STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v	No. 266508 Kalamazoo Circuit Court
TIMOTHY ALEN MILLER, Defendant-Appellant.	LC No. 05-001120-FH

Before: O'Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury trial of carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant to 12 months' probation. We affirm.

Defendant argues both that his trial counsel failed to provide effective assistance of counsel because he did not move to suppress defendant's pre-*Miranda*[1] statements to police and because he did not exercise a peremptory challenge on a purportedly biased juror.[2] Unpreserved claims of ineffective assistance of counsel are limited to apparent errors on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In order to sustain a claim of ineffective assistance of counsel, a defendant must prove that trial counsel's "performance was deficient" and that the deficiency "prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove defense counsel's deficient performance, the defendant must show that defense counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003); *Strickland*, *supra* at 690-691. A defendant must

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

[2] Defendant also contends in his brief's conclusion that this Court should consider that defendant was cumulatively denied the effective assistance of counsel, because defense counsel failed to do the following: hold a preliminary examination, conduct a *Walker* hearing, make an opening statement, and exercise a peremptory challenge. These conclusary statements are not arguments at all, and nor is any authority offered for these statements; as such, this Court will not review this claim. See MCR 7.212(C)(5); *People v Connor*, 209 Mich App 419, 430; 531 NW2d 734 (1995); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

overcome "a strong presumption that [defense] counsel's performance constituted sound trial strategy." *Id.* And, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *Riley, supra* at 142.

Defendant was not denied the effective assistance of counsel because his trial counsel did not move to suppress his pre-*Miranda* statement to the police. Defendant was asked by police, after he was taken into custody and found in possession of weapons, whether there was anything in his vehicle about which the police should be aware. Defendant informed the police about other weapons in the vehicle. Defendant's statement to the police officers, notifying them about the handgun that resulted in his conviction, did not violate *Miranda*. Generally, the prosecution may not use a defendant's statements as evidence unless he received *Miranda* warnings before the questioning began. *Miranda, supra* at 444; *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). There are exceptions, however. For example, *Miranda* warnings may be excused where there are overriding public safety concerns. *New York v Quarles*, 467 US 649, 651; 104 S Ct 2626; 81 L Ed 2d 550 (1984); *People v Attebury*, 463 Mich 662, 670; 624 NW2d 912 (2001). For the public safety exception to apply, there must be an immediate threat to the public or to police, and the questions asked of the defendant must be objectively reasonable to protect the public or police from the immediate threat. *Quarles, supra* at 655-656; *Attebury, supra* at 670-671.

In this case, defendant was in a custodial setting: handcuffed in the back of a police car. Based on defendant's appearance, the three pocket knives located on his person, and the cluttered condition of the vehicle, the arresting officer asked "if [there was] anything else in the vehicle that we should be concerned about?" Defendant voluntarily responded to the question, knowing that he was in custody for the warrant, telling the officers that there was a handgun and two other knives (bayonets) in duffle bags in the vehicle. The arresting officer's question was objectively reasonable to protect police officers from any hidden weapons that may have been in the vehicle.[3] *Attebury, supra* at 670-671. Therefore, a motion to suppress defendant's pre-*Miranda* statement would have been denied, because the public safety exception applied. *Id.* As such, trial counsel's failure to move to suppress defendant's pre-*Miranda* statement was not outcome determinative. Trial counsel was not required to bring a meritless motion. *Riley, supra* at 142. Because defendant cannot and did not show that trial counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms," *Riley, supra* at 140; *Strickland, supra* at 690-691, we reject his ineffective assistance of counsel argument.

Defendant also contends on appeal that leaving a particular juror, Juror R, on the jury rises to the level contemplated by *Strickland* in determining ineffective assistance of counsel, thus depriving him of a fair trial. We disagree. Generally, a trial attorney's decisions with

[3] The subsequent search of defendant's vehicle was constitutional, because the search was incident to a lawful arrest. See *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969).

respect to prospective jurors are considered matters of trial strategy, which this Court "decline[s] to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). This Court has previously held that failure to challenge a juror does not provide a basis for a claim of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). Further,

> [a] reviewing court cannot see the jurors or listen to their answers to voir dire questions. A juror's race, facial expression, or manner of answering a question may be important to a lawyer selecting a jury. [*Id.* at 94-95.]

In *Robinson*, this Court noted:

> Our research has found no case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would hold so, and we do not hold so in this case. [*Id.* at 95.]

Defendant relies on numerous cases from other jurisdictions to support his contention that a defense counsel's failure to challenge biased jurors constituted ineffective assistance of counsel, because it denied the defendant the right to a fair trial. *Presley v Missouri*, 750 SW2d 602 (Mo Ct App, 1988); *Smith v Gearinger*, 888 F2d 1334 (CA 11, 1989); *Knight v Texas*, 839 SW2d 505 (Tex App, 1992); and *McKee v Missouri*, 846 SW2d 26 (Mo App, 1992). However, those cases are clearly distinguishable. Each involved a biased juror whereas the record in this case reveals no bias on the part of Juror R. Our Supreme Court has held "that if a potential juror, under oath, can lay aside preexisting knowledge and opinions about the case, neither will be a ground for reversal." *People v Jendrzejewski*, 455 Mich 495, 517; 566 NW2d 530 (1997).

In this case, the trial court conducted voir dire, asking the prospective jurors if they could be fair and impartial, as well as follow the trial court's instructions as to the law. The trial court excused two prospective jurors, because they expressed a bias against handguns and believed it would affect their objectivity. Two prospective jurors indicated that they were in fishing and hunting clubs and they also owned guns; however, they stated that they could be objective and follow the law. Juror R then indicated that he contributed regularly to a gun control group. While he gave an inaudible response to the trial court's question whether he respected the rights of persons who possess guns and follow the law, Juror R actually stated that he would give both sides a fair hearing and follow the law about gun ownership. Further, Juror R recognized that defendant could only be found guilty if he violated the law, and Juror R agreed to find defendant not guilty if his possession of the gun was legal.

Defendant contends that Juror R was biased based on his purported membership in a control gun group and his inaudible response to the question concerning whether he respected the rights of persons who possess guns and follow the law. However, the trial court, the prosecution, and defense counsel concluded that Juror R was not biased, and the record does not demonstrate otherwise. Because he indicated, under oath, that we would set aside his preexisting opinions, by giving both sides a fair hearing and follow the law as instructed by the trial court, see *Jendrzejewski, supra* at 517, we find no merit to defendant's claim that his counsel was ineffective for not dismissing the juror by way of a peremptory challenge. In reaching our conclusion, we will not evaluate with the benefit of hindsight defense counsel's decision

regarding the juror. *Johnson, supra*. Defendant has failed to overcome the strong presumption that defense counsel's decision not to exercise a peremptory challenge was sound trial strategy. *Rockey, supra* at 77; *Robinson, supra* at 94-95. And, he has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness. *Riley, supra.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis