STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2004
v	No. 243340 Wayne Circuit Court
SHAWN ALLEN DEESE, Defendant-Appellant.	LC No. 01-012674-01

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Prior to the taking of testimony, defense counsel advised the trial court that defendant wished to waive his right to a jury and be tried by the court. The trial court informed defendant that he could have either a jury trial or a bench trial. Defendant indicated that he had signed the waiver form. In response to the trial court's inquiries, defendant indicated that he made the choice to have a bench trial freely and voluntarily, and that he understood he was waiving his constitutional right to a jury trial. The trial court granted defendant's request to waive the jury.

Ala Fakhouri, a party store operator, testified that Robert McClintock, a regular customer, entered the store and stated that he had been in a fight with defendant, another regular customer. Defense counsel did not object to this statement. Fakhouri testified that shortly thereafter, McClintock reentered the store and announced he had been shot.

Robert McClintock testified that defendant, whom he had known for many years, shot him after he argued with defendant and defendant's brother Gerald. McClintock testified that he reported the fight to Fakhouri because Gerald announced he was going to get a gun. Defense counsel did not object to McClintock's statement regarding Gerald.

Prior to accepting a waiver of jury, a trial court must advise the defendant in open court of the constitutional right to trial by jury. The trial court must ascertain, by addressing the defendant directly, that the defendant understands the right to trial by jury and that the defendant voluntarily chooses to waive that right and to be tried by the court. A verbatim record must be

made of the waiver proceeding. MCR 6.402(B). We review a trial court's determination that a defendant validly waived his right to a jury trial for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

Defendant argues that his convictions must be reversed because his jury waiver was invalid. We disagree. The responses defendant gave to the trial court's direct questions indicated that he understood he had the constitutional right to have a jury trial, but that he wanted the trial court to decide the case without a jury. Defendant acknowledged that he had signed the waiver form. The trial court complied with MCR 6.402(B). The trial court's questioning was sufficient to allow it to property ascertain that defendant understood his right to have a jury trial and that he voluntarily waived that right. *Id*. at 596; *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. *Id.* at 600. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that trial counsel rendered ineffective assistance by failing to object to Fakhouri's testimony that McClintock told him he had been in a fight with defendant and to McClintock's testimony that Gerald announced he was going to get a gun. We disagree. Defendant did not move for a *Ginther*[1] hearing; therefore, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Even assuming that counsel erred by failing to object to the statements, defendant has failed to establish that counsel's performance resulted in prejudice. The trial court was entitled to rely on McClintock's properly admitted testimony regarding his encounter with defendant. See *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). A judge sitting as the factfinder is presumed to understand the law and to be able to ignore evidentiary errors and decide a case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood

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