

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED
October 11, 1996

Plaintiff-Appellee,

v

No. 181180
LC No. 93-003164

KENNETH DENSON,

Defendant-Appellant.

Before: Gribbs, P.J., and Saad and J. P. Adair,* JJ

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529; MSA 28.797, and felony firearm. Defendant appeals; we affirm.

Defendant argues that he was denied effective assistance of counsel. Effective assistance of counsel is presumed; therefore, the defendant bears the burden of proving that counsel's assistance was ineffective. In order to establish a claim for ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney as guaranteed by the Sixth Amendment to the United States Constitution. Further, the defendant must demonstrate that any deficiency was prejudicial to his case. Finally, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy. *People vLaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Here, defendant claims that trial counsel was deficient in failing to object to the scoring of offense variable (OV) 1, Aggravated Use of Weapon. A criminal defendant is entitled to effective assistance of counsel at sentencing. *People v Newton (After Rem)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). However, the decision to address the court at sentencing is a tactical one. *Newton, supra* 179 Mich App at 494. A review of the record reveals that defendant displayed a

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

weapon during commission of the offense. Because Michigan's Sentencing Guidelines mandate a score of fifteen points for OV 1 where the defendant displayed a gun and was convicted of armed robbery, we conclude that defendant neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcame the presumption that counsel's actions were strategic. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Therefore, defendant's claim of ineffective assistance of counsel lacks merit.

Defendant also asserts that the trial court erred in failing to suppress a pretrial identification of defendant by complainant. We disagree. This Court reviews a trial court's decision to admit identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993), cert den 510 US 1058; 114 S Ct 725; 126 L Ed 2d 689 (1994); *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Here, complainant identified defendant when the two encountered each other at the police station. Complainant, who had gone to the precinct for a scheduled show-up, observed defendant waiting near the same bank of elevators. Without prompting, complainant tapped the officer who was accompanying him to the show-up on the shoulder and said, "That's the guy." We conclude that the trial court properly admitted this the identification testimony.. See *People v Hampton*, 52 Mich App 71, 77; 216 NW2d 441 (1974) rev'd on other grounds, 394 Mich 437; 231 NW2d 654 (1975); *People v Metcalf*, 65 Mich App 37; 236 NW2d 573 (1975).

Defendant also contends that the trial court erred in denying his motion for a directed verdict on the felony-firearm charge, because the complainant could not identify the type of gun used by defendants and no gun was ever located. We disagree. In reviewing a trial court's decision on a motion for a directed verdict, we consider the evidence presented in the light most favorable to the prosecution and to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). The crime of felony-firearm requires proof that the defendant possessed or carried a firearm during commission of any felony or attempted felony. *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992). No weapon need be admitted into evidence. *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984). Complainant testified that defendant used a pistol when he demanded money from the complainant. Viewed in a light most favorable to the prosecution, we find complainant's testimony sufficient to prove each element of felony-firearm beyond a reasonable doubt.

Affirmed.

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

/s/ Roman S. Gibbs
/s/ Henry William Saad
/s/ James P. Adair

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