STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEKASE COSE WASHINGTON,

Defendant-Appellant.

UNPUBLISHED
June 3, 1997

No. 185240
Recorder's Court
LC No. 94-009429

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305, armed robbery, MCL 750.529, MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant's sentences for the two counts of first-degree CSC, breaking and entering an occupied dwelling, and armed robbery were vacated and defendant was sentenced to serve an enhanced term of thirty to sixty years in prison as a third habitual offender, MCL 769.11; MSA 28.1083, and to two years for the felony-firearm conviction. We affirm.

Defendant first argues that the guilty verdict for breaking and entering an occupied dwelling is void because the verdict announced by the jury did not expressly indicate that defendant possessed the requisite specific intent to commit a felony within the dwelling. We disagree. A jury verdict is not void for uncertainty if the jury's intent can be clearly deduced by reference to the pleadings, the court's charge, and the entire record. *People v Rand*, 397 Mich 638, 643; 247 NW2d 508 (1976), modified 399 Mich 1040 (1977). In the instant case, (1) the trial court instructed the jury that in order to find defendant guilty of "breaking and entering an occupied dwelling," it must find that defendant intended to commit either first-degree CSC, armed robbery, or any of the lesser included offenses, (2) the verdict form listed as an option, "guilty of breaking and entering an occupied dwelling," and (3) the jury announced that it found defendant, "Guilty of breaking and entering an occupied dwelling." Because the jury was carefully instructed on the requisite specific intent, we hold that the intent of the jury to find defendant guilty of breaking and entering an occupied dwelling (including the specific intent element as

explained by the jury instructions) can be clearly deduced from the record. *Rand*, *supra* at 643. We further note that there is no requirement that a verdict, as announced by a jury, specifically refer to each element of the charged offense. See *id.*, citing *People v Levey*, 206 Mich 129; 172 NW 427 (1919).

Defendant next argues that the trial court erred in instructing the jury on the order of deliberations with regard to its consideration of the lesser included offenses. We disagree. In order to preserve the issue of instructional error for appellate review, a party must make an objection on the record, before the jury retires to consider the verdict, stating specifically the matter to which the party objects and the grounds for the objection. MCR 2.516(C); MCR 6.001(D); *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984); see also *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Kelly*, 423 Mich 261, 271-272; 378 NW2d 365 (1985). Absent an objection, relief will be granted only in cases of manifest injustice. *Van Dorsten*, *supra* at 545; *Kelly*, *supra* at 272. At trial, defendant expressed satisfaction with the instructions. The Michigan Supreme Court has explained that the specific sort of instructional error alleged by defendant must be preserved by an objection at trial in order to be considered on appeal. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Therefore, we hold that defendant is not entitled to relief because, by expressing satisfaction with the instructions given at trial, he failed to preserve the issue for appellate review. *Id.*

Defendant's third argument on appeal is that the trial court erred when it failed to ascertain on-the-record whether defendant knowingly and intelligently waived his right to testify on his own behalf. We disagree. Defendant's claim raises a constitutional issue. This Court reviews such constitutional questions de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

Defendant's argument is without merit. This Court has adopted the majority rule, holding that, in Michigan, there is no requirement of an on-the-record waiver of a defendant's right to testify. See *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985); see also *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991). Nothing in the United States Supreme Court's opinion in *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987), which expressly recognized that a criminal defendant's right to testify on his own behalf is a fundamental constitutional right, mandates a change in the Michigan rule. This Court, in *Simmons*, also recognized the fundamental importance of defendant's right to testify on his own behalf, but further explained that the existence of a fundamental constitutional right does not necessarily require application of the same procedural safeguards as applied to other constitutional rights, such as waiver of the right to counsel. *Simmons*, *supra* at 683-685. Accordingly, we hold that trial court made no error with regard to defendant's waiver of his right to testify.

Defendant's final argument on appeal is that he was denied effective assistance of counsel when defense counsel opted against a proposed delay of the beginning of trial to wait for the completion of DNA tests in favor of the adjournment in the middle of trial to wait for completion of the tests. Defendant asserts that if defense counsel had opted for the delay at the beginning of the trial, he could have had an independent DNA test done by the "RFLP" method as opposed to the "PCR" method and could have had the samples blood-typed, which, presumably, could have proved defendant's

innocence. Defendant also asserts that he was denied effective assistance of counsel when defense counsel failed to adequately advise him of his right to testify on his own behalf. We disagree with both of defendant's allegations of ineffective assistance of counsel.

To justify reversal on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was both deficient, and that it prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to show that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In doing so, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In order to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

Defendant has failed to establish that he was prejudiced by defense counsel's decision to accept an adjournment in the middle of trial as opposed to a delay at the beginning of trial. Because there was no hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent in the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Nothing in the record explains how the timing of the delay had an effect on the types of tests that could have been performed on the recovered sperm cells. Furthermore, nothing in the trial record explains why an independent DNA test, or a DNA test done by the RFLP method as opposed to the PCR method, performed on the same recovered sperm cells would have led to a different result. Therefore, we hold that defendant has failed to show that, but for counsel's "error," the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

As for defendant's claim that he was denied the effective assistance of counsel when defense counsel failed to adequately advise him of his right to testify on his own behalf, nothing in the record demonstrates that defense counsel failed to adequately advise defendant. Faced with an identical claim of ineffective assistance of counsel in *Simmons*, this Court explained that, "'[i]n the absence of a record made in connection with a motion for a new trial, all of the actions of counsel complained of by the defendant here are presumed to be taken pursuant to defense counsel's permissible trial strategy.'" *Simmons*, *supra* at 686, citing *People v Harlan*, 129 Mich App 769, 779; 344 NW2d 300 (1983). In *Simmons*, *supra* at 686, as in the instant case, the defendant did not allege that he was unaware of his right to testify or that he would have testified had he been adequately informed of his right to do so. Without any evidence on the record to demonstrate otherwise, we must assume that defendant's failure to testify was an informed exercise of trial strategy. *Simmons*, *supra* at 685-686.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman