated that her current case load is about seventeen cases, but that that's actually kind of light for her. She rep – indicated that she represented the defendant in this case, Ashly Drake Smith, and that he was charged with armed robbery.

She was appointed in May of 2012, Circuit Court arraignment. She then went on June 4th, 2012 to a court hearing with regard to this. She also indicated that she had an investigator appointed with regard to this matter. She indicated that the first time she visited or met with Mr. Smith other than in the bullpen at the jail was the day before the trial, and he (sic) also indicated that she believed that she did speak to one of the alibi witnesses she referred to as the gentleman before the trial.

She did indicate that she had just received notice with regard to the evidentiary hearing and didn't have her notes with her or anything like that. She was going from memory with regard to this matter.

She indicates that the investigator didn't take any written statements. That there was a bench trial in front of Judge Allen. She also testified that she did meet with or that she spoke with the alibi witnesses and that she spoke to a number of them on the day of

the trial and that their testimony or that their statements to her at that point and time they could not put together a complete time line of where Mr. Smith was during this entire time, which is contrary to what the alibi witnesses testified to. And the Court will get into that a little bit later.

She did indicate that after she heard the witnesses testify for the prosecution that she decided that the case was not going well for the prosecutor. She believed that they were going to win the case. That she indicated that she decided not to use the alibi witnesses because she was afraid it might mess up the defense, and that she made a strategic decision with regard to that or the Court will find she made a strategic decision. And actually, her words were that she thought that the alibi witness might hurt the case and that – okay, she specific – this Court will find that when she talked with the witnesses that they said they were in and out all day and that they could not establish the exact time that – they weren't able to give that complete time of him being under somebody's watch.

She felt that the identification was so weak in the prosecutor's case that the alibi witness could actually weaken it. And she said she did not file a motion for directed verdict because she felt that the judge would find that there's a question of fact with regard to the identification. Her experience had shown her that that's usually what a judge does in a case.

She also indicated it was custom not to file the alibi notice because the pros – or the defense had brought up that the statute mandated that, the filing of the notice within a certain amount of days before the trial. And the statute does say shall.

The Court has reviewed several of the cases with regard to that and it looks like there still is discretion with judges to not have to follow that shall language with regard to the alibi, and there are several cases that talk about that. And she indicated that at least in Judge Allen's courtroom that it was custom not to file alibi notices and he routinely would allow – can somebody stop that whoever is – alright. That it's custom that Judge Allen would allow that. The Court has talked to several other judges here and they allow this also, this practice to go on.

She indicated in another part of her testimony that all four could not say they were consistently with him. She also stated that as a tactical matter even if she would have put the alibi witnesses on that she would not have used the other three, but only used one because there would be discrepancies in their testimony, as was the Court found with regard to their testimony (sic). There was, there was discrepancies (sic). And she felt that the trial tactics if she decided to use an alibi witness that she would only use one.

The Court is also going to rely upon what – from the transcript, the waiver trial transcript of 8-20-2012, pages 67 and 68. The Court asked, “Okay. People have rested. Ms. Reed, what’s your pleasure?” And then Ms. Reed answered, “Your Honor, I have subpoenaed witnesses on my client’s behalf, but after the way the testimony has come in – and then it says sic, and then put in parens in, end of paren. “In further discussion with my client, I’m not going to call the witness. Is that okay with you, Mister?” And then Mr. Smith answered, “Yes, ma’am.” And then the Court said, “Okay.”

We then heard from Ashly Drake Smith, who indicated that he had a criminal history. That he’s got attempted possession of counterfeit coins, 2002, which he pled guilty to. That he also pled guilty in 2010 to larceny from a person. That he lived at Pine Haven Apartments, 29865 Cherry Hill, Inkster. That, that was apartment number two, his apartment. He lived there with Timothy, Timothy Mulroy, Jr., and that Sarah Urban lived directly across the hall and that Melissa Mulroy lived two floors up.

He says he was at Sarah’s apartment from 6:30 to 8:30 p.m. He said he did leave that apartment to go to his apartment to use the bathroom or talk to his girlfriend, but that he was sick on Sarah’s couch with the flu. The Court is going to find that the fact that he says he just went over there to use the bathroom or talk to his girlfriend would not be a long period of time for him to go to do either of those things. There was no testimony that he was gone for any long period of time to his apartment with regard to that.

He indicates he had a discussion with his attorney, Ms. Reed, where she had a discussion about whether to put the alibi witnesses on and that she thought that things were going to work out well for him without the alibi witnesses. He never complained about Ms.

Reed before the trial to Judge Allen about anything she was doing or her failure to do anything with the alibi witnesses.

He indicated she was on time all the time unlike other attorneys that he had. He had, had to two (sic) prior attorneys and they had withdrawn because his girlfriend didn't take care of paying the bill.

Then we heard from Sarah Urban. She indicates that she's a good friend with him. That he's good friends with her boyfriend. This all took place on January 11th, 2012 (sic). That she lives across the hall from him. That she has a one and a five year old daughter. That he was at her place from 6:30 to 8:30 p.m. That he had the stomach flu. That – she says that "Ashly may have gone across the hall," but again her language that he may have gone across the hall does not in any way indicate to this Court that he was gone for these long periods of time over at his apartment like his roommate testified to. Again, being inconsistent in this Court's mind.

She also indicated that Ms. Reed didn't like the way that she was dressed the day of the hearing. That she had black pants on, black shirt, and shoes, and didn't like the way she was dressed.

We then heard from Melissa Mulroy. She indicated that she was at Sarah Urban's apartment from 6:30 to 8:30 that night. That Mr. Smith was there. She said she spoke with Ms. Reed as did Ms. Urban on the day of the trial and they didn't get called as a witness (sic). They both indicated that, and they both basically say they didn't report this to the police because they didn't know the procedure how to report it to the police or the prosecutor.

Then we heard from Timothy Mulroy, Jr. He said he has known Mr. Smith since seventh grade. That they're good friends, although he did indicate he wouldn't lie for him. He indicated he was with him from seven to 8:30. He said from seven to 7:30, Mr. Smith was asleep the entire time in his apartment, not over in the Urban apartment. But then on his affidavit, he says that he was over on Sarah's couch. So he signs an affidavit under oath, states that he's over on Sarah's couch and then he turns around and says, "Oh well I was pressured and I was under a time constraint and I had to – and then I changed it." But never contacted anybody to change anything, although he was clear in his testimony he knew the problem when he signed it the day that he signed it, but he never talked about

it until the attorney talked to him two weeks before this hearing. And then at that point and time, he brought it up to the attorney, and the attorney at that point and time advised him they would not put in a new affidavit, but they'd just take care of it here at the hearing.

He says he got a call from Nicholas Horn saying that Mr. Smith had committed this crime and he – first, he's talking about it took place either 7:15, 7:20, 7:30. Then later, he said seven to 8 o'clock some time that the call took place. So, it never really was clear to the Court what exact time, but he did advise the person on the phone that it was impossible because he had been with him for at least the last thirty minutes, which again, is inconsistent, inconsistent with what the young ladies testified because they said he's over at their place.

Alright. First of all, the Court is going to make a decision with regard to the ineffective assistance of counsel with regard to whether or not this was below the reasonable standard of an attorney or not.

The Court believe[s] that this was a strategic decision by Ms. Reed with regard to this matter. She had witnesses who she testified to could not state a full time line where he was, had lots of – had holes in that or something to that effect. And after the Court heard the testimony of the witnesses, the Court certainly understands the problem that she saw with regard to their testimony, as one of them is saying primarily he's over in her apartment and the other – and she got her friend saying that, and the young man testifies that he's over in his apartment and that he couldn't be anywhere other than his apartment. They're very inconsistent statement[s], and they're not just minor details in this Court's opinion. Those are major differences where he was during that time. Was he in apartment two, apartment four, or whatever confusion that Gilligan's Island or whatever it was that was cited, the problem with regard to that. Those are in – very inconsistent stories, who he's with.

And so the Court can certainly understand based on – now my (sic) [Ms.] Reed was wrong in her call. She thought she had enough in that she was going to win, but that's not the standard that attorneys are held to. It's a strategic decision with regard to this, and I disagree with any analysis that it's a weak strategic decision or not a strategic decision. I think it is a strategic decision based first of all, upon the fact that she said these people were – could not set

down a full time line that he was with them. And she actually did testify. That's one other finding of fact I'd like to make. That she did testify. When the Court asked, "Well, if they would have put together a period of time where you could say where he was, would you have used them as an alibi witness (sic), then she said, yes, she would. Also, she's in the heat of battle and she made a strategic decision not to put on alibi witnesses. She specifically asked. So she – and obviously, she was making a decision because she put it on the record.

This isn't a case where there was no mention of alibi witness (sic). She puts on the record that she subpoenaed witnesses on the client's behalf. So she obviously knew there was a need for alibi witnesses because she had subpoenaed these people. So this idea that this – that she hadn't done some planning with regard to that – and then, but after she hears how the testimony goes in, and she miscalled that. She miscalled how the testimony went in and what effect it would have on Judge Allen. But she says, "In further discussion with my client, I'm not going to call the witness." So she had some discussion with the client and he indicates that she had some discussion with him, and then asked him, "Is that okay with you, mister?" Now he could have at that point and time said, no, but he says yes. He goes along with her. He didn't like the outcome of the case, but that doesn't mean it's not a strategic decision.

Then regard to whether or not there was a reasonable probability that their testimony would have made a different outcome. The Court can't make – so I'm going to find with regard to that, that there was a strategic decision and that for the first prong of the test, the defense has not met their burden.

With regard to the second one. Had the alibi witness (sic) testified, would there be a reasonable probability that absent error, the outcome may have been different? Again, the Court is going to find that there is such inconsistencies in these testimony (sic) between the two young ladies and the young man on where he was. Was he in two or four? And both of them basically say that he's in their place. These are real big differences. That's not just some minor difference, and I don't think a jury would have believed them.

So, for all these reasons, I'm going to – I'll send this to the Court of Appeals, but I'm going to find that there was – that the defense has not met their burden of proving that there was ineffective assistance of counsel.

(Transcript entitled "Postconviction Hearing/Motion, 08/09/13, 28-39).

Argument

To be entitled to a new trial based on the claim that trial counsel was ineffective in not calling alibi witnesses, the defendant must establish the counsel had no legitimate strategy in not calling the witnesses and that the testimony of the witnesses would have given the defendant a reasonable probability of being acquitted. Defendant's trial counsel explained that she felt that the prosecution's case was sufficiently weak on identification that alibi witnesses were not necessary, a strategy that Defendant agreed with on the record, and the alibi witnesses gave conflicting testimony on a major point, in any event. The trial court did not err in finding that Defendant had not sustained his burden of establishing ineffective assistance of counsel

A) Defendant's Claim

Defendant's sole claim is that his trial counsel was ineffective in failing to file a timely notice of alibi and in not calling his alibi witnesses at trial.

B) Counterstatement of Standard of Review

The People accept Defendant's statement that the trial court's findings of fact following an evidentiary hearing relative to a claim of ineffective assistance of counsel are reviewed for clear error, and that the court's determination based on those facts is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A finding is clearly erroneous if it leaves the reviewing court with "a definite and firm conviction" that a mistake has been made. *People v Adkins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

C) The People's Position

i) The law pertaining to claims of ineffective assistance of counsel generally

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), this Court explained that when evaluating a claim of ineffective assistance of counsel under either the Sixth Amendment to the

United States Constitution or under the equivalent provision of the Michigan Constitution, Michigan courts must examine the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).¹ In order to establish ineffective assistance of counsel, the defendant must make two showings. First, he must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense.

Under the first requirement, defense counsel's performance must be measured against an objective standard of reasonableness, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and not counsel's subjective state of mind. *Harrington v Richter*, – US –; 131 S Ct 770, 790; 178 L Ed 2d 624 (2011). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Id.* Furthermore, every effort must be made to eliminate the distorting effects of hindsight, and the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In other words, hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predictions of how the trial would proceed. *Premo v Moore*, – US –; 131 S Ct 733, 745; 178 L Ed 2d 649 (2011), citing *Harrington v Richter*, *supra*, 131 S Ct at 770. Indeed, “[i]t is ‘all too tempting to second-guess counsel’s assistance after conviction or adverse sentence.’” *Id.*, citing and quoting from *Strickland*, 466 US at 689; 104 S Ct at 2065. Thus, a court should neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor evaluate counsel's competence with the benefit of hindsight.

¹ It would seem that more recent United States Supreme Court cases which cite and apply *Strickland*, one of which the People will be citing, would be applicable as well.

People v Matuszak, 263 Mich App 42, 58; 687 NW2d 342 (2004). Stated differently, even where review is de novo, the standard for judging counsel's representation has to be a most deferential one. *Premo v Moore*, 131 S Ct at 740. "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, interacted with the client, with opposing counsel, and with the judge." *Id.* Furthermore, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practiced or most common custom." *Premo v Moore, supra*, 131 S Ct at 740. And finally, as far as the deficient performance prong, a court reviewing counsel's performance "is required not simply to "give [the] attorneys the benefit of the doubt," but to affirmatively entertain the range of possible "reasons counsel may have had for proceeding as they did." *Cullen v Pinholster*, – US –, 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011), quoting from *Pinholster v Ayers*, 590 F3d 651, 692 (CA 9, 2009) (Kozinski, CJ, dissenting). *Strickland* does, after all, as noted previously, "call for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Cullen, supra*, 131 S Ct at 1407, quoting from *Richter, supra*, 131 S Ct at 791.

Under the prejudice component, a court must conclude, upon a finding of deficient performance, that there is a reasonable probability that, absent the deficient performance, the factfinder would have had a reasonable doubt respecting guilt. *Pickens, supra*, 446 Mich at 312; *People v Poole*, 218 Mich App 702, 717; 555 NW2d 702 (1996). In other words, the defendant must show that there is a reasonable probability that, but for the deficient performance, the factfinder would not have convicted the defendant. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502

(2000). At the very least, the likelihood of a different result must be substantial, not just conceivable. *Harrington v Richter, supra*, 131 S Ct at 792.

Finally, *Strickland* allows a reviewing court to dismiss an ineffectiveness claim under the prejudice prong without addressing the first prong of the test. *Strickland, supra*, 466 US at 697; 104 S Ct at 2069.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, supra, 466 US at 697; 104 S Ct at 2069.

ii) Discussion

The People do not see where any of the trial court's findings of fact, as laid out fully in the foregoing Counterstatement of Facts, were clearly erroneous as that term has been defined. Thus, the only question is whether the trial court's conclusions, based on those findings, are erroneous on de novo review.

a) Deficient performance prong

First, as to Defendant's claim that his trial counsel was ineffective in not filing a timely notice of alibi, trial counsel testified that she did not file such a notice because she knew from

experience, from practicing in the forum that she was in, and knowing that the prosecutor would likely not object to her calling alibi witnesses despite there not be a timely filing of a notice of alibi, that she would not be prohibited from putting on alibi witnesses for failing to file a timely notice of alibi. Furthermore, not filing a timely notice of alibi was not the reason why trial counsel did not call any alibi witnesses. That is, this was not a situation where trial counsel tried to call alibi witnesses and was prohibited by the court from doing so, due to the failure to timely file a notice of alibi.

Rather, the reason that trial counsel did not call any of Defendant's alibi witnesses was two-fold: (1) that trial counsel did not believe that Defendant's alibi witnesses could completely account for Defendant's whereabouts the whole time, and (2) that the prosecution's case was weak, in that the complainant's identification was weak, in that the identification of Defendant by the complainant was based upon some type of vendetta that the complainant had against Defendant, which was evidenced at trial by a derogatory remark that the complainant made about Defendant on Facebook.

The failure to call a particular witness a trial is presumed to be a matter of trial strategy, and an appellate court will not substitute its judgement for that of trial counsel in a matter of trial strategy. *People v Gonzalez*, unpublished opinion per curiam of the Court of Appeals, decided April 12, 2007 (Docket No. 267568), pp 1-2, citing *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999) (a copy of the *Gonzalez* Opinion is attached as **Appendix A**). And the failure to call an alibi witness does not constitute ineffective assistance of counsel if counsel believes that the purported alibi witness could not provide an effective alibi. *Gonzalez, supra* (**Appendix A**), p 3, citing *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

Furthermore, as noted, the crux of trial counsel's strategy in this case was to undercut the complainant's credibility. See again *Gonzalez, supra* (**Appendix A**), p 2 ("A review of the record reveals that the crux of counsel's strategy did not involve defendant's mother's purported alibi testimony, but rather, involved undercutting the credibility of the prosecution's witnesses who identified defendant as one of the assailants."); and see *People v Lockett*, unpublished opinion per curiam of the Court of Appeals, decided April 19, 2005 (Docket No. 249831), p 2 ("Moreover, we cannot characterize the decision to forego the alibi defense to force the jury to focus on discrepancies in the prosecutor's case as an unsound trial strategy.") (a copy of this Opinion is attached as **Appendix B**).

And there was also the fact that Defendant agreed with his counsel's decision not to call any witnesses, which colloquy the People will set forth again here:

THE COURT: Okay. People have rested. Ms. Reed, what's your pleasure?

MS. REED: Your Honor, I have subpoenaed witnesses on my client's behalf, but after the way the testimony has gone it (sic) [in] and further discussion with my client I am not going to call the witness. Is that okay with you, mister -

MR. SMITH: Yes, ma'am.

THE COURT: Okay.

(Waiver Trial Transcript, 08/20/12, 67-68).

See e.g. *People v Monroe*, unpublished opinion per curiam of the Court of Appeals, decided September 26, 2005 (Docket No. 254008) (a copy of which is attached as **Appendix C**):

Defendant also argues that he was denied his right to the effective assistance of counsel because his trial counsel failed to present an alibi defense. However, the record indicates that on the first day of trial defense counsel informed the court that pursuant to discussions with defendant, the defense was withdrawing presentation of its sole alibi witness. Although present at the time of these statements, defendant did not interject to dispute his attorney's statements to the court. Nor did he object to his counsel's waiver of an alibi defense at any other point during trial, or at sentencing. Because the record indicates that defendant acquiesced in the decision not to present an alibi defense, he may not now predicate a claim of error on that decision. Indeed, "[t]o hold otherwise would allow defendant to harbor error as an appellate parachute." *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

(Appendix C, pp 2-3).²

And see *United States v Weaver*, 882 F2d 1128 (CA 7, 1989):

Where a defendant, fully informed of the reasonable options before him, agrees to follow a particular strategy at trial, that strategy cannot later form the basis of a claim of ineffective assistance of counsel. *United States v Williams*, 631 F2d 198, 204 (CA 3, 1980) (No ineffective assistance of counsel where defendant ultimately concurred in his trial counsel's tactical decision). To allow that would exempt defendants from the consequences of their actions at trial and would debase the right to effective assistance of counsel enshrined in the sixth amendment.

882 F2d at 1140.

² The People are cognizant that Defendant did complain at sentencing about the fact that his trial counsel did not call four witnesses that were available at trial. But it is the timing of this complaint that is noteworthy. Indeed, it was only *after* Defendant was convicted that he complained.

b) Prejudice prong

The trial court found, and rightfully so, that the testimony of the three alibi witnesses who Defendant did call at the evidentiary hearing conflicted, that the conflict was mainly between what the two women testified to and what the man testified to. Indeed, the two women testified that between 6:30 p.m. and 8:30 p.m., Defendant was sick on the couch in the apartment of Sarah Urban, that he was there almost the whole time, except for when he would leave to go back to his apartment across the hall for brief intervals, whereas the man, Timothy Mulroy, Jr., testified that Defendant was in their (his and Defendant's) apartment sick on the couch for the whole time between 7:00 and 8:30 p.m. See *People v Murray*, unpublished opinion per curiam of the Court of Appeals, decided October 18, 1996 (Docket No. 137294), a copy of which is attached as **Appendix D**:

Following a two day *Ginther* (footnote omitted) hearing, the trial court found that the alibi witnesses testimony did not provide defendant with a complete alibi and, furthermore, that the testimony of the witnesses conflicted. The trial court held that counsel's failure to file a notice of alibi did not constitute ineffective assistance of counsel. A reading of the testimony of the alleged alibi witnesses showed that defendant's alibi was either incomplete or fabricated by defendant himself and/or the witnesses. We agree with the trial court. In light of the fact that defendant's alibi was incomplete, counsel did not err in failing to file a notice of alibi or in calling the alleged alibi witnesses. (Citations omitted). Accordingly, counsel's representation of defendant was not ineffective. (Citation omitted).

Appendix D, pp 1-2.

And there is the fact that not one of the alibi witnesses who testified said that they went to the police to inform them that Defendant could not have been the culprit because he was with them (with either Susan Urban and Melissa Mulroy or with Timothy Mulroy, Jr, that is). See again

Lockett, supra (**Appendix B**), p 1 (“None of these individuals went to the police with information that potentially could have exonerated defendant.”).

Based on these considerations, the trial court properly found that Defendant did not show that there is a reasonable probability that he would have been acquitted had the three alibi witnesses who he called at the evidentiary hearing testified at trial.

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

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Dated: December 1, 2014

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 149357

ASHLY DRAKE SMITH,

Defendant-Appellant.

Court of Appeals No. 312721
Trial Court No. 12-004553-FC

The People's Appendix A

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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED
April 12, 2007

Plaintiff-Appellee,

v

No. 267568
Wayne Circuit Court
LC No. 05-007734-01

MIGUEL GONZALEZ,

Defendant-Appellant.

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 6 to 25 years' imprisonment for the armed robbery conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that his counsel's failure to call two purported alibi witnesses to the stand constitutes ineffective assistance of counsel. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *LeBlanc, supra* at 579. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *LeBlanc, supra* at 579.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The

failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court will not substitute its judgment for that of counsel in a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant argues that he was denied the effective assistance of counsel when his counsel failed to call defendant's mother, Catherine Gonzalez, and defendant's sister, Lucinda Gonzalez, as alibi witnesses. Pursuant to the Michigan Code of Criminal Procedure, a trial court must exclude alibi evidence when a defendant fails to comply with MCL 768.20(1), the notice-of-alibi statute. MCL 768.21. Here, defense counsel only filed the requisite notice of alibi with respect to defendant's mother, not defendant's sister. Consequently, defense counsel was precluded from calling defendant's sister to testify. MCL 768.21. To the extent that defendant is arguing that his counsel was ineffective for failing to file an alibi notice concerning defendant's sister, there is nothing in the lower court record to suggest that defendant's sister could have provided defendant with an alibi. Although defendant attaches to his appellate brief the affidavits of his sister and mother, the affidavits are not a part of the lower court record and, therefore, cannot be considered. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Given that there was no evidentiary hearing on the matter and nothing concerning defendant's sister nor what her alleged testimony would have been, there are no mistakes apparent on the record with respect to counsel's failure to call defendant's sister as an alibi witness. Thus, defendant is unable to establish an ineffective assistance of counsel claim as it relates to the purported alibi testimony of defendant's sister.

Regarding defendant's mother, a notice of alibi was filed and reference to defendant's mother appears in the lower court record. Although counsel was aware that defendant's mother could have provided defendant with an alibi, counsel never called defendant's mother as a witness. The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998).

During his opening statement, defense counsel only indicated that he "may" call defendant's mother to testify on behalf of defendant. A review of the record reveals that the crux of counsel's strategy did not involve defendant's mother's purported alibi testimony, but rather, involved undercutting the credibility of the prosecution's witnesses who identified defendant as one of the assailants. Defense counsel took care to extensively cross-examine the prosecution's witnesses with an eye toward discrediting them. Counsel elicited testimony from Alfie Parker, one of the prosecution's main witnesses who identified defendant as his assailant, that Parker took drugs on the day of the incident, was a drug dealer, had animosity toward defendant, lied to police when he was interviewed after the incident, and attempted to burn down the house of Clifford Sabin, another of the assailants, in retaliation for Sabin burning down Parker's house. With regard to another of the prosecution's main witnesses, Mary Garcia, defense counsel elicited testimony from Garcia that her trial testimony differed greatly from a prior statement she had given to police on the night in question.

The decision to abstain from calling defendant's mother to the stand appears to have been purposeful. Counsel was able to call defendant's mother to the stand if he wished, given that he fulfilled the relevant statutory requirements by filing a notice of alibi listing defendant's mother as a proposed witness. Further, it is clear that counsel was aware of defendant's mother's

purported testimony given his reference to it in his opening statement. The failure to call an alibi witness does not constitute ineffective assistance of counsel if counsel believes that the purported alibi witness could not provide an effective alibi. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Defendant's mother's purported alibi testimony might not have been effective given that allowing defendant's mother to testify would have been a risky proposition. Had defendant's mother's credibility been called into question, which, presumably, the prosecution would have at least attempted to do, the progress defense counsel had made in discrediting the prosecution's witnesses would have been seriously undermined. If defendant's mother was perceived to be lying about defendant being at home with her at the time of the incident, the jury would likely conclude that the prosecution's witnesses who identified defendant as the assailant were credible after all. It appears that counsel's decision to focus on discrediting the prosecution's witnesses and not presenting his own witnesses and running the risk of having them discredited was effective in that defendant was acquitted of two counts of assault with intent to murder. To the extent that his strategy was unsuccessful in that it failed to garner defendant an acquittal on all charges, that a trial strategy is ultimately unsuccessful does not render counsel ineffective for using it. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Accordingly, defendant has failed to establish that his counsel provided him with ineffective assistance.

Second, defendant contends that the trial court erred when it failed to extend the prior inconsistent statement jury instruction to both of the witnesses who testified regarding making prior inconsistent statements, rather than just to the one. We disagree.

Defense counsel neither requested an instruction concerning prior inconsistent statements, nor did he object to the lack of instruction. Rather, defense counsel affirmatively expressed approval of all of the jury instructions. Defendant's affirmative statement indicating his satisfaction with the jury instructions constitutes express approval of the instructions and waives review on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004) (one who waives his rights may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error).

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 149357

ASHLY DRAKE SMITH,

Defendant-Appellant.

Court of Appeals No. 312721
Trial Court No. 12-004553-FC

The People's Appendix B

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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAVID TYREE LOCKETT,

Defendant-Appellant.

UNPUBLISHED

April 19, 2005

No. 249831

Wayne Circuit Court

LC No. 02-012639-01

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of first-degree murder, but was convicted of two counts of assault with intent to murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of thirteen to twenty years' imprisonment for the assault convictions, to run consecutively to the mandatory two-year term for the felony-firearm conviction. Defendant appealed by right and was granted a remand to develop a claim of ineffective assistance of counsel. Following an evidentiary hearing, the trial court denied defendant's motion for a new trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his trial counsel's failure to interview all four potential alibi witnesses and to present them at trial to establish an alibi defense constituted ineffective assistance of counsel. Counsel indicated he spoke with two or three of the witnesses. Three of the four witnesses said that they spoke with defense counsel. Counsel explained that there were some problems with the alibi witnesses. While he did not elaborate, we note that all had the bias of girlfriend, brother or friend. Further, defendant's brother had the added problem of a larceny conviction, which could have been used to impeach his testimony. None of these individuals went to the police with information that potentially could have exonerated defendant. Moreover, the trial court found it suspect that three of the witnesses traveled from downtown Detroit all the way to Warren at 10:45 p.m. just so that one individual could borrow \$20 from defendant. Counsel stated that he had filed the notice of alibi defense as a precautionary measure, but decided against raising it because he did not want to shift the focus from inconsistencies in the prosecution's case to the credibility of the alibi witnesses. Counsel specifically noted the fact that casings from the shooting were found at a location different from where the victims claimed defendant was standing, as well as numerous inconsistencies in the victims' testimony. Also,

counsel described alibi defenses generally as “not an outstanding defense” since alibi witnesses in particular often get “tripped up” on why they recall that it was a specific day or a specific time, “and all of a sudden the jury can become hesitant about . . . whether or not they believe a witness is telling the truth.”

In reviewing a determination regarding ineffective assistance of counsel, factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004). “[T]o demonstrate ineffective assistance, a defendant must show that his attorney's performance fell below an objective standard of reasonableness. The defendant must overcome the presumption that the challenged action could have been sound trial strategy. . . . A reviewing court must not evaluate counsel's decisions with the benefit of hindsight. On the other hand, the court must ensure that counsel's actions provided the defendant with the modicum of representation that is his constitutional right in a criminal prosecution.” *Id.* at 485, citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), and *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

“Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland, supra* at 690-691.

* * *

A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make “an independent examination of the facts, circumstances, pleadings and laws involved . . .” *Von Moltke v Gillies*, 332 US 708, 721; 68 S Ct 316; 92 L Ed 309 (1948). This includes pursuing “all leads relevant to the merits of the case.” *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). [*Grant, supra*, 470 Mich 485-487.]

That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant argues that trial counsel’s decision could not have been sound trial strategy since he said he had only talked to “two or three” of the four witnesses and did not seek additional time to talk to the others. However, there was no clear error in the trial court’s finding that the investigation was adequate. Counsel understood the gist of the defense and would not have learned anything more of significance if he had spoken to the additional one or two witnesses. Moreover, we cannot characterize the decision to forego the alibi defense to force the jury to focus on discrepancies in the prosecutor’s case as an unsound trial strategy. The credibility of the alibi witnesses would likely have been called into question, and this may have overshadowed the credibility issues attendant to the victims’ testimony and the inconsistencies between their testimony and the physical evidence. It is noteworthy that counsel employed the same strategy during an earlier trial that resulted in a hung jury. Moreover, counsel gained an

acquittal of the most serious charge – first-degree murder. Under the circumstances, we cannot conclude that the decision to forego the alibi defense was an unsound trial strategy.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

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STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 149357

ASHLY DRAKE SMITH,

Defendant-Appellant.

Court of Appeals No. 312721
Trial Court No. 12-004553-FC

The People's Appendix C

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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 27, 2005

v

WILLIE MONROE,

No. 254008
Wayne Circuit Court
LC No. 03-012337

Defendant-Appellant.

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of carjacking, MCL 750.529a, receiving stolen property, MCL 750.535(7), and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

This case arises out of an incident in which defendant is alleged to have stolen a car from the complainant at gunpoint. At trial, the complainant testified that while seated in a rental vehicle outside a Detroit gas station she saw someone reach for the driver door handle of the vehicle. The complainant turned to see a man standing by the driver's window, armed with a handgun and telling her to get out of the car. She described the man as approximately five feet seven inches to five feet nine inches in height, skinny, approximately one-hundred-sixty pounds, and brown skinned. After leaving the vehicle the complainant saw the man drive away in the car.

Approximately one week later, defendant was found by police kneeling by the front driver's side tire of the vehicle. Defendant was taken into custody. According to the arresting officer, defendant was six feet one inch in height and weighed two hundred pounds at the time of his arrest. The following day, the complainant was shown a photographic array consisting of six photographs, including one of defendant. After approximately three minutes, the complainant identified defendant as "look[ing]" like the man who stole her car at gunpoint. During the preliminary examination and again at trial, the complainant again identified defendant as her assailant.

On appeal, defendant first argues that he was denied due process because a witness' statement containing exculpatory information was not presented at his trial. Specifically, defendant argues that "if" the prosecutor did not produce the subject statement prior to trial, the prosecution was in violation of the disclosure requirements of *Brady v Maryland*, 373 US 83; 83

S Ct 1194; 10 L Ed 2d 215 (1963). However, defendant has failed to provide any factual support for his allegation that the prosecution suppressed favorable evidence, see *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998), and his mere conjecture as to the prosecution's suppression of the statement is insufficient to establish a *Brady* violation. See *People v Brownridge*, 237 Mich App 210, 214-215; 602 NW2d 584 (1999).

For this same reason, we reject defendant's assertion that "if" defense counsel possessed this statement before trial but failed to present it to the court, defendant was denied his right to the effective assistance of counsel. Defendant's assertion in this regard is one of several alleged errors on the part of trial counsel that defendant argues establishes that the assistance of his trial counsel was ineffective. A defendant seeking to establish ineffective assistance of counsel must overcome a strong presumption that his counsel's performance constituted sound trial strategy, *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003), and must show that his counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the results of the proceedings would have been different, *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Because this Court denied defendant's motion to remand for a *Ginther*¹ hearing, our review of defendant's claim that he was denied the effective assistance of counsel is limited to mistakes apparent on the record. *Id.* at 423.

Applying the foregoing principles, we find defendant's assertion that counsel ineffectively handled the alleged exculpatory statement to be baseless. Indeed, defendant has failed to provide any factual support for his contention that his defense counsel had possession of the statement, and his mere speculation regarding defense counsel's possession of the statement is insufficient to overcome the strong presumption that his counsel provided effective assistance at trial. *Riley, supra.*

We similarly reject as baseless defendant's claim that his counsel was ineffective for failing to timely file a notice of alibi. Contrary to defendant's assertion, the record reveals that the notice of alibi was filed with the court and served on the prosecuting attorney within ten days before trial in this matter commenced. Consequently, the notice of alibi was timely under MCL 768.20(1). See *People v Bennett*, 116 Mich App 700, 703-707; 323 NW2d 520 (1982).

Defendant also argues that he was denied his right to the effective assistance of counsel because his trial counsel failed to present an alibi defense. However, the record indicates that on the first day of trial defense counsel informed the court that pursuant to discussions with defendant, the defense was withdrawing presentation of its sole alibi witness. Although present at the time of these statements, defendant did not interject to dispute his attorney's statements to the court. Nor did he object to his counsel's waiver of an alibi defense at any other point during trial, or at sentencing. Because the record indicates that defendant acquiesced in the decision not to present an alibi defense, he may not now predicate a claim of error on that decision. Indeed,

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

“[t]o hold otherwise would allow defendant to harbor error as an appellate parachute.” *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).²

Defendant next argues that he was denied his right to the effective assistance of counsel because his defense counsel failed to challenge the use of a photographic array in place of a corporeal lineup. In *People v Currelley*, 99 Mich App 561, 564; 297 NW2d 924 (1980), this Court acknowledged the general rule in Michigan that a photographic array should not be used in place of corporeal lineup when the defendant is in custody, but that this general rule is subject to certain exceptions. *Id.* Defendant argues that no such exceptional circumstances existed in this case and that, therefore, a corporeal lineup was required. We do not agree. One of the exceptions recognized by the *Currelley* Court as justifying the use of a photographic array rather than a corporeal lineup are those instances where it is not possible to arrange a proper lineup because there are insufficient persons available with physical characteristics similar to those of the defendant. *Id.* at 564 n 1. Here, the police officer who set up the array testified that a photographic array, rather than a lineup, was used because there were not enough prisoners in custody of similar description to defendant. Because the use of a photographic array in place of a corporeal lineup was justified, counsel was not ineffective for failing to challenge use of the array. See *People v Walker*, 265 Mich App 530, 546; 697 NW2d 159 (2005) (“Counsel is not ineffective for failing to advocate a futile or meritless position”).

Finally, defendant argues that the complainant’s in-court identification of defendant denied him due process because it was fatally tainted by the suggestive nature of the confrontation at the preliminary examination. Again, we disagree. Due process is denied when identification procedures are unnecessarily suggestive and conducive to irreparable misidentification. See *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Thus, an identification procedure will be found to be impermissibly suggestive when it can give rise to a substantial likelihood of misidentification. *Simmons v United States*, 390 US 377, 386; 88 S Ct 967; 19 L Ed 2d 1247 (1968). The danger is that an initial improper identification procedure may result in misidentification and will unduly influence any later identification. See *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). As defendant points out, our Supreme Court has held that confrontation between a witness and the defendant at a preliminary hearing can constitute a suggestive identification procedure. See *People v Solomon*, 47 Mich App 208, 216-221; 209 NW2d 257 (1973) (Lesinski, C.J., dissenting), adopted 391 Mich 767; 214 NW2d 60 (1974). However, this Court has held that *Solomon*, *supra*, was a narrow holding and does not establish that all confrontations at preliminary examinations are impermissibly suggestive. See *People v Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975) (explaining that whether a

² Moreover, to the extent that defendant implies that it was incumbent upon the trial court to inquire of defendant whether he in fact acquiesced in counsel’s decision to forgo an alibi defense, we note that there is no case law to support that a defendant must personally state his agreement to waiver of an alibi witness on the record. Cf. *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985) (finding that there is no requirement that a defendant’s waiver of his right to testify be asserted on the record); see also *People v Stevenson*, 60 Mich App 614, 618-619; 231 NW2d 476 (1975) (the decision whether to call an alibi witness is a matter of trial strategy left to the discretion of trial counsel).

confrontation is impermissibly suggestive depends on the totality of circumstances in the particular case); see also *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

Here, there is an insufficient basis to conclude that the identification of defendant during the preliminary examination was impermissibly suggestive. *Kachar, supra*. There is no allegation of any police suggestion. Moreover, the length of time between the carjacking and the preliminary examination was twenty-one days, and the in-court identification occurred just under three months after that. Furthermore, the proceedings took place in the courtroom, and the complainant observed defendant during the carjacking and identified him from the photographic array. Given these circumstances, we find no due process violation attendant the in-court identification.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 149357

ASHLY DRAKE SMITH,

Defendant-Appellant.

Court of Appeals No. 312721
Trial Court No. 12-004553-FC

The People's Appendix D

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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

October 18, 1996

Plaintiff-Appellee,

v

No. 137294

LC No. 90-043067

WILLIE LEE MURRAY,

Defendant-Appellant.

Before: Markey, P.J., and McDonald and M. J. Talbot*, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, two counts of kidnapping, MCL 750.349; MSA 28.581, two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e), MSA 28.788(2)(1)(e), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and arson of an unoccupied dwelling, MCL 750.73; MSA 28.268. Defendant was sentenced to life imprisonment on each of the first-degree murder, kidnapping and criminal sexual conduct convictions, two years on the felony-firearm conviction and five to ten years on the arson conviction. We affirm.

Defendant first argues that he was denied his right to effective assistance of counsel because counsel failed to properly present an alibi defense. To establish a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that under an objective standard of reasonableness counsel was not functioning as an attorney as guaranteed by the Sixth Amendment to the United States Constitution. Moreover, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy and that any deficiency in counsel's performance was prejudicial to his case. *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991).

Following a two day *Ginther*¹ hearing, the trial court found that the alibi witnesses testimony did not provide defendant with a complete alibi and, furthermore, that the testimony of the witnesses

* Circuit judge, sitting on the Court of Appeals by assignment.

conflicted. The trial court held that counsel's failure to file a notice of alibi did not constitute ineffective assistance of counsel. A reading of the testimony of the alleged alibi witnesses showed that defendant's alibi was either incomplete or fabricated by defendant himself and/or the witnesses. We agree with the trial court. In light of the fact that defendant's alibi was incomplete, counsel did not err in failing to file a notice of alibi or in calling the alleged alibi witnesses. *People v McMillan*, 213 Mich App 134; ___ NW2d ___ (1995); *People v Kelly*, 186 Mich App 524; 465 NW2d 569 (1990). Accordingly, counsel's representation of defendant was not ineffective. *LaVearn, supra* at 213.

Next, defendant alleges that he was denied his right to a fair trial due to several instances of prosecutorial misconduct. However, because defendant did not object to the complained of comments or conduct, this issue is not properly before this Court. *People v Gonzalez*, 178 Mich App 526; 444 NW2d 228 (1989). Furthermore, a reading of the record shows that failure to review this issue will not result in manifest injustice. *Id.*

Defendant also argues that the trial court erred in admitting into evidence photographs of the decedent and the victim. The photographs showed the decedent's charred body both at the scene and lying on a table in the morgue, as well as the burn scars on the victim's buttocks.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495; 513 NW2d 431 (1994). Photographic evidence is admissible if it is "substantially necessary or instructive to show material facts or conditions." *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). Photographs are not inadmissible merely because they are gruesome or shocking. The trial court should, however, prevent the jury from seeing those photographs which might "lead the jury to abdicate its truth-finding function and convict on passion." *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). Furthermore, photographs taken during an autopsy must be subjected to more careful scrutiny because they depict the corpse not as it was left by its assailant, but by the "probing instruments and procedures of the medical examiner." *People v Turner*, 17 Mich App 123, 132; 169 NW2d 330 (1969). Here, the photographs of the knife burn marks on the decedent's body were admitted to show premeditation and deliberation and the photographs of the knife burn scars on the victim were admitted to place her at the scene in an attempt to bolster her credibility. We are of the opinion that the photographs were substantially necessary to show material facts or conditions. *People v Anderson*, 209 Mich App 527; 531 NW2d 780 (1995); *Hoffman, supra* at 18. As such, the trial court did not abuse its discretion in admitting the photographs. *McAlister, supra* at 505.

Defendant next contends that the trial court's instruction on "reasonable doubt" was erroneous and incomplete. Because defendant did not object to the instructions as given, this issue is not properly before this Court. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540; 494 NW2d 737(1993). Further, a reading of the record shows that failure to review this issue will not result in manifest injustice, as the instructions as given fairly presented the issues to be tried and sufficiently protected defendant's rights. *Van Dorsten, supra* at 544-545; *People v Wolford*, 189 Mich App 478; 472 NW2d 767 (1991).

Additionally, defendant argues that the trial court did not properly caution the jury on the use of impeachment evidence. Although defendant objected to the impeachment testimony itself and requested a cautionary instruction, he did not object to the instruction that was given and, as such, this issue is also not properly before this Court. *Van Dorsten, supra* at 544-545. Further, a reading of the record shows that failure to review this issue will not result in manifest injustice, as the instruction informed the jury that the witness' testimony could only be used for impeachment purposes. *Id.*; *Wolford, supra* at 481.

Finally, defendant alleges that the trial court erred in admitting the testimony of two police officers when the prejudicial effect of that testimony outweighed any probative value it might have. Because defendant did not object to the admission of the officers' testimony, this issue is not properly before this Court. *Considine, supra* at 162.

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot

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