STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 300935 Kent Circuit Court
ARTHUR LEE PRYOR, Defendant-Appellant.	LC No. 10-000270-FC

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for four counts of armed robbery, MCL 750.529; carrying a concealed weapon, MCL 750.227; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. Following defendant's jury trial, he was sentenced to serve 20 to 60 years in prison for the armed robbery convictions, three to seven years and six months for his carrying a concealed weapon conviction, three to seven years and six months for his possession of a firearm by a felon conviction, and two years for his felony-firearm conviction. For the reasons set forth in this opinion we affirm the convictions and sentence of defendant.

This appeal sets forth two issues. Both issues were introduced to the trial court in a post-sentencing motion for an evidentiary hearing. Following his conviction, defendant alleged for the first time that three of his family members were asked to leave the courtroom during jury voir dire and the trial court denied defendant's request for an evidentiary hearing on this issue. Hence, defendant's first argument on appeal is that the exclusion of the public from the courtroom without any reasons constitutes structural error as the action violated defendant's Sixth Amendment Right to a public trial. Secondly, defendant argues that defense counsel was ineffective when he failed to object to the closure of the courtroom.

We begin by addressing defendant's first issue. Defendant's mother submitted an affidavit in support of defendant's request for an evidentiary hearing which stated:

> 1. On August 9, 2010, I along with my husband and daughter arrived at the courtroom of the Hon. Mark A Trusock to attend the trial of Arthur Pryor…;
>
> 2. We entered the courtroom as jury selection was being conducted and found seats in the back row;

> 3. Just as we got seated, a member of the courtroom staff approach [sic] and asked us if we were potential jurors;
>
> 4. When we replied 'no,' we were told that unless we were potential jurors, we would have to leave the courtroom for the entire time jury selection was underway and could only return when the process was completed;
>
> 5. The three of us left the courtroom as ordered.

In denying defendant's request for an evidentiary hearing on the matter, the trial court stated that it would never have asked for closure during voir dire. Additionally, there is no citation proffered by defendant, and we could find no reference in the trial court record, to any closure of the courtroom by the trial judge. We also note that the proffered affidavit fails to indicate whether this information was ever given to trial counsel prior to the conclusion of the trial.

It is well-established that the right to a public trial extends to jury voir dire. *People v Vaughn*, 291 Mich App 183; __ NW2d __ (2010), lv pending; *Presley v Georgia*, __ US __; 130 S Ct 721; 175 L Ed 2d 675 (2010). However, a defendant must timely assert his right to a public trial, and he surrenders appellate relief on the issue if he fails to object to the trial court's decision to close the courtroom during jury voir dire. *Vaughn*, 291 Mich App at 196. ("[T]his right is not self-executing: the defendant must timely assert it . . . . Thus, the failure to timely assert the right to a public trial forecloses the grant of later relief.") In this case, defendant failed to object to the closure of the courtroom at trial, and he is not entitled to relief from this Court. *Id.*; see also *People v Orlewicz*, __ Mich App __; __ NW2d __ (Docket No. 285672, issued June 14, 2011), lv den 489 Mich 902 (2011) (concluding that the defendant waived his right to a public trial by failing to object to the closure of the courtroom during jury voir dire).

Defendant acknowledges this Court's holding in *Vaughn*; however, he argues that it should not apply to his case because he raises additional issues that were not raised in *Vaughn*. First, he argues that the trial court had a duty to ensure that he received a public trial. There is no support in our case law for defendant's position. In *Vaughn*, we addressed this very issue when we held that "[the right to a public trial] is not self-executing: *the defendant must timely assert the right*." *Id.* (emphasis added). Defendant also attempts to distinguish his case from *Vaughn* by asserting the right to a public trial on behalf of his excluded family members. Defendant is correct in noting that under the First Amendment, the public may assert a right to be present at criminal trials. See, e.g., *Press Enterprises Co v Superior Court of California, Riverside Cty*, 464 US 501; 104 S Ct 819; 78 L Ed 2d 629 (1984). However, the right of the public to attend criminal trials belongs to the public, and not to a criminal defendant. A defendant's right to a public trial exists under the Sixth Amendment, not the First Amendment. See *Presley*, __ US at __, slip op at 4. In this case, defendant waived his Sixth Amendment right to a public trial by failing to object to the closure of the courtroom. See *Vaughn*, 291 Mich App at 196. Accordingly, defendant cannot assert a right that does not belong to him, and this Court's holding in *Vaughn* controls.

Defendant next argues that trial counsel was ineffective for failing to object to the closure of the courtroom. A defendant is denied effective assistance of counsel in violation of the Sixth

Amendment if counsel's "performance fell below an objective standard of reasonableness, . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In order to make a successful claim for ineffective assistance of counsel, a defendant must overcome the strong presumption that counsel's conduct constituted reasonable trial strategy. *Id.* at 343. Additionally, a defendant bears the burden to "establish[] the factual predicate for his claim of ineffective assistance of counsel . . . ." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant is not entitled to relief on his ineffective assistance of counsel claim because he has not established the factual predicate on which his claim is based. See *id.* As previously stated, the only evidence presented that this event actually occurred was the affidavit of defendant's mother, and she fails to state whether she brought this matter to the attention of trial counsel. Hence trial counsel cannot be ineffective for failing to raise an objection to a matter of which there is no proof he had any knowledge. See *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005) ("counsel cannot be found ineffective for failing to pursue information that his client neglected to tell him.")

Finally, defendant is not entitled to relief because even assuming counsel's performance fell below an objective standard of reasonableness, defendant failed to establish that but for any alleged error in counsel's performance, the outcome at trial would have been different. The prosecution's case against defendant was strong, and it presented uncontroverted evidence that he was involved in the robbery. Thus, defendant cannot demonstrate that but for any error committed by counsel in failing to object to the closure of the courtroom, the jury would have been left with a "reasonable doubt respecting guilt." *Pickens*, 446 Mich at 312. Accordingly, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello