STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2004
v	No. 246501 Oakland Circuit Court
KENT JAY GOLDY, Defendant-Appellant.	LC No. 02-184840-FH

Before: Owens, P.J., and Kelly and Gribbs,[*] JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, on one count of carrying a concealed weapon (pistol) in a vehicle, MCL 750.227(2), and one count of possessing a prohibited weapon (muffler or silencer), MCL 750.224(1)(b), for which he was sentenced to sixty months' probation. We affirm.

Defendant argues first that he received ineffective assistance of trial counsel, and that the trial court erred by deciding this issue without conducting a requested evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). We disagree.

We review claims of ineffective assistance of counsel as mixed questions of law and fact, reviewing the trial court's factual findings for clear error, and reviewing its rulings on questions of law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Ineffective assistance is found only where counsel's performance falls below an objective standard of reasonableness and where the errors committed by counsel were so prejudicial to the defendant that there is a reasonable probability that without counsel's errors, the outcome would have been different. *People v Pickens*, 446 Mich 298, 303, 314; 521 NW2d 797 (1994). A reasonable probability that the outcome would have been different occurs when counsel's performance was so deficient that it undermines one's confidence in the outcome of the case. *Id.* at 314, citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

To justify a remand for an evidentiary hearing on the issue of ineffective counsel, it was incumbent on defendant to demonstrate that such a hearing is necessary to establish a factual basis to support his claim and to permit "appellate consideration of the issue." MCR 7.211(C)(1)(a)(ii); *People v Hernandez*, 443 Mich 1, 21; 503 NW2d 629 (1993). Defendant has failed to make such a demonstration.

Regarding defendant's assertion that the voir dire conducted by his counsel was inadequate, no evidentiary hearing is necessary for this Court to assess the adequacy of the voir dire. Having reviewed the voir dire that was conducted, we conclude that, particularly given the lengthy and comprehensive questioning conducted by the trial court and the prosecutor, trial counsel's voir dire questioning was direct, pertinent, and brief, but not inadequate. There is no merit to defendant's claim and no need for an evidentiary hearing.

Next, with regard to defendant's claim that counsel was ineffective because he did not effectively deal with the trial court's disrespectful treatment, we have reviewed the record and conclude that it is more than adequate to review this claim. Contrary to defendant's characterization, the record does not indicate that the trial court was disrespectful. The court specifically disclaimed any irritation with trial counsel and the record bears this out; in fact, the record contains numerous examples of the trial court showing respect and consideration to trial counsel, and emphasizing that defendant was entitled to a fair and full trial. To the extent that the trial court interjected its own questions of the witnesses, it was generally because the testimony of the witnesses was confusing and had to be clarified. The trial court has broad discretion with respect to controlling trial proceedings, *People v Taylor*, 252 MA 519, 522; 652 NW2d 526 (2002), and defendant has not established an abuse of the trial court's discretion. A remand is unnecessary for review of this claim.

Defendant next contends that his counsel was ineffective because his inept questioning opened the door to the admission of otherwise inadmissible evidence in response. This claim does not require an evidentiary hearing. If the questioning was appropriate, then counsel was not ineffective. Moreover, even if it was debatable whether counsel should have engaged in this questioning, disagreement over trial strategy decisions – such as the questioning of witnesses – is not the basis for a claim of ineffective assistance. *Pickens, supra* at 330. Unless it is not possible to imagine a valid strategic reason to engage in the questioning – even at the possible price of inviting damaging responsive testimony – there is no basis for a finding of ineffective assistance. Having reviewed trial counsel's questioning, we cannot conclude that it fell "outside the wide range of professionally competent assistance." *Id.* at 330, quoting *Strickland, supra* at 690. We therefore conclude that no ineffective assistance of counsel claim has been shown.

Regarding defendant's claim that his trial counsel was ineffective because he failed to question a police officer concerning his apparent failure to make a notation, in his police report, about his alleged observation of an instruction manual on the building of silencers when he searched defendant's apartment, we conclude that this was a decision of trial strategy that we will not second guess and that, in any event, defendant has not established prejudice. *Pickens, supra* at 314, 330. The police officer explained that he had made a mistake by not seizing the manual and it was entirely reasonable for trial counsel to avoid this topic so as not to emphasize it in the jurors' minds.

Likewise, with regard to defendant's claim that his counsel was ineffective for failing to object to the prosecutor's cross-examination of a defense witness concerning whether defendant was going to be terminated, the record shows that the witness "didn't know" the answer to the prosecutor's question and that the fact defendant was terminated was already established during the prosecutor's case-in-chief. Therefore, we conclude that not only was the decision not to object a matter of trial strategy, *People v Burns*, 118 Mich App 242, 247; 324 NW2d 589 (1982), but defendant has failed to establish how he was prejudiced by the prosecutor's questioning.

Defendant further claims that his counsel was not effective because he failed to request an instruction on the intent element of possession of a silencer. While, as we subsequently explain, the propriety of the silencer possession instruction is not properly before us, we observe that the evidence clearly established defendant's knowing and intentional possession of an article shown to be a silencer. Therefore, even if the instruction was flawed, defendant has failed to demonstrate that he was prejudiced by the instruction. Furthermore, the general instruction that was given without objection was sufficient to inform the jurors of the elements of the offense. An evidentiary hearing is not necessary on this point.

Finally, defendant claims his counsel was ineffective because he initially told the jurors that defendant would testify, but subsequently talked defendant out of testifying. However, the record plainly establishes that defendant stated it was his choice not to testify. It is entirely possible that counsel and defendant changed their strategy concerning the wisdom of offering defendant's testimony as they assessed the strength of the evidence. This sort of strategic decision is one that we do not second guess. *Pickens, supra* at 330. In any event, the mere fact that the jurors were initially told defendant would testify and then later became aware that he changed his mind is insufficient to establish the prejudice that is necessary to prevail on a claim of ineffective assistance. *Strickland, supra* at 693; *Pickens, supra* at 303, 314, 338. The jury was specifically instructed that it was not to consider the fact that defendant chose to invoke his right not to testify, and we must assume that the jury followed this instruction. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997), citing *People v Banks*, 438 Mich 408, 418; 475 NW2d 769 (1991).

Defendant has therefore failed to demonstrate that he was prejudiced. We conclude that, given the strong and ample evidence of defendant's guilt, defendant has not established that but for these alleged errors, the result of the trial would have been different, *Strickland, supra* at 694; that is, "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.[1]

[1] We recognize that our Supreme Court has phrased the inquiry slightly differently, requiring a finding that "the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303, 338; 521 NW2d 797 (1994). However, because the *Pickens* Court explicitly decided that the standard for ineffective assistance of counsel claims in Michigan was identical to the federal standard enunciated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), see *Pickens, supra* at 338, we conclude that the difference in wording does not establish a different standard.

The trial court concluded both that counsel did a creditable job trying a difficult case, and that the evidence against defendant on the charged counts was so strong that, even if counsel was not completely effective, there would be no ground for reversal under the *Pickens/Strickland* standard. We find no error in these rulings.[2] We also find that the trial court did not err by denying defendant's motion for a *Ginther* hearing to determine whether counsel was ineffective, given that there was no possibility of any showing being made that would have justified a new trial on the ground of ineffective assistance.

Defendant also asserts that the trial court erred by using the model jury instruction with respect to the elements of the offense of illegal possession of a silencer, claiming that this instruction fails to state the intent element of the crime properly. However, defendant affirmatively and specifically stated on the record, through counsel, that he was satisfied with the instruction. Because defendant waived any arguable error in this instruction,[3] he may not raise this issue on appeal. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs

[2] The court also found that defendant was incorrect in his contention that the court had become irritated with what it regarded as defense counsel's poor performance and that its negative attitude toward defense counsel had a negative impact on defendant. We find no error in this ruling. Indeed, a review of the record indicates that the trial court was not only very respectful to defense counsel, but that the court took pains to assure counsel that he was entitled to do whatever was necessary to ensure that defendant received the "good and fair trial" to which he was entitled.

[3] Our reference to "arguable error" is not meant to imply that there was any such error.