STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD AARON POMEROY,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 233495
Van Buren Circuit Court
LC No. 00-012030-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of two counts of armed robbery, MCL 750.529, and one count of felony-firearm, MCL 750.227b. For these convictions, defendant was was sentenced to two concurrent terms of nine to thirty years' imprisonment for the armed robbery counts, and a consecutive two-year term for the felony-firearm conviction. We affirm.

On appeal, defendant challenges his conviction for two counts of armed robbery as violative of his right against double jeopardy. Defendant contends that, because he took money from only one entity, a bank, he should have only been charged with one count of bank robbery, MCL 750.531. However, a similar argument has been rejected by our Supreme Court in *People v Wakeford*, 418 Mich 95, 112-113; 341 NW2d 68 (1983). There, in a factual scenario almost identical to the instant case, our Supreme Court stated that because two people were robbed, the defendant's convictions for two counts of armed robbery did not violate the defendant's right against double jeopardy. Here, defendant concedes that the facts establish that he robbed two people. We therefore find defendant's convictions were proper.

Defendant next argues that his trial counsel was ineffective for three reasons: first, for failing to present any defense; second, for failing to challenge the voluntariness of defendant's confession; and third, for failing to challenge the two in-court identifications of defendant. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of showing otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). A defendant must

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

affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial that it deprived him of a fair trial. *Knapp, supra.* The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Id*. at 385-386. This Court will not second-guess counsel regarding matters of trial strategy and, even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *Id.* at 386-387, n 7. When, as here, no evidentiary hearing is held, this Court's review is limited to errors apparent on the record. *Id*. at 385.

Defendant first specifically criticizes his trial counsel's failure to deliver an opening statement, arguing that the jury was deprived of hearing a defense theory. According to MCR 2.507, an attorney must make an opening statement, unless the attorney waived it with the consent of both the court and opposing counsel. Although defense counsel waived giving an opening statement at the beginning of trial, as well as before he called his only witness, he delivered a closing statement. This Court has repeatedly held that the decision to forego an opening statement is a matter of trial strategy. See, e.g., *People v Cicotte*, 133 Mich App 630, 636; 349 NW2d 167 (1984), and *People v Harlan*, 129 Mich App 769, 778-779; 344 NW2d 300 (1983). We will not examine that decision in hindsight. *Knapp, supra* at 386-387, n 7.

This argument is part of defendant's larger contention that his counsel presented no defense at all. On appeal, defendant maintains that defense counsel should have raised the defense of intoxication to negate the specific intent requirement of armed robbery. We disagree with defendant's representation that his trial counsel failed to present any defense at all; defendant is actually taking issue with his counsel's chosen defense of mistaken identity. Defense counsel questioned several witnesses on their perceptions and whether they were in a position to see the robber that day. During his closing argument, defense counsel generally tried to cast doubt on all of the evidence the prosecutor presented. For example, defense counsel reiterated that several of the witnesses could not positively identify defendant as the person who robbed the bank. Defense counsel questioned whether a gun was pointed at anyone, since there was testimony that the robber merely placed the gun on the counter. Defense counsel pointed out that, although she stated she could positively identify defendant as the robber, one witness admitted that she never looked directly at the robber.

Defense counsel's examination of the witnesses and his closing statement indicate that the strategy employed at trial was that defendant was not the person that robbed the bank that day. Thus, defendant's assertion that his counsel presented no defense is baseless. However, defendant continues that his counsel should have presented an intoxication defense. Defendant argues that such a defense was warranted because Chief Muinch, the police officer who arrested and interviewed defendant, testified that defendant admitted to using crack cocaine and Vicodin on the morning of the robbery. Muinch testified that defendant appeared to be "suffering" from the effects of the drugs at the time of his interrogation. Defendant now posits that those facts serve as the basis for an intoxication defense.

Defendant's argument is, in essence, because one defense did not succeed, trial counsel should have employed a different strategy. However, this Court should not view defense counsel's strategy with the benefit of hindsight. *Knapp, supra,* 386-387, n 7. The decision regarding which defense to present is inherently strategic. To have suggested to the jury that defendant was intoxicated at the time of the robbery, defense counsel would have essentially been required to forego the other defense of mistaken identity. Defense counsel may have

believed that offering an alternate defense may have made the defense of mistaken identity less believable. Where the strategy of the defense backfires, it does not necessarily follow that the counsel who devised the strategy is ineffective. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

Defendant next asserts his trial counsel was ineffective for failing to challenge the admissibility of defendant's two confessions to the police. The record reflects two different confessions by defendant. First, after defendant fled from the bank, he was finally apprehended by Muinch. Muinch ordered defendant to come towards him with his arms raised. When Muinch asked defendant why he was running, defendant responded that he had just robbed the bank. Defendant argues that his trial counsel was ineffective for failing to challenge the admission of this evidence because he was not read his *Miranda*[1] rights before Muinch began to interrogate him. Defendant's second confession was a thorough and detailed account of his preparation for, and involvement in, the bank robbery. This statement was given after defendant was read his *Miranda* rights at the police station. Defendant argues his trial counsel was ineffective for failing to challenge the admissibility of that statement; in light of the evidence of defendant's drug use at the time of the interview, defendant asserts that he could not have validly waived his right against self-incrimination. Because we find defendant's second confession was properly admitted, no prejudice resulted from his counsel's failure to object to admission of the initial statement.

Our Supreme Court repeated the requirements for a valid waiver of *Miranda* rights in *People v Daoud*, 462 Mich 621; 614 NW2d 152 (2000). Waiver must be both voluntary, as well as knowingly and intelligently given. *Id.* at 635-639. The test for voluntariness requires an inquiry into whether the police were coercive in obtaining waiver. *Id.* at 635. Here, there is no evidence that the police were at all coercive in obtaining defendant's confession, and defendant does not allege they were. Accordingly, defendant's argument is directed at the part of the test requiring an intelligent and knowing waiver.

To waive rights intelligently and knowingly, a defendant must understand basically what those rights encompass and minimally what their waiver will entail. The defendant must be cognizant at all times of the State's intention to use the statements to secure a conviction and of rights to stand mute and request a lawyer. *Id*. at 640-641.

Here, no evidence suggested that defendant was unaware of the significance of his confession. Although defendant admitted to using crack cocaine and Vicodin some hours earlier, and that he appeared to be "suffering from it," Muinch testified that defendant appeared oriented as to the time and place of the interrogation, and he was able to speak rationally about the events of the day. Other than that information, the record is devoid of any fact which would support defendant's contention that he was not able to waive his Fifth Amendment rights. Accordingly, if defense counsel had brought a motion to suppress this confession, this motion should have been denied. Case law is clear that counsel is not ineffective for failing to bring a futile motion. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).]

Defendant's final claim of ineffective assistance of counsel is based on his trial counsel's failure to require an independent basis for the in-court identification of defendant by two witnesses. Citing *People v Kachar,* 400 Mich 78; 252 NW2d 807 (1977), defendant's argument assumes that an independent basis is required for all in-court identifications. However, defendant misconstrues the holding of *Kachar,* which addresses the "standards for establishing an independent basis for in-court identification when pretrial identification has been rendered invalid." *Id.* at 83. *Kachar* thus requires an independent basis only where an invalid pretrial identification has been employed; here, defendant does not argue that any invalid pretrial identification was conducted. We therefore find none of the errors defendant asserts amount to ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof