

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE SAM BONNER,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 246783

Wayne Circuit Court

LC No. 02-004066

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of armed robbery, MCL 750.529, for which he was sentenced to eighty-five months to thirty years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that he was denied a fair trial due to ineffective assistance of counsel because counsel did not challenge a biased juror for cause. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003) (citations omitted).]

A criminal defendant has a constitutional right to a fair and impartial jury. *People v Washington*, 251 Mich App 520, 530; 650 NW2d 708 (2002), *rev'd* on other grounds 468 Mich 667 (2003). "[A] defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury." *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998). Jurors are presumed to be competent and impartial. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001) (O'Connell, PJ). To warrant relief on the basis of information

potentially affecting a juror's ability to act impartially, the defendant must show "(1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." *Daoust, supra.* at 9 (footnote omitted). A juror is excusable for cause if she is biased against a party, has a state of mind that prevents her from rendering a just verdict, or has opinions that would improperly influence her verdict. MCR 2.511(D)(3), (4), (5); MCR 6.412(D)(1).

"[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy" which will not be evaluated with the benefit of hindsight. *Johnson, supra* at 259. The record shows that juror Jackson expressed possible bias against defendant because of her experience as the victim of a similar crime. The court questioned her further, explaining the role of the jury in deciding the case, and Jackson then indicated that she could decide the case fairly. Because defendant has not shown that the juror was in fact biased, counsel's conduct in retaining her on the jury cannot, on the basis of the record before us, be considered objectively unreasonable. Moreover, defendant has not shown that but for Jackson's presence on the jury, the outcome of the trial likely would have been different. The victim, who had known defendant all his life, was positive that defendant was the person who robbed him despite the fact that defendant's face was covered by a ski mask. While the victim had told police that he was not sure if the robber was defendant or his twin brother, it was undisputed that defendant's brother was incarcerated on the day in question.

We find defendant's reliance on *State v Chastain*, 285 Mont 61; 947 P2d 57 (1997), to be misplaced. In that case, the court held that trial counsel was ineffective because he did not question further jurors who had expressed an inability to decide the case fairly, the record did not indicate any reasonable strategic decision for leaving the jurors on the panel, and the evidence against the defendant was not overwhelming. In this case, by contrast, juror Jackson was questioned further about her reservations and indicated an ability to decide the case fairly. Moreover, *Chastain* has since been overruled by *State v Herrman*, 316 Mont 198, 206-208; 70 P3d 738 (2003), in which the court held that counsel cannot be found ineffective simply because the record does not indicate the reasons for his or her actions.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens