STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2004
v	No. 246974 Kalamazoo Circuit Court
MICHAEL LEE JOHNSON, Defendant-Appellant.	LC No. 02-001164-FC

Before: Gage, P.J., O'Connell and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to rob while armed, MCL 750.89; assault with intent to do great bodily harm, MCL 750.84; felon in possession of a firearm, MCL 750.224f; carrying a concealed weapon, MCL 750.227; and three counts of felony-firearm, MCL 750.227b. Defendant appeals as of right. We affirm.

I. Basic Facts

This case arises from the January 7, 2002, attempted robbery of Thomas Krill's store. At around 10:00 p.m., a man entered Krill's store brandishing a firearm. The man aimed the gun at Krill, pulled the trigger several times, but the gun did not fire. Krill then struck the man's arm with a baseball bat. After being struck by the bat, the man pulled the trigger again. This time the gun fired but the bullet missed Krill. The man then fled the store. The robbery was captured on store videotape, and was later aired on local television. Ralph Carter, the brother of defendant's ex-girlfriend, Rosemary Carter, saw the televised videotape and identified defendant as the perpetrator. Ralph told his mother, Joyce Spencer, and she informed the police.

II. Ineffective Assistance of Counsel

A. Standard of Review

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

B. Analysis

To establish a claim for ineffective assistance of counsel, defendant must show, with regard to counsel's performance "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *LeBlanc*, *supra* at 578.

1. Failure to Stipulate

Defendant argues he was denied effective assistance of counsel when counsel did not exclude evidence of his prior conviction for assault with a dangerous weapon by stipulating that defendant had been convicted of a less serious felony, receiving and concealing stolen property, or "an unspecified felony," in regard to the felon in possession of a firearm charge.

Although a felony conviction is a required element of establishing a defendant's guilt of a charge of felon in possession, the prosecution and the defense counsel may agree to stipulate that the defendant has been convicted of an unspecified prior felony in order to minimize any prejudice to the defendant. See *People v Nimeth,* 236 Mich App 616, 627; 601 NW2d 393 (1999); *People v Green,* 228 Mich App 684, 691; 580 NW2d 444 (1998).

Here, defendant has not demonstrated under the prejudice prong a reasonable probability that, but for counsel's alleged unprofessional error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

> A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [*People v Reed*, 449 Mich 375, 400-401; 535 NW2d 496 (1995), quoting *Strickland, supra* at 697.]

There was overwhelming evidence of defendant's guilt presented at trial. Ralph and Rosemary, Spencer and Krill identified defendant as the perpetrator. Defendant outright admitted to Spencer that he robbed Krill's Corner. Also, defendant's statements to detective Alofs strongly indicate that he committed the crime. Specifically, when Alofs told defendant that bond was unlikely because he was charged with assault with intent to murder, defendant responded, "you see the tape it is not all about that," and then stated the gun was not supposed to have been loaded. When Alofs told defendant that no one except defendant had been hurt in the incident, defendant responded by smiling, holding up his left elbow, and stating "Yeah, with the bat." Also, Albert White III testified to statements made to him in jail by defendant which provide a basis for finding defendant committed the offense. Moreover, defendant's alibi defense was not supported by any evidence beyond his own questionable testimony.

Here, the overwhelming evidence of defendant's identification as the perpetrator so marginalizes any affect evidence that defendant acted in conformity with a prior conviction for assault with a dangerous weapon that it cannot be said that the alleged error probably affected the outcome of trial. Therefore, this alleged error does not "undermine confidence in the outcome," and defendant has not shown sufficient prejudice to establish ineffective assistance of counsel. *Carbin, supra* at 600, quoting *Strickland, supra* at 694.

2. Impeachment With Letter

Defendant argues that defense counsel failed to prevent the prosecution from using a letter defendant had written to his attorney to impeach defendant's testimony.

The prosecution concedes that the letter at issue was within the scope of the attorney-client privilege. The question is whether defendant waived the privilege in regard to this letter. A waiver, express or implied, requires an intentional, voluntary act or the voluntary relinquishment of a known right. A waiver of the attorney-client privilege cannot arise by accident. *Leibel v General Motors Corp*, 250 Mich App 229; 646 NW2d 179 (2002).

Defendant wrote to defense counsel requesting new counsel. The letter reflected that defendant believed defense counsel was not assisting his defense. Apparently with defendant's consent, defense counsel attached the letter to a motion to withdraw. During the hearing on the motion to withdraw, defendant did not object to the letter being viewed by the prosecution and the trial court. Rather, defendant specifically referenced the letter and reiterated its contents on the record when requesting new counsel. The only conclusion permitted by defendant's reference to the letter and reiteration of the letter's contents is that defendant intentionally and voluntarily waived the attorney-client privilege in regard to the letter. Moreover, the record does not contradict defense counsel's testimony that he attached the letter to the motion with defendant consent. Thus, there is evidence that defendant expressly waived the attorney-client privilege in regard to this letter.

Because the letter was not protected by the attorney-client privilege, defense counsel could not have precluded its use on this basis. Defense counsel is not obligated to make futile objections. *People v Milford*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Accordingly, defendant has not established that defense counsel's representation fell below the required standard of assistance in this regard.

Affirmed.

/s/ Peter D. O'Connell
/s/ Hilda R. Gage
/s/ Brian K. Zahra