

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY J. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
October 19, 1999

No. 212890
Recorder's Court
LC No. 97-008542

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of armed robbery, MCL 750.529; MSA 28.797, felonious assault, MCL 750.82; MSA 28.77, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to three to twenty years' imprisonment for each of the armed robbery convictions, 2½to 4 years' imprisonment for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. The sentences for the armed robbery and felonious assault convictions are to run concurrently with each other, but consecutively to the felony-firearm sentence. Defendant now appeals as of right. We affirm.

Defendant claims that his trial counsel failed to provide him with effective assistance of counsel. We disagree. An ineffective assistance of counsel claim is reviewed to 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). Because defendant failed to move for a *Ginther*¹ hearing or a new trial based on ineffective assistance of counsel, this claim is not properly preserved and our review is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995). 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). Defendant 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.

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

Defendant argues that defense counsel was ineffective for failing to move for suppression of defendant's confessions. Trial counsel is not required to argue frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Because the record is devoid of any evidence suggesting that defendant's confessions were not freely and voluntarily made, we conclude that such a motion would have been unsuccessful and that this alleged error cannot support a claim of ineffectiveness. Defendant also argues that he was denied effective assistance of counsel when, during opening statement, defense counsel admitted defendant's participation in the robbery. Defendant claims that counsel's opening statement was tantamount to a unauthorized guilty plea when counsel said, "I'll tell you right now, we are not even contesting the fact that Mr. Williams did, in fact, participate in the robbery of that particular store. The sole issue is whether or not Mr. Williams possessed a firearm during the attempt – during the commission or attempt to commit that particular felony."

A complete concession of guilt constitutes ineffective assistance of counsel. *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). However, a lawyer does not render ineffective assistance by conceding certain points at trial, including conceding guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Furthermore, "[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." *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). Notwithstanding these principles, in this case counsel's apparent strategy of focusing on whether defendant had a firearm may have been inappropriate because defendant could still have been convicted as a principle under the alternate theory of aiding and abetting. MCL 767.39; MSA 28.979. Defense counsel's decision to concede defendant's participation, therefore, may not have been sound trial strategy, *Stanaway*, *supra* at 687, and it is at least arguable that in so proceeding counsel's performance may have fallen below an objective standard of reasonableness. *Pickens*, *supra*.

Even if defense counsel's assistance constituted deficient performance, however, reversal is not mandated because defendant has not demonstrated that this representation so prejudiced him as to deprive him of a fair trial. *Id.* The testimony elicited at trial overwhelmingly supports defendant's convictions. Consequently, defendant has not shown that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Stanaway*, *supra* at 687-688.

The prosecution presented testimony from the restaurant's general manager who identified defendant, a former restaurant employee, as one of the gunmen that robbed the restaurant. Despite the fact that defendant wore a mask, the manager recognized defendant's facial features. Moreover, the manager recognized defendant's voice when defendant ordered him to open the safe. Although defendant was not specifically identified by other restaurant employees, their testimony corroborated the general manager's testimony as to the events of the robbery. All the witnesses testified that there were three assailants, that at least two of the assailants had guns, that each of the assailants wore a mask, and that one of the assailants forced the general manager, at gun point, to open the safe. In addition, testimony from the arresting officer noted that defendant was apprehended following a chase that began when he observed defendant and the other assailants leaving the restaurant. Disregarding both defendant's confessions and defense counsel's concession of defendant's participation, there was ample

evidence to support defendant's convictions. We hold, therefore, that defendant was not prejudiced by trial counsel's alleged errors.

Affirmed.

/s/ Janet T. Neff

/s/ William B. Murphy

/s/ Joseph B. Sullivan

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