IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01017 COA

CHARLES WALKER A/K/A

CHARLES HENRY WALKER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HENRY LAFAYETTE LACKEY

COURT FROM WHICH APPEALED: UNION COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

REGAN RUSSELL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: LAWRENCE LITTLE

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: SENTENCED TO 20 YRS IN MDOC 8 YRS SUSPENDED TO RUN CONCURRENT WITH CT II; CT II AGGRAVATED ASSAULT: SENTENCED TO SERVE 20YRS IN THE MDOC 8 YRS SUSPENDED TO RUN CONCURRENT WITH CT I

MANDATE ISSUED: 5/29/97

BEFORE THOMAS, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Charles Walker was convicted of two counts of aggravated assault and sentenced to serve two twenty year terms with eight years suspended on each count. Walker appeals, asserting (1) that he was denied his constitutional right to testify, and (2) that he was denied his due process rights by his counsel's ineffective assistance. We reject these arguments and affirm.

FACTS

Charles Walker and his wife, Cynthia, had an argument on the night of October 30, 1993. Cynthia's sister, Deann Driver came to the house and became concerned about Cynthia's safety. Driver ran next door to the home of Edwin Woods to ask for help. She asked Woods' two sons, Chris Woods and Henry Hayes, to call the police and help her get her sister out of the house. After calling the police, the two sons went next door to the Walkers' house with Driver. At some later point, Edwin Woods also came to the Walker home. A fight ensued involving the Defendant Walker, Edwin Woods, and Hayes. During the fight, Walker stabbed Hayes in the arm and stabbed Woods in the chest. When the police arrived, a crowd had gathered, and people were holding Walker up against a car to prevent him from leaving the scene.

At trial, during a conference in the judge's chambers, Walker's counsel told the judge that Walker wanted to testify, but that he had strongly advised Walker against it and would continue to advise him against it. The attorney acknowledged to the judge that if Walker insisted on testifying, he would put him on the stand. He warned that if the judge saw a "flare up" at the defense table, that would be what it was about.

After the State rested, Walker's attorney offered the testimony of one witness, Michael Slate, then rested. Walker did not take the stand in his own defense, and there is no record of a "flare up" at the defense table indicating that he and his lawyer disagreed further about it. The jury found Walker guilty of both counts of aggravated assault, and he was sentenced to serve two twenty year terms with eight years suspended on each count.

DISCUSSION

I. Walker's constitutional right to testify

Walker contends that his constitutional right to testify was denied by the court and his attorney. He argues that, after the discussion in chambers where his attorney told the judge he wanted to testify, the court or his lawyer should have taken steps to assure that he was either afforded the opportunity to testify or expressly waived this right. Walker claims that his desire to testify remained constant and that his attorney rested without his knowledge of what he was doing.

An appellate court will look to the transcript of the trial to determine whether or not a defendant insisted on testifying in his own behalf and whether he was prevented from doing so by counsel or the court. *Cole v. State*, 666 So. 2d 767, 774 (Miss. 1995), (citing *Cabello v. State*, 524 So. 2d 313, 318 (Miss. 1988)). We find no indication that Walker was denied his right to testify. The record only supports that Walker did not testify; assigning reasons would solely be speculation.

The supreme court has held that where the defendant does not testify, "the defendant should be called before the court out of the presence of the jury, and advised of his right to testify." *Culberson v. State*, 412 So. 2d 1184, 1185 (Miss. 1982). No such advisory occurred here. In *Shelton v. State*, 445 So. 2d 844, 847 (Miss. 1984), the court held that while the language in *Culberson* states that the court should inquire into the defendant's desire to testify, it is a mere suggestion and failure to do so does not constitute reversible error.

The Mississippi Supreme Court has usually held that questions will not be decided on direct appeal which were not presented to the trial court in order for the Court to have an opportunity to rule on them. *See, e.g. Fleming v. State*, 604 So. 2d 280, 293 (Miss. 1992). Since there is no evidence in the record that Walker was prevented by the court or his lawyer from testifying, his claim fails. *See Jaco v. State*, 574 So. 2d 625, 634 (Miss. 1990) (defendant's claim that his right to testify was denied fails on direct appeal).

The proper statutory procedure in which to raise this issue is under the Post-Conviction Relief Act, which allows after a proper showing a hearing on an issue not supported by the records. *See* Miss. Code Ann. § 99-39-1 (Supp. 1996); *Neal v. State*, No. 92-KA-00601-SCT, 1996 WL 444939, at *2 (Miss. Aug. 8, 1996); *Culberson v. State*, 456 So. 2d 697, 698 (Miss. 1984).

II. Right to effective assistance of counsel

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). The test to be applied is whether or not counsel's overall performance was (1) deficient and (2) whether or not the deficient performance, if any, prejudiced the defense. *Cole v. State*, 666 So. 2d 767, 775 (Miss. 1995), citing *Strickland*, 466 U.S. at 693). The burden is on the defendant to prove both parts of the *Strickland* test. *Cole*, 666 So. 2d at 775 (citing *Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993)). To be successful on this claim, the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988).

Our scrutiny of counsel's performance must be deferential, for there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Moody v. State*, 644 So. 2d 451, 456 (Miss. 1994). We must make our determination from the "totality of the facts in

the entire record." *Gray v. Lucas*, 677 F.2d 1086, 1092 (5th Cir. 1982), *cert. denied*, 461 U.S. 910 (1983). The *Strickland* standard for proving ineffective assistance of counsel makes the charge difficult to establish and appropriately so. *Knox v. State*, 502 So. 2d 672, 676 (Miss. 1987). If the counsel is reasonably effective, he meets constitutional standards, regardless of the client's evaluation of his performance. *Brooks v. State*, 573 So. 2d 1350, 1353 (Miss. 1990).

Walker contends that his counsel's deficient performance prejudiced his case, thereby undermining any possible confidence in the correct outcome. We will address each of Walker's alleged deficiencies.

a. Failure to call witnesses

Walker states his counsel's most egregious error was the failure to call him as a witness. He contends that this failure contributed to the lack of proof of self-defense. Walker would have testified that the intruders were not invited into his home, that they physically and/or verbally threatened him, and that, at one point, a pistol was displayed by one of them. He admits that this evidence was revealed through other witnesses, but claims that his testifying that he was acting in self-defense would have resulted in a different outcome.

Walker further argues that his counsel called only one witness to testify on his behalf, and did not call any of the four witnesses subpoenaed by the defense. He claims that his counsel relied on the testimony of one witness, who was not in the house when the incident began, did not see the pistol displayed by the intruders, and did not see the acts causing injury to Henry Hayes and Edwin Woods. He argues that the witnesses who did not get called would have been more compelling and credible, and the jury would have more to weigh in favor of Walker's defense. He argues that by not calling these witnesses, his counsel failed to zealously assert his claim of self-defense.

Decisions regarding which witnesses to call are within the gambit of trial strategy. *King v. State,* No. 07-KA-59203-SCT, 1996 WL 460021, at *211 (Miss. Aug. 15, 1996). Walker does not meet the *Strickland* test that his attorney's failure to call him or other witnesses was deficient. In light of the fact that there was testimony that Walker was intoxicated and had been allegedly beating his wife, it is reasonable to assume that the danger of Walker taking the witness stand was great, and his attorney's failure to call him as a witness was a strategic decision. As for not calling other witnesses, Walker does not argue that these witnesses would testify to anything new, but argues that they would have been more credible than Slate and give his defense more weight. Again, Walker does not meet the *Strickland* test that counsel's failure to call these witnesses was deficient, or would have resulted in a different outcome.

b. Failure to object

Walker contends that counsel was deficient in that he failed to object to irrelevant and prejudicial evidence concerning the domestic dispute between Walker and his wife which preceded the incident giving rise to these charges. He states that the prosecution repeatedly questioned witnesses about the domestic dispute and that witnesses testified to the nature of the dispute without prompting by the State. He argues that the State asked Walker's wife's sister whether Walker had stomped on his wife's stomach two weeks after she had a cesarean section delivery, and the witness answered the question without defense counsel objecting. The State also asked on redirect of the same witness

whether Walker was defending himself when he beat up his wife, over no objection. During this line of questioning, Walker's lawyer objected only once, on the ground of relevancy. Immediately after the objection was sustained, the prosecution asked "Charles beat Cynthia up?". There was no objection.

The failure of counsel to object is within a trial lawyer's discretion in planning trial strategy. *Cole v. State*, 666 So. 2d 767, 777 (Miss. 1995), citing *Murray v. Maggio*, 726 F.2d 279, 282 (5th Cir. 1984). Some questions may not elicit objection because the attorney feels that the jury would think he was trying to hide important evidence from it, or that the jury was not paying attention and does not want to call its attention to damaging testimony. After reviewing the record, we find no fundamental failure of performance and hold that it was within the broad permissible range of attorney conduct.

c. Withdrawal of Jury Instructions

Walker claims that his counsel's withdrawal of all the defense's jury instructions was evidence that his representation was deficient. The State argues that his attorney withdrew the instructions because the court fully and correctly charged the jury on Walker's theory of self-defense and all other principles of law which applied to the case.

After a review of the jury instructions that were given, this Court finds that the jury was adequately instructed, and Walker's counsel's withdrawal of his jury instructions was not deficient performance. A court is 1not required to give instructions requested by the defendant when the court has already charged the jury on the same principles of law in the other instructions. *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992).

THE JUDGMENT OF THE UNION COUNTY CIRCUIT COURT OF CONVICTION OF CHARLES WALKER OF TWO COUNTS OF AGGRAVATED ASSAULT, SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ON EACH COUNT, TO RUN CONCURRENTLY, WITH EIGHT YEARS SUSPENDED ON EACH, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO UNION COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.