STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 177014
LC No. 93-000578-FC

Before: MacKenzie, P.J., and Markey and J.M. Batzer,* JJ.

PER CURIAM.

Defendant was charged with two counts of assault with the intent to commit murder, MCL 750.83; MSA 28.278, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and the jury found defendant guilty as charged. The trial judge sentenced defendant to concurrent terms of seventeen to fifty years' imprisonment for each of the assault with intent to commit murder convictions, to be consecutive to the concurrent two-year sentences for each of the felony-firearm convictions. Defendant appeals as of right from his convictions. We affirm.

I

Below, defendant's attorney attempted to obtain testimony from a police officer that defendant was intoxicated at the time he gave an inculpatory statement to this officer. Following his unsuccessful attempt to elicit this testimony, the attorney objected to the introduction of the statement on the ground that it was involuntarily made. On appeal, defendant argues that the resulting discussion of the objection in front of the jury constituted an improper *Walker* hearing. We disagree. We note, however, that defendant failed to request a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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* Circuit judge, sitting on the Court of Appeals by assignment.

Consequently, our review of this issue is limited to the record as it stands. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

As a general rule, an attorney's failure to move for a hearing on the voluntariness of a statement does not automatically equate to ineffective assistance of counsel. *People v Means (On Remand)*, 97 Mich App 641, 647-648 n 1; 296 NW2d 14 (1980). To establish a claim that the assistance of one's counsel was ineffective, the defendant must first show that counsel's assistance fell below the objective standard of reasonableness. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In other words, the defendant must overcome the presumption that his counsel's actions were the product of sound trial strategy. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). The defendant must also establish that his counsel's representation prejudiced him so as to have deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). If this element cannot be established, the defendant's claim must fail. *Id*. at 333.

Our review of the record shows that defendant put forth an intoxication defense to the assault with intent to commit murder charges. If the jury believed this defense, it would have been unable to convict defendant of the charge because the intoxication would negate the requisite specific intent to commit murder element. *Barclay*, *supra* at 674. We believe that defendant's trial counsel attempted to bolster this defense with his questioning of the officer, but the strategy obviously failed. Strategy that fails does not equate with ineffective assistance of counsel. See, e.g., *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995) (counsel's choice between two inconsistent defenses does not constitute ineffective assistance of counsel). Because defendant failed to show that counsel's actions were not sound trial strategy, his claim must fail. *Pickens*, *supra* at 309. Furthermore, defendant failed to show how the discussion of the statement in front of the jury prejudiced him. Defendant's claim must also fail for this reason. *Id*. at 333.

II

Defendant argues that the trial court erred when it declared a witness to be an expert on shotguns because this witness did not have the proper schooling to testify on this subject. We disagree. The rules of evidence provide that a witness may be qualified to testify on a given subject through either knowledge, skill, experience, training, or education. MRE 702. Furthermore, a trial court may consider the proffered witness's trial experience when determining the qualifications of the witness. *People v Lewis*, 160 Mich App 20, 28; 408 NW2d 94 (1987). Here, the witness is a lieutenant with the Michigan State Police specializing in firearm identification, tool mark identification, bombs, and explosives since March 1981. He has attended courses on firearms identification at Oakland Community College and gunpowder and primer residue at the FBI Academy. He tests approximately fifty shotguns a year for various reasons. In addition, the witness has testified as an expert before six courts of record. Therefore, we find that the witness is qualified to testify as an expert on shotguns. Correspondingly, the trial court did not abuse its discretion when it came to the same determination. *People v England*, 176 Mich App 334, 339-340; 438 NW2d 908 (1989), aff'd sub nom *People v Perlos*, 436 Mich 305; 462 NW2d 310 (1990).

Alternatively, defendant argues that trial court erred when it allowed this same witness to render an expert opinion on the distance from which shots were fired because the witness's testing methodology violated the general acceptance requirements of *Frye v United States*, 293 F 1013; 54 US App DC 45 (1923). We disagree. The test procedure in question consisted of firing defendant's shotgun from known distances at fabric samples and then comparing the resulting shot patterns to those found on the victim's clothing. This testing procedure has long been recognized as an acceptable test procedure by the legal and ballistics communities. See *Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired*, 86 ALR2d 611, 643-648. Because the *Frye* requirement is only applicable to new scientific principles or techniques and the test procedures in question have long been recognized, defendant's argument is without merit. *People v Haywood*, 209 Mich App 217, 221; 530 NW2d 497 (1995).

III

Defendant argues that his convictions must be reversed because of instructional error. We disagree. We note that this issue is unpreserved because defendant failed to object to the jury instructions as given. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Therefore, we will only review this issue to determine whether relief is necessary to avoid manifest injustice. *Haywood, supra* at 230. We find that no manifest injustice occurred below. The trial court properly instructed the jury on expert witnesses. Even though the trial court failed to properly instruct the jury on the elements of felony firearm, we find this error to be harmless because the missing element, that defendant had to knowingly carry or possess a firearm at the time of the incident, was not in dispute. See *People v Lawless*, 136 Mich App 628, 637; 639; 357 NW2d 724 (1984).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Jane E. Markey
/s/ James M. Batzer