

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY WRIGHT,

Defendant-Appellant.

UNPUBLISHED

May 25, 2010

No. 289899

Wayne Circuit Court

LC No. 08-009269-FC

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant was found guilty by a jury of felon in possession of a firearm, MCL 750.224f, and he was sentenced to two years' probation. The jury acquitted defendant of assault with intent to commit murder, MCL 750.83, assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant appeals as of right the felon-in-possession conviction, arguing instructional error and ineffective assistance of counsel. We affirm.

I. FACTUAL OVERVIEW

The prosecution elicited testimony showing that, on June 26, 2008, defendant and his brother¹ drove to a home at which the complainant and several other individuals were present. According to the complainant, who had known defendant for about eight months but only by the name "Bunk," defendant asked the complainant to temporarily hold a handgun for him. Defendant then left for a short period of time before returning to the home.² During defendant's brief absence, and for safekeeping purposes, the complainant had hid the gun, described as a TEC-9 handgun, in a toolbox in the home's garage. Once defendant returned to the home, he

¹ Defendant and defendant's brother, Renado Wright, were tried jointly by a single jury. Renado Wright was prosecuted under an aiding and abetting theory and charged with assault with intent to commit murder, felonious assault, and felony-firearm. The jury acquitted him of all three charges.

² The complainant testified that this was not his home; rather, it belonged to someone named "Chris." The complainant further asserted that drugs were kept in the home and that defendant sold drugs.

asked the complainant to go retrieve the gun and give it back to defendant. The complainant, however, could not locate the weapon; it was missing from the toolbox. The complainant denied that he stole the gun from defendant or that he had purchased and received the gun from defendant but failed to fully pay for it, leading defendant to demand its return. This latter factual proposition was asserted by defendant when he subsequently took the stand, which we shall discuss below.

The complainant testified that when he could not find the gun and informed defendant that it was missing, defendant directed his codefendant brother to go get another firearm. Defendant's brother then drove away from the location but returned to the home within a few minutes. Defendant proceeded to reach through an open window of the car driven by his brother and pulled out an AK-47 assault rifle. The complainant, who was standing outside the home, ran into the home when defendant, wielding the AK-47, began chasing him. Defendant also entered the home and shot at the complainant a couple of times, striking him in the knee and thigh. According to the complainant, he then grabbed the AK-47 and tried, unsuccessfully, to wrestle it away from defendant. The complainant let go of the gun and ran out of the house and up the street to a nearby car wash. Defendant fired the weapon a couple of more times in the complainant's direction as the complainant made his way to the car wash, but he did not suffer any more gunshot wounds. Defendant then left the scene.³

The complainant spoke to police and identified defendant as the shooter. He also pointed out defendant at trial, identifying him as the perpetrator of the shooting. Additionally, there was police testimony concerning a search and the seizure of incriminating evidence. Defendant and his brother resided with their mother, who gave the police consent to search her home. The police found an AK-47 and two magazine clips for the weapon during the search. Five spent shell casings had been found at the crime scene, and the parties stipulated that ballistics testing revealed that the casings were fired from and matched the AK-47 discovered in defendant's home. The parties also stipulated that defendant was a convicted felon and had no right or authority to possess, transfer, or use a firearm.

Defendant testified on his own behalf and was the only witness presented by the defense. According to defendant, he and his brother went to see the complainant and complainant's cousin "concerning some money that they owed me for an allegedly stolen gun that I sold 'em."⁴ On the day before the shooting, defendant received \$200 from the complainant for the purchased gun, and on the day of the shooting, defendant went to the home where the shooting took place in order to get an additional \$200 from the complainant, which was the balance owing on the gun sale. At first, defendant shot dice with the complainant and others at the home, without mentioning the remaining \$200 debt. When defendant prepared to leave, he asked the complainant for the \$200, at which point a person named Tyree told the complainant not to give defendant anything, which led to a physical and verbal altercation between defendant and Tyree.

³ The complainant's cousin, who was present at the crime scene, also testified for the prosecution, recounting the events that transpired in a manner fairly consistent with the account given by the complainant.

⁴ Defendant later testified that the gun which he sold to the complainant was a TEC-9 handgun.

Defendant further testified that, during the altercation with Tyree, he observed the complainant heading toward a closet in which defendant knew a firearm was kept. Defendant started to run in an attempt to get out of the house, but the escape route involved running past the closet, and by the time defendant neared the closet, the complainant had already pulled out of it an AK-47. As the complainant wheeled around with the AK-47 in his hands, defendant grabbed the firearm and engaged in a tussle with the complainant over control of the weapon. Defendant testified that during the scuffle the AK-47 discharged, striking the complainant; however, the two men continued to struggle over the gun, although the other persons present in the home scattered. Another shot from the assault rifle subsequently rang out during the continuing struggle, and this time the complainant fell to the ground having been struck a second time. Defendant estimated that the gun went off four to five times during the entire fight over control of the AK-47. Defendant claimed that, once the complainant fell to the ground after being hit a second time, defendant was able to grab the AK-47 and exit the home. Once outside, defendant hopped in a car and, with his brother behind the wheel, they fled the scene. Defendant indicated that he hid the AK-47 in a home that he shared with his mother and other siblings. Defendant testified that he did not go to the police about the shooting because he was on parole at the time and was not supposed to have any involvement with firearms. When questioned by the prosecutor relative to explaining how one of the shell casings from the assault rifle ended up outside the home and not inside the home where, as claimed by defendant, the struggle over the gun and discharges occurred, defendant stated that he had no answer, but maybe the complainant or others had previously fired the AK-47 outside the home.

The jury was instructed on self-defense, and evidently the jurors accepted this defense and found defendant's version of events credible, given the acquittal on the two assault charges and on the felony-firearm charge. The jury did, however, convict defendant of being a felon in possession of a firearm. Defendant appeals as of right that conviction.

II. CLAIMS OF INSTRUCTIONAL ERROR

A. STANDARD OF REVIEW AND GOVERNING PRINCIPLES

In *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007), this Court set forth the well-established principles concerning a claim of instructional error:

Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her. The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law. Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. [Citations omitted.]

B. ARGUMENTS AND ANALYSIS

In order to give context to and understand the arguments concerning instructional error raised by defendant, we begin with a discussion of the pertinent facts relative to the instructions given by the trial court.

With respect to the charge of felon in possession of a firearm, the trial court initially instructed the jury that the prosecution was required to prove the following elements beyond a reasonable doubt:

First, the Defendant Mr. Rodney Wright possessed or used a firearm in the State of Michigan. Second, that he was convicted of a specified felony. Third, that less than five years had passed since all fines were paid, all imprisonment were served, all terms of probation was completed and, fourth, the Defendant's right to possess, use or transport a firearm has not been restored pursuant to Michigan law.

After the jury began its deliberations, it sent a note to the court, which requested some of the exhibits and further provided, "Also, we would like the elements." The record indicates that an issue then arose regarding the elements of the felon-in-possession charge. The trial court stated:

[T]he prosecution rightfully has brought to the Court's attention that when the instruction was originally read to the jury it included a portion of the standard jury instruction that should not have been part of the instruction given the fact that there was no dispute of -- or evidence presented by the defense that . . . his rights had not been restored. Is that a correct statement?⁵

The prosecutor agreed, and counsel for defendant replied, "No response."⁶ The trial court then stated that it was going to reinstruct the jury on the felon-in-possession count, and defense counsel stated that he had "[n]o objection" in so proceeding. The jury was returned to the courtroom, and the court directed the jurors to disregard the prior instruction on felon-in-possession. The court then instructed the jury that the prosecution was required to prove the following elements beyond a reasonable doubt:

First, the Defendant Mr. Rodney Wright either possessed, used, transported, sold, received a firearm in the State of Michigan and the second element is that the Defendant Mr. Rodney Wright had been convicted of a specified felony.

⁵ As indicated earlier in this opinion, the parties had stipulated that defendant was a convicted felon and had no right or authority to possess, transfer, or use any firearm.

⁶ It appears from the transcript that defense counsel spoke the words "[n]o response," as opposed to the court reporter indicating that there was no response from defense counsel.

The prosecutor and defense counsel expressly indicated their satisfaction with the court's reinstruction on felon-in-possession. As reflected above, the trial court not only deleted the last two elements of the crime as given to the jury in the original instruction, but it also modified the instruction as to element one, where initially the jury was asked to decide whether defendant "possessed or used a firearm," and where, in the new instruction, it was asked to decide whether defendant "possessed, used, transported, sold, [or] received a firearm."

On appeal, defendant begins by noting that the felony information referred to defendant's use of a rifle in relation to the felonious assault and felony-firearm charges. Defendant posits, therefore, that the information overall concerned the possession and use of the AK-47 assault rifle, even though the information merely referred to the term "firearm" with respect to the felon-in-possession charge. Defendant proceeds to argue that the jury should have been instructed that the felon-in-possession charge specifically related to a rifle, not simply a firearm, given that the felony information made clear that a rifle was at issue. Defendant contends that the court effectively and improperly amended the information, absent fair notice to defendant, when it failed to reference a "rifle" when instructing the jury on the charge of felon-in-possession. Defendant essentially finds fault with the instruction because it allowed the jury to consider the TEC-9 handgun in rendering a verdict on the felon-in-possession charge, instead of solely considering the AK-47 assault rifle.

Defendant further complains that the reinstruction on the felon-in-possession charge was inconsistent with the felony information on an additional basis, where the information indicated that defendant was only charged with possessing or using a firearm, but where the court allowed the jury to also consider, vis-à-vis the instruction, whether defendant "sold" or "received" a firearm. This again brought the TEC-9 handgun into play for consideration by the jury, instead of limiting the jury's deliberations to consideration of the AK-47. According to defendant, if the jury had not erroneously been instructed to consider the selling or receiving of a firearm, he likely would have been acquitted. The jury, defendant asserts, found no culpability on defendant's part with regard to the AK-47 in light of the acquittals on the assault and felony-firearm charges. And while defendant himself testified to having "sold" the TEC-9 handgun to the complainant, he was not charged in the information with "selling" a firearm, especially considering that the sale of the gun would not have occurred on June 26, 2008, which is the offense date listed in the felony information. The jury clearly convicted defendant of "selling" the TEC-9 handgun on the basis of the improper instruction.

The standard jury instruction, CJI2d 11.38a, indicates that, as to the first element of felon-in-possession, the prosecution is required to prove "that the defendant [possessed / used / transported / sold / received] a firearm in this state." The bracketed section reflects that a jury should be instructed on the word or words that are applicable. See CJI2d, Note to Users ("brackets indicate a choice of words or phrases"). CJI2d 11.38a further provides, consistent with the court's decision to drop elements three and four in light of the parties' stipulation, that said elements should be given "only if the defendant offers some evidence that more than five years has passed since completion of the sentence on the underlying offense and that his or her firearm rights have been restored." MCL 750.224f provides in relevant part:

(2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:

- (a) The expiration of 5 years after all of the following circumstances exist:
 - (i) The person has paid all fines imposed for the violation.
 - (ii) The person has served all terms of imprisonment imposed for the violation.
 - (iii) The person has successfully completed all conditions of probation or parole imposed for the violation.
- (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927[.]

We hold that defendant waived any challenge to the reinstruction on the felon-in-possession charge because defense counsel expressed that he had “no response” to the court’s statement that the initial instruction was incorrect, because defense counsel stated that he had no objection to the court reinstructing the jury on felon-in-possession, and because defense counsel affirmatively expressed his satisfaction with the new instruction given to the jury.

In *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), our Supreme Court discussed the principle of waiver:

Waiver has been defined as “the ‘intentional relinquishment or abandonment of a known right.’” It differs from forfeiture, which has been explained as “the failure to make the timely assertion of a right.” “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.”

* * *

In the present case, counsel clearly expressed satisfaction with the trial court’s decision to refuse the jury’s request and its subsequent instruction. This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no “error” to review. [Citations omitted.]

On the record presented here, there was an express and intentional relinquishment or abandonment of any claim that the reinstruction on felon-in-possession constituted error. Nevertheless, we shall substantively explore below the arguments posed by defendant because he bootstraps a claim of ineffective assistance of counsel with respect to the claims of instructional error.

III. CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW AND GOVERNING PRINCIPLES

Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich

590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involved in analyzing a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to the record because no *Ginther*⁷ hearing took place. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

B. ARGUMENTS AND ANALYSIS

Defendant argues that trial counsel was ineffective for myriad reasons. Two of the reasons pertain to the arguments framed in section II of this opinion. Defendant contends that counsel was ineffective for failing to challenge the reinstruction on felon-in-possession, and for indeed waiving the issue, where the instruction should have alluded to a “rifle” instead of a firearm in general given the language in the felony information, and where the instruction improperly allowed for a conviction if defendant “sold” or “received” a firearm, instead of solely focusing on the “use” or “possession” of a firearm as stated in and confined by the felony information. An associated argument is that counsel was ineffective for failing to use the term “rifle” with respect to the stipulation that defendant was a convicted felon who had no right or authority to possess, transfer, or use any “firearm.” Another closely related argument connected to that same stipulation is that defense counsel was ineffective when he essentially agreed to the amendment of the information by allowing the stipulation to cover the “transfer” of a firearm. Yet another related argument is that counsel should have requested an instruction specifically advising the jury that defendant was not charged relative to the sale of a handgun to the complainant. We hold that none of these arguments support reversal of the conviction.

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

With respect to that part of the instruction that spoke of a firearm and not specifically of a rifle, it cannot be disputed that the felony information referred to a “firearm” in general when particularly addressing the felon-in-possession charge.⁸ This would encompass both the AK-47 and the TEC-9 handgun. See MCL 750.222(d) (defining the term “firearm” as a “weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air”); *People v Peals*, 476 Mich 636, 656; 720 NW2d 196 (2006) (under the statutory definition of firearm, MCL 750.222(d), “there is no operability requirement for the offenses of felony-firearm and felon in possession of a firearm”). Accordingly, on this issue, the felony information was consistent with the instruction given to the jury; both alluded to a firearm. Although the information referred to a rifle in connection with the felonious assault and felony-firearm charges, it is logical to conclude that there was a decision not to be so limiting in addressing the felon-in-possession charge, given that the prosecution had evidence of defendant possessing both the handgun and the rifle. In reviewing the trial and preliminary examination transcripts, the prosecution never claimed or argued that the felon-in-possession charge pertained only to the AK-47. Rather, the prosecution argued in general that defendant was a felon who was guilty of unlawfully possessing a firearm. There is nothing in the record suggesting that defendant was led to believe that only the AK-47 was at issue. Counsel is not required to raise meritless and futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Even assuming that there was an inconsistency between the jury instruction on felon-in-possession and the felony information and that counsel should have raised the issue, reversal is still not warranted. We cannot conclude that defendant was prejudiced, i.e., that there exists a reasonable probability that, but for counsel’s presumed error, the result of the proceeding would have been different. First, had the court limited the jury’s consideration to the assault rifle, there was clear evidence that defendant possessed the rifle after the shooting where his own testimony was that he took the rifle home, keeping it hidden in the basement. Second, if faced with an objection, the trial court could have amended the information to conform with the evidence and left the instruction intact. MCR 6.112(H) provides, in relevant part, that “[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant.” “A trial court may permit

⁸ An information “must set forth the substance of the accusation against the defendant and the name, statutory citation, and penalty of the offense allegedly committed.” MCR 6.112(D). Additionally, MCL 767.45 provides in relevant part:

(1) The indictment or information shall contain all of the following:

(a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.

(b) The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense.

amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant.” *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008), citing MCL 767.76 and MCR 6.112(H). It cannot reasonably be argued that defendant would have been unfairly surprised or prejudiced by an amendment of the information that incorporated the handgun as part of the felon-in-possession charge. The prosecution’s case from the beginning, including the preliminary examination, included proofs showing that defendant possessed the TEC-9 handgun and gave it to the complainant. Moreover, defendant’s own theory, as reflected in his testimony, was that he was involved in selling the handgun. Under these circumstances, reversal is unwarranted.⁹

We next address defendant’s contention that counsel was ineffective for failing to challenge the reinstruction on felon-in-possession because the instruction improperly allowed for a conviction if defendant “sold” or “received” a firearm, instead of solely focusing on the “use” or “possession” of a firearm as stated in the felony information. Defendant is correct that the information only spoke of the possession and/or use of a firearm, not the sale or receipt of a firearm. However, reversal is not warranted. First, defendant’s assertion that the jury must have convicted defendant solely on the basis of the sale of the TEC-9 handgun to the complainant is misplaced.¹⁰ As indicated above, there was clear evidence that defendant possessed the AK-47 by taking it home with him after the shooting and hiding it away, which is consistent with defendant’s own version of events. The jury could also have believed the complainant’s testimony that defendant possessed the handgun on the date of the offense and gave it to the complainant to hold. Additionally, the jury could have inferred that defendant once “possessed” the handgun on the basis of defendant’s testimony that he sold the gun to the complainant; the jury was not instructed to limit consideration to a specific offense date. Moreover, had defense counsel raised the issue and objected to the instruction, the trial court could have, given the lack of unfair surprise or prejudice regarding a gun sale, amended the information such that it would conform to the evidence and then left the instruction intact. MCR 6.112(H); *Unger*, 278 Mich App at 221.

With respect to the related arguments, i.e., failure to refer to a “rifle” in the felon-in-possession stipulation, allowing the stipulation to cover a “transfer” of the firearm, and failure to request an instruction excluding consideration of the handgun, these arguments fail for all of the same reasons given by us above in rejecting the first two instances of claimed ineffective assistance of counsel.

Defendant next maintains that counsel was ineffective for stipulating to the admission of a written statement given by the complainant to police, where it constituted inadmissible hearsay under MRE 801. The record reflects that the trial court admitted two statements given by the complainant to the police. Defense counsel did not object to the first statement and stipulated to

⁹ If defendant was unsure whether the felon-in-possession charge concerned the handgun, he could have requested a bill of particulars, MCR 6.112(E); however, defendant does not claim that counsel was ineffective for failing to do so.

¹⁰ Defendant does not develop his argument that the jury should not have been instructed that it could convict defendant for “receiving” a firearm.

allowing this statement to be admitted through the testimony of the complainant and not the interrogating officer. Defense counsel did object on hearsay grounds to the admission of the second statement. We conclude that defense counsel's performance was not deficient in regard to the first statement because the record reveals that counsel, for both defendant and his brother, reasonably used this statement in an effort to impeach the credibility of the complainant and to call into question his trial testimony. Furthermore, the first statement did not add anything of significance to the prosecution's case in regard to the felon-in-possession charge, nor to any of the charges; therefore, defendant has not established the prejudice necessary to dictate the reversal of his conviction.

Defendant next argues that counsel was ineffective for failure to object to the trial court's deletion of the third and fourth elements of the crime of felon in possession of a firearm, which related to the completion of previously imposed punishments and the restoration of firearm rights. Defendant fails entirely to explain why it was improper to delete these elements, nor does he argue that the stipulation that led to the deletion was not grounded in fact. CJI2d 11.38a makes clear that elements three and four are to be given "only if the defendant offers some evidence that more than five years has passed since completion of the sentence on the underlying offense and that his or her firearm rights have been restored." There was no such evidence, and defendant himself testified that he was on parole when the shooting occurred. The trial court correctly concluded that the original instruction on felon-in-possession was improper for having included elements three and four.

Defendant next contends that counsel was ineffective for failing to request a specific instruction that defendant could possess a firearm under limited circumstances, such as where the complainant was attempting to kill defendant. In *People v DuPree*, 284 Mich App 89, 92; 771 NW2d 470 (2009), app gtd __ Mich __; 773 NW2d 261 (2009), this Court held that the temporary possession of a firearm for purposes of self-defense during a life-threatening altercation constitutes an affirmative defense to the crime of felon-in-possession, requiring an appropriate instruction when supported by the facts. Here, defendant had more than temporary possession of the AK-47, where, according to defendant himself, he took it home with him and maintained possession after successfully defending himself against the complainant. Furthermore, in reviewing the instructions given by the trial court on self-defense in the case at bar, the court did state that "[i]f a person acts in lawful self-defense his actions are excused and he cannot be guilty of *any* crime." (Emphasis added.) The trial court never stated that the self-defense theory proffered by defendant was limited to the assault and felony-firearm charges or that the jury could not consider the defense with respect to the felon-in-possession charge. Therefore, defendant was effectively given the protection alluded to in *DuPree*. Moreover, defendant's argument would not entail the use and possession of the TEC-9 handgun, which, according to defendant's testimony, was not utilized by defendant in defending himself against the complainant. Reversal is unwarranted.

Finally, defendant requests a remand for a *Ginther* hearing on the claims of ineffective assistance of counsel. Defendant does not explain what relevant facts are necessary to develop at a *Ginther* hearing. On examination of defendant's claimed instances of ineffective assistance of counsel, we find that there is no basis or need to order a *Ginther* hearing for further development of a factual record.

IV. CONCLUSION

We hold that defendant's assertions of instructional error were waived. Further, we hold that defendant's claims of ineffective assistance of counsel fail because counsel's performance was not deficient and, even assuming deficient performance, defendant did not establish the requisite prejudice.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens