

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS FITZGERALD ALLMON,

Defendant-Appellant.

UNPUBLISHED

November 24, 2009

No. 287949

Oakland Circuit Court

LC No. 07-009193-FH

Before: Talbot, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of nine to 30 years for the home invasion conviction and three to 15 years’ imprisonment for the assault conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The complainant, Jesse Garner, testified that on April 22, 2007, he was watching and staying in a house at the request of its owner, Carmen Allmon, who is defendant’s mother. Garner testified that Ms. Allmon had put defendant and “his woman” out of the house. Garner had known defendant since 2005. Garner testified that an individual came to the door of the house and verbally identified himself as “Carlos.” Garner opened the door and was immediately struck by a bat. He was struck a number of times on the arm and head. The assailant left, and Garner crawled to the front yard. Officer Amy Matelic testified that when she asked Garner who had beaten him, he replied, “Carmen’s son.” Defendant was found at the home the following day and arrested.

On appeal, defendant claims that he was denied the effective assistance of counsel by his trial attorney’s failure to hold a pretrial hearing concerning the reliability of the complainant’s in-court identification and by counsel’s failure to investigate and call an alibi witness. Generally, to establish ineffective assistance of counsel, a defendant must show that counsel’s performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel’s error, the result of the proceeding might have been different. *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 657 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Because no testimonial record was made, review of this claim is limited to facts contained in the record. *People v Hoag*, 460 Mich 1, 6;

594 NW2d 57 (1999) (citation omitted); *People Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In support of his ineffective assistance claim, defendant notes that “[n]o pretrial hearing pursuant to *People v Kachar*, 400 Mich 78 (1977), was held” and argues that “had trial counsel held the proper pretrial hearing, the reliability of the Complainant’s identification would have been further compromised.” When a witness has been exposed to an impermissibly suggestive identification procedure before trial, his in-court identification will not be allowed unless it has a basis independent of the improper identification procedure. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998) (citation omitted); *People v Kachar*, 400 Mich 78, 91; 252 NW2d 807 (1977). However, in the instant case, there is no evidence of any visual identification procedure, such as a photographic showup or a physical lineup, taking place. The sole pretrial “identification” of defendant was Garner’s on-the-scene statement, to which Officer Matelic testified, that the person who beat him was “Carmen’s son.” This was not a corporeal identification, but a statement in response to Officer Matelic asking Garner who had beaten him. There is no evidence whatsoever that this statement of identification was preceded by any suggestive conduct or procedure. Defendant’s argument that witnesses present at the scene might have discussed the incident with Garner and influenced his identification is speculation. In the absence of any evidence of an identification procedure such as a lineup or photographic showup having taken place, and where there is no evidence of suggestion or impropriety surrounding Garner’s on-the-scene statement of the identity of the perpetrator, the record fails to establish that counsel for defendant performed below objective standards of reasonableness by not holding a hearing to determine an independent basis for Garner’s in-court identification of defendant. *Strickland*, *supra* at 687, 690, 694; *Frazier*, *supra* at 243.

The record also supplies no basis to conclude that, but for counsel’s alleged errors, there is a reasonable probability that the result might have been different. *Strickland*, *supra* at 687, 690, 694; *Frazier*, *supra* at 243. Garner testified that he did not see his assailant because he was struck as soon as he opened the door. However, he testified that the individual at the door identified himself as “Carlos.” Garner was familiar with defendant’s voice and knew him before the incident. Garner responded to questions by the court by indicating that “[y]es, in a way” the voice he heard was the same voice he was familiar with as defendant’s. This response was fully cross-examined by defense counsel, who elicited further testimony from Garner that he was not absolutely certain whose voice he heard at the door, but he was sufficiently sure to say it had to be defendant, who used to live in the home. Thus, the basis for Garner’s identification of defendant was fully examined in court and there is no reason to believe that a different result would have occurred if the identification had been challenged in a pretrial hearing.

Defendant next claims ineffective assistance in his trial attorney’s failure to investigate and call an alibi witness. A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses that might have made a difference in the outcome of a trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). However, when a defendant claims ineffective assistance of counsel by virtue of failure to present a defense, it is the defendant’s burden to show that he made a good faith effort to avail himself of the right to present the defense, and that the defense was substantial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The testimony of trial counsel is essential in making the evidentiary record necessary to sustain a claim of ineffective assistance of counsel. *People v Rockett*, 237

Mich App 74, 77; 601 NW2d 887 (1999). The record available for review contains no evidence concerning the proposed testimony of any alibi witness. See *Kelly, supra* at 527. In these circumstances, defendant has entirely failed to show that he made any good faith effort to assert the alibi defense, or that the defense was substantial. *Id.* at 526. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. In the absence of any testimonial record to illuminate the reasons for counsel's actions, defendant fails to overcome the presumption that the challenged action could be sound trial strategy, and deficient performance by trial counsel is not shown. *Strickland, supra* at 668, 687, 690, 694; *Frazier, supra* at 243. Similarly, where no record was made of any testimony that might have been given by an alibi witness, defendant has not met his burden to establish that, but for counsel's allegedly deficient performance, there is a reasonable probability that the outcome of trial might have been different. *Strickland, supra* at 687, 690, 694; *Frazier, supra* at 243.

Defendant finally argues that the trial court impermissibly relied on his refusal to admit guilt when sentencing him. Although defendant argues on appeal that the trial court "extended" the minimum guideline range applicable to the count of home invasion, the trial court in fact sentenced defendant within the guidelines minimum on this count, which counsel agreed was 57 to 118 months. Defendant's minimum sentence of nine years (108 months) falls within the guidelines minimum range. Also, defendant's claim that the trial court enhanced his sentence because of his refusal to admit guilt is without factual support. A sentencing court may consider lack of remorse in determining a defendant's rehabilitation potential, but may not base its sentencing decision on the defendant's refusal to admit guilt. *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007). Improper reliance on a defendant's continued assertion of innocence may be indicated by a judge attempting to get an the defendant to admit guilt, or where it appears that the sentence would have been less severe if the defendant had affirmatively admitted guilt. *Id.* In this case, the court did not attempt to get defendant to admit guilt, nor does it appear that the sentence would have been less severe if he admitted guilt. *Id.* The court merely indicated it did not believe defendant's protestations of innocence and referenced the heinous nature of the offense. Defendant's refusal to admit guilt was not a factor considered by the trial court in the imposition of the sentence, and defendant is not entitled to resentencing.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis