

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 1, 2011

v

ANDY MALDONADO,

Defendant-Appellant.

No. 298144
Wayne Circuit Court
LC No. 09-031432-FC

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction for assault with intent to commit murder, MCL 750.83. The trial court sentenced defendant to 6 to 20 years in prison. For the reasons set forth below, we affirm.

I. ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel's failure to object to a juror denied him his constitutional right to the effective assistance of counsel.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews findings of fact for clear error and questions of constitutional law de novo. *Id.* Because defendant failed to preserve the issue below, "in determining whether defendant has overcome the presumption that counsel was effective, our review is limited to the facts apparent in the lower court record." *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998), citing *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989).¹

¹ "For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show deficient performance, the defendant must overcome the strong presumption that defense counsel's

This Court presumes jurors are competent and impartial, *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001), and the defendant bears the burden to prove that a juror has prejudices that would impair her capacity to render a fair and impartial verdict, *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). Generally, an attorney's decisions whether to challenge a juror constitutes trial strategy, *Johnson*, 245 Mich App at 259, and this Court will not reevaluate the attorney's decisions with the benefit of hindsight, *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

Defendant must first show that defense counsel's decision not to challenge juror number seven for cause was so misguided as to fall below an objective standard of reasonableness. *Walker*, 162 Mich App at 63. MCR 2.511(D) provides, in pertinent part, that the parties may challenge potential jurors for cause if the potential juror "is biased for or against a party or attorney . . . [,] shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be." MCR 2.511(D)(3)-(4).

Defense counsel's failure to challenge juror number seven for cause did not amount to ineffective assistance of counsel. See *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). The juror's statements did not amount to a showing of bias such that the court, on defense counsel's motion, would have necessarily excluded the juror for cause. See, e.g., *Johnson*, 245 Mich App at 256. Although the juror initially expressed concern because of his interactions with his grandfather, he stated that he could put aside any personal beliefs, follow the trial court's directions, and render a fair verdict. Because defense counsel is not required to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), defense counsel's failure to challenge the juror for cause did not fall below an objectively reasonable standard of professional decision making.

This Court generally defers to trial counsel's decision whether to challenge a juror because of trial counsel's superior position to observe and examine potential jurors. *Robinson*, 154 Mich at 92. Defense counsel observed juror number seven's answers, and decided not to object to his service. Because the trial court thoroughly questioned juror seven regarding his potential bias, and juror seven stated that he would follow the trial court's directions and put aside his personal beliefs, defense counsel's decision to allow juror seven to serve constituted trial strategy and was not objectively unreasonable.

We further observe that this Court will only overturn a jury verdict in an extreme case of juror bias. See *People v Skinner*, 153 Mich App 815, 819-820; 396 NW2d 548 (1986). In *Skinner*, the trial court rejected defense counsel's motion to remove a juror for cause because the juror "stated a number of times that he did not believe he could be fair, that he had a pre-formed belief that a ten-year-old girl would not fabricate a story, and that he found it impossible to grant defendant the presumption of innocence." *Id.* This Court reversed. *Id.* Here, the juror's

decisions constituted sound trial strategy. *Id.*, citing *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). To show prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Mitchell*, 454 Mich at 167.

statements do not even remotely rise to the level of juror bias in *Skinner*. Although juror seven admitted he had preconceived notions based on his grandfather's bias, again, he stated that he "[w]ould be able to follow and apply [the court's] instructions"

In *Johnson, supra*, this Court held that defense counsel's showing that a juror had been a victim of domestic violence did not show sufficient bias to allow a challenge to a juror sitting in a domestic violence case. *Johnson*, 245 Mich App at 252-253. In *Johnson*, the juror revealed during voir dire that she had been a victim of an assault, but defense counsel failed to question her further, and only learned that the assault involved domestic violence during the trial. *Id.* After learning the details of the juror's assault, defendant moved for a new trial. *Id.* The trial court denied the motion, and this Court affirmed. This Court held that, because the juror did not intentionally give false information, and she indicated that she could remain fair and impartial, allowing the juror to serve did not amount to error requiring reversal. *Id.* at 253. Similarly, here, juror seven agreed, despite his past experiences, to be fair and impartial in judging defendant's case.

We also reject defendant's argument because to permit defendant to challenge the verdict based on juror bias for the first time on appeal would allow defendant the opportunity to "build error into the jury selection process." *Johnson*, 245 Mich App at 243 n 3. Where defense counsel fails to challenge a juror for cause, and expresses satisfaction with the jury as impaneled, defendant cannot later challenge the verdict based on the composition of the jury. *Id.* Here, defense counsel did not challenge juror seven for cause, and did not use a peremptory challenge to remove juror seven although defendant still had peremptory challenges available. At the conclusion of voir dire, defense counsel stated, "Judge, the defense is satisfied with this panel" Defendant, therefore, cannot now claim that allowing juror seven to serve affected his right to a fair trial.

II. CONFESSION

Defendant argues that the trial court's admission of defendant's confession violated his right to due process because fairness requires police to record a defendant's confession as a prerequisite to its admission at trial. We disagree.

Defendant did not raise this issue before the trial court, and therefore, did not preserve the issue for appeal. See, e.g., *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). However, we will consider this claim for the first time on appeal because, if admitting defendant's confession was erroneous, the error could have been decisive of the outcome. *Id.* This Court reviews unpreserved constitutional claims for plain error affecting substantial rights. *People v Geno*, 261 Mich App 624; 683 NW2d 687 (2004). To avoid forfeiture, defendant must show that an error occurred, that the error was clear and obvious, and that the error affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Due Process Clause of the United States Constitution² does not require that police record a defendant's confession. *California v Trombetta*, 467 US 479; 104 S Ct 2528; 81 L Ed 2d 413 (1984). In addition, this Court has twice considered and rejected the proposition that the Due Process Clause of the Michigan Constitution³ requires that a defendant's confession be recorded. *Geno*, 261 Mich App at 624; *Fike*, 228 Mich App at 178. Defendant's reliance on *Stephan v State*, 711 P2d 1156, 1158 (Alaska, 1985), is misplaced because this Court previously considered this case and its rationale, and rejected defendant's argument. *Geno*, 261 Mich App at 690-691 (citing MCR 7.215(J)(1)); *Fike*, 228 Mich App at 183-184. Accordingly, defendant's argument fails.

We also reject defendant's request to convene a special panel to review the *Geno* and *Fike* decisions under MCR 7.215(J)(2)-(6). As discussed in *Geno* and *Fike*, "the courts of this state should reject unprincipled creation of state constitutional rights that exceed their federal counterparts." *Fike*, 228 Mich App at 185 (quoting *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993)). Adopting this argument would amount to unprincipled creation of state constitutional rights. *Geno*, 261 Mich App at 628. In *Fike*, this Court supported its decision to reject the argument by noting the Legislature had not yet spoken on the subject. *Fike*, 228 Mich App at 183. Since then, the Legislature has considered, but has not yet passed, a bill that would have required recording during interrogations on certain felonies. HB 5763 (2010). Because this Court has definitively rejected the contention that the constitution mandates confessions be recorded, and the Legislature has not adopted a statutory mandate, we reject defendant's request that we create this right.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell

² US Const, Ams V and XIV.

³ Const 1963, art 1, § 17.