STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL VICTOR HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED
September 17, 1999

No. 207176
Bay Circuit Court
LC No. 97-001123 FC

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

PER CURIAM.

Defendant was convicted by a jury of conspiracy to commit armed robbery, MCL 750.529; MSA 28.797 and MCL 750.157(a); MSA 28.354(1), armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for driving the "get away car" after his two companions robbed a party store at gunpoint. The trial court sentenced defendant to concurrent terms of five to twenty years' imprisonment for the conspiracy and armed robbery convictions, these sentences to be served consecutively to the mandatory two-years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred by refusing to instruct the jury on duress as an affirmative defense. We disagree. A trial court must instruct the jury on a defense theory of the case when the defendant requests such an instruction and the evidence adduced at trial supports the theory. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), citing *People v Rone (On Remand)*, 101 Mich App 811; 300 NW2d 705 (1980). Defendant clearly asked the court to instruct the jury on duress. Therefore, our analysis must focus on whether the evidence supported duress as a defense.

Defendant points to his testimony that Joshua Dewitt jumped in his van holding a shotgun and shouted "Go!" as evidence of duress in this case. *People v Lemons*, 454 Mich 234; 562 NW2d 447 (1997), is our Supreme Court's most comprehensive statement on duress, an affirmative defense that applies in cases where a criminal act avoids a greater harm. In *Lemons*, the Court held that a defendant must produce evidence of a prima facie case of duress before a court must instruct on the issue. *Id.* at 246-248. Duress exists when:

A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

D) The defendant committed the act to avoid the threatened harm.
[*Id*. at 247 (footnote omitted); See also *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

The *Lemons* Court explained that the "threatening conduct or act of compulsion must be 'present, imminent, and impending[, that] [a] threat of future injury is not enough,' and that the threat 'must have arisen without the negligence or fault of the person who insists upon it as a defense.'" *Id*., quoting *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920).

Evidence adduced at trial critically failed to point to any threat by Dewitt or Francisco Martinez compelling defendant to drive them away after they robbed the party store. While defendant's testimony indicated that because he did not expect Dewitt to have a gun he "froze" and was "scared" when he saw Dewitt jump over the fence and get into the van, defendant did not assert that Dewitt or Martinez verbally threatened him with death or physical harm at any point. Nor was there evidence that Dewitt brandished the shotgun in a way that implied an immediate physical threat to defendant. Without explicit evidence of a particular threat, defendant's alleged fear in the circumstances of this case was not sufficiently reasonable to justify instruction on the defense of duress.

Defendant also claims that he was denied the effective assistance of counsel when his attorney conceded during his opening statement that defendant committed the lesser offense of accessory after the fact. See US Const, Am VI; Const 1963, art 1, § 20. We again disagree. Defendant failed to raise this issue in the lower court by moving for an evidentiary hearing. Therefore, this issue is not preserved and we may only review the record for apparent mistakes. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); see also *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). In reviewing an ineffective assistance of counsel claim we must determine whether defendant has shown that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To demonstrate ineffective assistance, defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). He must also show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688.

In *People v Wise*, 134 Mich App 82, 97; 351 NW2d 255 (1984), this Court held that a defense attorney's decision to argue to a jury that his client committed a lesser offense was not

ineffective assistance. This should be a strategy intended to secure acquittal on a greater charge in most cases and, in the best of all circumstances, the record should reflect that the defendant consented to the tactic. *Id.* at 99. We reasoned that "[w]here defense counsel in opening statement recognizes and candidly asserts the inevitable, he is often serving his client's interests best by bringing out the damaging information and thus lessening the impact." *Id.* at 98. Only a complete concession of defendant's guilt constitutes ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988).

The record plainly indicates that defense counsel decided to argue that defendant was an accessory after the fact as a trial tactic. He informed the trial court that it was his "decision," "theory," and intention to argue that defendant was only guilty as an accessory after the fact because it carried a shorter prison sentence than armed robbery. Cf. *People v Gridiron*, 190 Mich App 366; 475 NW2d 879 (1991). The trial court in this case asked defendant if he understood his counsel's strategy and agreed with it. Defendant answered affirmatively to both questions. At the end of the trial, when the attorneys and the trial court were discussing proposed jury instructions, defendant still expressed his satisfaction with using the lesser offense strategy.

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). While it is clear from defendant's conspiracy and armed robbery convictions that the strategy ultimately failed, success is not the touchstone for determining if trial counsel acted effectively. See *People v Strong*, 143 Mich App 442, 449; 372 NW2d 335 (1985). Consequently, defendant's appellate argument that his trial counsel planted "a seed in the collective mind of the jury that the defendant had a criminal propensity" and that the strategy was "doomed to fail from the start" does not show the requisite prejudice to reverse his convictions. Defendant has neither overcome the presumption that his trial counsel rendered constitutionally satisfactory assistance, nor shown a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Stanaway, supra* at 687-688.

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder