

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE CALHOUN,

Defendant-Appellant.

UNPUBLISHED

February 10, 1998

No. 169791

Recorder's Court

LC No. 93-000257

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for felonious assault, MCL 750.32; MSA 28.277, intentionally pointing a firearm without malice, MCL 750.233; MSA 28.430, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to one year probation for the felonious assault conviction, one year probation for the intentionally pointing a firearm without malice conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied the effective assistance of counsel when his trial counsel refused to allow him to testify at trial. However, there was no evidentiary hearing regarding this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

Our review of the record does not lead us to conclude that defendant was denied effective assistance of counsel. The record is silent as to the reason for defendant's failure to testify. The

decision whether to call the defendant to testify is a matter of trial strategy. *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984). The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant contends that counsel's failure to call him to testify could not have been sound trial strategy because the complaining witness' credibility could not have been challenged without defendant's testimony. However, this argument is not supported by the record. Defense counsel attempted to cast doubt on the complainant's credibility by bringing out on cross-examination her failure to timely report the alleged assault and the fact that she married defendant after the incident. Moreover, counsel called defendant's mother to testify that the complainant had stated that she wanted defendant dead or in jail. We conclude that defendant has neither sustained his burden of proving that his counsel made a serious error that affected the result of trial nor overcome the presumption that his counsel's failure to call defendant to the stand was based on sound trial strategy. See *Pickens, supra*; *Stanaway, supra*.

Defendant next maintains that the trial court erred by refusing to exclude the complainant's testimony even though she violated the court's sequestration order by remaining in the courtroom during opening statements. We review a trial court's decision regarding whether to exclude the testimony of a witness who has violated a sequestration order for an abuse of discretion. A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

Defendant asserts that he was prejudiced because the complainant could tailor her testimony to fit both the prosecution's theory of the case and defendant's response as presented in opening statements. However, defendant has not identified any portion of the complainant's testimony at trial that was altered in response to the opening statements or that was inconsistent with her testimony at the preliminary examination. Therefore, defendant has not made shown that he was prejudiced. We find no abuse of discretion in the trial court's decision to allow the complainant's testimony.

Defendant's final claim is that the cumulative effect of errors denied him a fair trial and rendered the resulting convictions unreliable. Because we have concluded that no errors occurred at trial, we reject the argument that the cumulative effect of the errors requires reversal. Cf. *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh