

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC HENRY BEJARANO,

Defendant-Appellant.

UNPUBLISHED

May 26, 2000

No. 219432

Allegan Circuit Court

LC No. 98-010946-FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant Eric Bejarano was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He appeals as of right. We affirm.

Defendant contends he was denied effective assistance of counsel. We disagree. Defendant moved to remand this case for a hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This Court denied defendant's motion. Accordingly, we review defendant's claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

To establish a claim of ineffective assistance of counsel, defendant must first demonstrate that counsel's performance was deficient by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Next, defendant must demonstrate that counsel's deficient performance so prejudiced the defense that it deprived defendant of a fair trial. *Id.* Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant was prosecuted for shooting Travis Tervoort, the boyfriend of defendant's estranged wife, Samantha. The defense theory was that the shooting was accidental. Defendant contends that during cross-examination of Samantha, defense counsel was successful in creating doubt regarding whether defendant's shooting of Tervoort was intentional. However, defendant argues, counsel undermined that doubt by ineffective cross-examination in which he elicited from Lieutenant Cain, the officer in charge of the case, that Cain had reason to dispute defendant's contention that the shooting was accidental and that he shared his partner's opinion that the shooting was intentional. Defendant also contends that counsel further undermined that doubt by eliciting from Tervoort during cross-examination a reiteration of Tervoort's direct testimony that he thought defendant intended to kill him.

Decisions such as how to cross-examine witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). Without the testimony of trial counsel, this Court will not address the matter of whether counsel's specific form of cross-examination fell below an objective standard of reasonableness. *Id.*

However, we need not address the issue of whether counsel's conduct fell below an objective standard of reasonableness, as required by *Pickens*, *supra* at 338, because even if counsel's conduct fell below this standard, the second prong of the test has not been satisfied. This Court has declined to address the first prong of an ineffective assistance claim when it is clear from the record that the defendant cannot show harm. See *People v Ramsdell*, 230 Mich App 386, 407; 585 NW2d 1 (1998); *People v Truong (After Remand)*, 218 Mich App 325, 339; 553 NW2d 692 (1996).

The only real issue in the present case was whether the shooting was accidental or intentional. The only evidence supporting the conclusion that the shooting was accidental is the testimony of Tervoort, Samantha, and defendant that the gun discharged during the struggle between Samantha and defendant and defendant's declaration that he did not intend to harm Tervoort. However, Samantha testified that when defendant entered the house, he had leveled the gun at Tervoort. In addition, the cross-examination of Tervoort merely reiterated his direct testimony; it did not develop new evidence that prejudiced defendant. Tervoort had testified on direct examination that defendant "looked right at me and his eyes lit up and he turned and just boomed, he moved him and her at the same time and just pulled the trigger." Further, defendant chased Tervoort as Tervoort fled, "sighted" the gun at Tervoort, and put the gun to Tervoort's head after Tervoort fell.

In addition, we find no harm from Cain's testimony that he did not believe defendant's exculpatory statements. The evidence supporting defendant's claim that the shooting was accidental was weak, consisting largely of defendant's self-serving statements. On the other hand, the evidence of defendant's intent was strong, coming from Tervoort's and Samantha's testimony about defendant's conduct immediately before and after the shooting. Cain's testimony went only to whether he believed defendant when defendant told him the shooting was an accident. By the time counsel cross-examined Cain, the jury already had before it a substantial amount of evidence that the shooting was not accidental; Cain's opinion added virtually nothing to this evidence. Based on the overwhelming evidence that the shooting was intentional, and the fact that defense counsel's cross-examination merely reiterated matters that had been brought before the jury on direct examination, we cannot conclude that, even if defense counsel's conduct was unreasonable, defendant was prejudiced by counsel's conduct.

We affirm.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck