STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

D'ANDRE COFFEE,

Defendant-Appellant.

UNPUBLISHED
February 21, 1997

No. 187852
Recorder's Court
LC No. 95-001129-FY

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant was sentenced to concurrent terms of one to four years in prison for the possession of less than twenty-five grams of cocaine conviction, and one to five years for the carrying a concealed weapon conviction. We affirm.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel. Because defendant failed to preserve this issue for our review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors by counsel evident in the existing trial record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

To establish a claim of ineffective assistance of counsel mandating reversal of a conviction, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Defendant first claims that his trial attorney failed to provide effective assistance by failing to contact and present key witnesses whose testimony could have exonerated defendant. Trial counsel's failure to call the witnesses only constitutes ineffective assistance of counsel if the failure deprives

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

defendant of a substantial defense. *People v Hyland,* 212 Mich App 701, 710; 538 NW2d 465 (1995). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.* Nothing in the trial record indicates that witnesses existed whose testimony could have provided defendant with a substantial defense. Defense counsel also extensively cross-examined the police officers about their ability to see defendant throw the gun and the cocaine, about not fingerprinting the gun, and their collection of the evidence. *Marji, supra* at 533. Therefore, we hold that trial counsel's failure to call the witnesses does not constitute ineffective assistance.

Defendant next claims that trial counsel prejudiced him by not allowing him to testify. While a criminal defendant has a constitutional right to testify, if the defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right will be deemed waived. *People v Simmons,* 140 Mich App 681, 683-684; 364 NW2d 783 (1985). Defendant did not testify. The record does not contain defendant's protest to his attorney's decision that defendant not testify. Therefore, we hold that defendant waived his right to testify.

Defendant next claims that his trial attorney failed to adequately argue his case. The record does not support this claim. *Marji, supra* at 533. Trial counsel forcefully argued to the trial court that the prosecution failed to fingerprint the cocaine packs, the blue box containing them, and the gun and its holster. Counsel's decision not to mention the five hundred dollars supposedly taken from defendant by police and not to contest the lack of physical evidence at trial may have been, contrary to defendant's contention, sound trial strategy to avoid placing irrelevant information or argument before the trial court. Action appearing erroneous from hindsight does not constitute ineffective assistance if the action was taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Finally, defendant's claim that his trial attorney failed to tell him about the evidence stipulation is unsupported by the record. *Marji, supra* at 533.

Defendant also claims that trial counsel failed to conduct adequate discovery on his case. A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *People v Kelly,* 186 Mich App 524, 526; 465 NW2d 569 (1990). When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this lack of preparation. *People v Caballero,* 184 Mich App 636, 640; 459 NW2d 80 (1990). It must be shown that the failure to prepare resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *Caballero, supra* at 642. The record below is silent regarding whether further investigation by defendant's trial counsel would have discovered evidence that would have substantially benefited defendant. *Marji, supra* at 533. Based on the trial record, we find that defendant has not overcome the presumption that he received effective assistance of counsel. *People v Wilson,* 180 Mich App 12, 17; 446 NW2d 571 (1989).

Defendant's second issue on appeal is that the trial court erred in accepting his waiver of his right to a jury trial because the trial court failed to establish that the waiver was freely, understandingly, and voluntarily made.

Before accepting a defendant's waiver of his right to a trial by jury, the trial court must advise the defendant in open court of his constitutional right to trial by jury. The court must also ascertain that the defendant understands the right and voluntarily chooses to give up that right. MCR 6.402(B); *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993). We find, on review of the record made at defendant's waiver hearing, that the trial court fully complied with these requirements and that defendant's waiver was freely, understandingly, and voluntarily made. *Shields, supra* at 560-561. The voluntary nature of defendant's waiver, which is apparent on the record, undermines defendant's claim that his trial counsel provided ineffective assistance of counsel by convincing defendant to opt for a bench trial with promises of the trial court's leniency. We have never required the trial court to ask defendant "whether anyone has promised the defendant that the court would be lenient if the defendant gives up his rights." *People v Margoes*, 141 Mich App 220, 223; 366 NW2d 254 (1985).

Defendant's third issue on appeal is that the prosecution failed to present sufficient evidence to support his convictions.

The offense of possession of a controlled substance requires proof that the defendant had actual or constructive possession of the substance. *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990). Possession may be established by evidence that the defendant exercised control or had the right to exercise control of the substance and knew it was present. *Id.* Knowledge of the presence of the substance is also an essential element of the offense. *People v Hunten*, 115 Mich App 167, 170-171; 320 NW2d 68 (1982). Viewing the evidence in a light most favorable to the prosecution, we find that the prosecution presented sufficient evidence of knowledge and control to establish possession. The police officers involved were answering a report about three black males selling drugs in the area. Defendant matched the description of one of the three black males. As the officers struggled to subdue defendant, one of the officers saw defendant toss from his person a clear blue box containing about nineteen packs of a material the officer suspected was cocaine. The other officer saw defendant spit five similar packs from his mouth. A laboratory analysis of two of these packs showed that together they contained 0.26 grams of material containing cocaine. A rational trier of fact could find beyond a reasonable doubt, based on these facts, that defendant knowingly possessed the cocaine. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

With regard to the conviction for carrying a concealed weapon, it is a general intent crime. *People v Combs*, 160 Mich App 666, 673; 408 NW2d 420 (1987). The only intent necessary is an intent to knowingly carry the weapon on one's person or in an automobile. *Id.* One of the police officers saw defendant take a handgun and its holster from the right side of his body and throw it onto a porch. The other officer recovered the gun and its holster. A rational trier of fact, viewing this evidence in a light most favorable to the prosecution, could find beyond a reasonable doubt that defendant knowingly carried the gun. *Hutner, supra* at 282.

Defendant's fourth issue on appeal is that the trial court erred in failing to give him credit for 131 days served while awaiting trial on the instant offenses. We find that defendant is not entitled to credit

for time served because he was serving a sentence on another offense at the time he committed the instant offenses. *People v Connor*, 209 Mich App 419, 431; 531 NW2d 734 (1995).

Defendant's fifth issue on appeal is that the trial court erred in preventing him from exercising his right of allocution. Contrary to defendant's assertion, the record indicates that the

trial court did give defendant a chance to allocute by specifically asking defendant if he wished to address the court before sentencing. *People v Lugo,* 214 Mich App 699, 711; 542 NW2d 921 (1995).

Defendant's sixth issue on appeal is that his sentence was erroneously imposed pursuant to an inaccurate presentence investigation report. Defendant failed to preserve this issue for our review by failing to object to the contents of the report at sentencing. *People v Sharp,* 192 Mich App 501; 504; 481 NW2d 773 (1991). Defendant presented no evidence that the asserted inaccuracies prejudiced him by having a determinative effect on his sentence. *People v Daniels,* 192 Mich App 658, 675; 482 NW2d 176 (1991).

Defendant's final issue on appeal is that the trial court abused its discretion in failing to take his personal circumstances into account in imposing the sentences. Defendant's one-year concurrent minimum sentences are within the sentencing guidelines range of one to three years and are presumed proportionate. *People v Tyler,* 188 Mich App 83, 85; 468 NW2d 537 (1991).

The proportionality of defendant's sentence is further supported by the facts of the case. The police officers found a .380-caliber automatic handgun and its holster near defendant at the time they arrested him. The officers also recovered nineteen packs of what they suspected was cocaine. Two of the packs were analyzed and together yielded .26 grams of material containing cocaine. Defendant was on prisoner escape status at the time of the instant offenses, having fled from a halfway house some months before because he feared his late return would result in reincarceration. The sentencing court did not abuse its discretion in sentencing defendant to one-year minimum concurrent sentences for his convictions. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky