STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 10, 2011
v	No. 300004 Otsego Circuit Court
JAMES JOSEPH PLATTE, JR., Defendant-Appellant.	LC No. 07-003753-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction entered following a jury trial of possession of oxycodone less than 25 grams, MCL 333.7403(2)(a)(b), and possession of clonazepam, MCL 333.7403(2)(b)(*ii*). Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 34 months to 15 years in prison. We affirm.

Defendant argues on appeal that the trial court erred in denying his motion for a new trial based on improper voir dire of potential jurors, improper contact between an interested party and the jury, improper viewing by the jury of defendant in leg irons, improperly admitted evidence, and ineffective assistance of trial counsel. A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010). A trial court does not abuse its discretion when it chooses an outcome falling within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The constitutional question of whether an attorney's ineffective assistance deprived a defendant of his Sixth Amendment[1] right to counsel is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant's argument that the court erred in denying his motion for a new trial based on improper influence of the jury pool is undercut by his affirmation at the close of voir dire that he was "satisfied with the jury." Waiting to raise these matters until he filed his motion for a new trial, instead of at a time when the court could have effectively addressed them, renders any

[1] US Const, Am VI.

claim of error on the part of the court meritless. See *People v Ho*, 231 Mich App 178, 183; 585 NW2d 357 (1998).

In any event, the court instructed the jury to base its verdict only on the evidence admitted during the course of trial. There is nothing in the record before us which would suggest that the jurors disregarded this clear instruction. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (observing that jurors are presumed to follow a trial court's instructions).

Defendant also argues that his trial counsel was ineffective for failing to conduct a proper voir dire with regard to pretrial publicity. Because an evidentiary hearing was not conducted, review of defendant's challenge to the effectiveness of trial counsel is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient, and that counsel's deficient performance prejudiced the defense. *Taylor*, 275 Mich App at 186. A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance prejudiced defendant if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Id.* Because of the difficulties inherent in considering the reasonableness of a trial counsel's performance, this Court approaches the issue presuming that counsel's performance falls within the wide range of reasonable professional assistance. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

An attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, and we will not evaluate that strategy through the lens of 20/20 hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). The trial court found that defendant's trial strategy may have been to avoid mentioning the pretrial publicity. Defendant has not overcome the presumption that counsel's actions were based on such a reasonable trial strategy. *Cline*, 276 Mich App at 637.

Next, defendant argues that several statements were improperly admitted into evidence because they were irrelevant and prejudicial. Generally, all relevant evidence is admissible and irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more or less probable than it would be without the evidence. MRE 401; MRE 402. The evidence's relationship to the elements of the charge, the theories of admissibility, and the defenses asserted govern admissibility. *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008).

Defendant argues that evidence he invoked his right to remain silent after his arrest was improperly admitted. "A defendant's right to due process guaranteed by the Fourteenth Amendment is violated where the prosecutor uses his postarrest, post-*Miranda* warning silence for impeachment or as substantive evidence unless it is used to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events." *People v Solmonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004), citing *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976). If a defendant has not received *Miranda* warnings, no constitutional difficulties arise

from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege.[2]

In this case, defendant asked Otsego County Sheriff's Deputy Amy Klepadlo to retrieve his wallet and cell phone from the home where he was found by police. Klepaldo found the narcotic pills that are the subject of this prosecution in a cigarette package inside the wallet. Klepaldo stated on direct examination that she then read defendant his *Miranda* rights, after which defendant "didn't want to talk." On cross-examination, defendant's attorney asked Klepadlo if she had several conversations with defendant, and Klepadlo responded, "Actually, no, I've not. He didn't want to talk to me." Defendant's attorney then asked if Klepadlo had spoken to defendant since the day he was taken into custody, and Klepadlo stated, "He didn't talk to me" and then confirmed that "[h]e refused." The trial court denied defendant's motion for a new trial regarding this issue finding that the testimony was a very minor part of a substantial amount of the evidence presented and did not require reversal.

No error requiring reversal exists with respect to testimony solicited by defendant regarding having invoked his post-*Miranda* right to silence. See *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003) ("[A]n appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence.") However, Klepadlo's testimony on direct examination about defendant's post-*Miranda* silence violated the Fifth Amendment privilege against self-incrimination. *Solmonson*, 261 Mich App at 664. Nonetheless, the trial court did not abuse its discretion in denying defendant's motion for a new trial because the testimony was brief, arguably non-responsive, and plaintiff did not argue defendant's guilt from his silence. Further, the evidence properly admitted was substantial, rendering any error inconsequential.

Next, defendant argues that improperly admitted evidence introduced by the prosecution regarding his previous involvement in drug activity requires a new trial. Defendant's attorney asked defendant questions regarding his prior arrests for drugs, current use of drugs, and possession and sale of drugs. Defendant denied use, prior arrests, possession, and sale, but clarified that he was arrested in 1999 for manufacture and delivery of marijuana.

Once defendant presented himself as someone who was not involved in using or possessing drugs, it opened the door for plaintiff to present evidence to the contrary. MRE 404(a)(1); *People v Lukity*, 460 Mich 484, 497-499; 596 NW2d 607 (1999). On redirect, plaintiff showed defendant a letter he sent to his parole officer in 2004 stating that he was drinking daily and took heroin leading to a desire for pills. Defendant also wrote in the letter that he was planning to obtain a large amount of oxycontin pills. Defendant explained that he wrote the letter to create the impression of a substance abuse problem. Having opened the door to this evidence, defendant cannot now claim error.

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[2] US Const, Am V.

Next, defendant argues that evidence of other charges that were pending against him was improperly admitted. We disagree. The evidence was relevant to demonstrate the circumstances regarding how defendant came to be apprehended by the police. See *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). Further, the cited testimony revealed only vague and general information about the pending charges stemming from a car accident.

Other items of evidence that defendant asserts were improperly admitted were that he had been incarcerated in the past and had faced six felony counts for forgery in 2004. Defendant also challenges the admission of two cell phones. Defendant's cousin, Stormy Tweedy, testified that she had known defendant for ten years except when he was "locked up," and that he had been locked up for more time than the time she spent with him personally. Arguably, the statement was more prejudicial than probative because it suggests an extensive criminal past which could have inordinately influenced the jury. However, defendant himself later specifically testified to the extent of his criminal history, mitigating any prejudicial impact of Tweedy's comment. Additionally, there was substantial independent evidence to support defendant's conviction and, therefore, defendant cannot demonstrate error requiring reversal of his convictions.

Similarly, it was defendant who testified that he faced six possible felony charges for forgery in 2004. As for the two cell phones, one was identified as defendant's, and the other was clearly identified as not relating to the instant case. No error has been shown with respect to this evidence.

Defendant also raises multiple arguments with respect to the effectiveness of trial counsel. A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right encompasses the effective assistance of counsel. *Cline*, 276 Mich App at 637. Whether a defendant has been deprived of the effective assistance of counsel is both a question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004).

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Taylor*, 275 Mich App at 186. A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance prejudiced the defendant if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Id.* Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We have already found defendant's claim of ineffective assistance with respect to counsel's handling of the jury pool to be without merit. We similarly reject his additional claims.

Defendant argues that counsel's handling of the evidentiary issues considered above constituted ineffective assistance of trial counsel. As discussed, an objection to testimony about defendant's post-arrest silence would have been meritorious. However, defendant does not argue that this failing prejudiced defendant. There was sufficient evidence to convict defendant

independent of the brief mention of his post-arrest silence, and plaintiff did not argue that this silence indicated defendant's guilt.

Next, defendant argues that trial counsel was insufficient for failing to object to, and for soliciting, evidence of defendant's past drug use. However, it was a defense strategy to demonstrate that defendant was not an active drug user. Decisions regarding what evidence to present are presumed to be matters of trial strategy, and this Court has consistently indicated that it will not substitute its judgment for that of counsel with the benefit of hindsight. See, e.g., *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Because trial counsel's questioning in this regard was a matter of reasonable trial strategy, even if not successful, his performance cannot be deemed deficient. *Cline*, 276 Mich App at 637.

Next, defendant challenges counsel's performance with respect to allowing testimony referencing another criminal case that was pending against defendant. However, an objection to this vague and generalized information was not likely meritorious, see *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004), and could arguably have served to heighten any prejudicial impact by focusing attention on the pending matter. Additionally, this testimony was not shown to have prejudiced defendant in that there was substantial evidence presented to sustain defendant's conviction.

Defendant also argues that other evidentiary admissions demonstrating past crimes of defendant were improperly admitted and solicited by defendant's trial counsel. We conclude that counsel's handling of these matters was well within the broad discretion afforded trial counsel. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro