STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY WILSON,

Defendant-Appellant.

UNPUBLISHED
January 10, 1997

No. 186240
Wayne County
LC No. 94-12492

Before: Cavanagh, P.J., and Reilly, and C.D. Corwin,* JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to rob while unarmed, MCL 750.88; MSA 28.283 and was sentenced to a prison term of nine months to fifteen years. He appeals as of right. We affirm.

Defendant raises two claims of ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced by the representation. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Because defendant did not move for a *Ginther*[1] hearing, or a new trial, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant first claims that counsel's failure to object to the court's instructions regarding the order of deliberations constituted ineffective assistance of counsel. We disagree. The instructions in this case indicated that the jury could consider the lesser offenses if "you're not satisfied . . .", "if you're not convinced beyond a reasonable doubt that defendant is guilty of that [greater] offense . . ." and that the jury could consider the offenses in the order the court indicated that the jury should consider them, "being satisfied that the prosecutor has not proven the greater offense before you proceed to examine proofs of the - - proofs related to the lesser offense." Defendant claims that these instructions were

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

erroneous under *People v Hurst*, 396 Mich 1; 238 NW2d 6 (1976) and its progeny, including People *v Handley*, 415 Mich 356; 329 NW2d 710 (1982). However, the instructions in this case are indistinguishable from that which the Supreme Court found satisfactory when it reversed this Court's decision in *People v Henderson*, 113 Mich App 505; 317 NW2d 340 (1982), rev'd 417 Mich 891; 330 NW2d 850 (1983). . Because, from the terms of the Supreme Court's peremptory order in *Henderson* and this Court's published opinion, this Court can determine the applicable facts and the reason for the decision, the peremptory order constitutes a binding precedent. *Wechsler v Wayne County Road Comm*, 215 Mich App 579, 591 n 8; 546 NW2d 690 (1996), citing *People v Crall*, 444 Mich 463, 464; 510 NW2d 182 (1993). Accordingly, we conclude that defendant has not established that he was denied ineffective assistance of counsel by his counsel's failure to object to the court's instructions.

Defendant also claims that he was denied effective assistance of counsel because counsel did not elicit defendant's explanation of the incident from defendant during his testimony. The direct examination of defendant, in its entirety is as follows:

Q Mr. Wilson?

A Yes.

Q Do you know that you have a right to not to testify in this case?

A I certainly do.

Q Are you giving up that right to testify before this jury?

A Yes, I'm giving it up.

Q Do you know that you're charged with assault with intent to commit robbery while armed?

A I'm well aware of that.

Q Did you commit that crime, sir?

A No, I didn't.

The prosecution did not cross-examine defendant.

We are not persuaded that defendant has overcome the presumption that counsel's terse examination was sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 318 (1991). Furthermore, defendant has not established that he was prejudiced. The record does not indicate what defendant's testimony would have been had counsel conducted a more thorough examination. We are not inclined to speculate there was a reasonable probability that had defendant's

testimony been more thoroughly presented, the result of the proceeding would have been different. *Pickens*, *supra* at 314.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant argues that if this Court finds the record insufficient, we should remand for an evidentiary hearing. This we decline to do. Defendant did not file a motion for remand pursuant to MCR 7.211(C)(1) and to the extent that his appellate brief was intended as a substitute for such a motion, it was not "supported by affidavit or offer of proof regarding the facts to be established at a hearing." MCR 7.211(C)(1)(a)(ii).