

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM RICHARD DARABAN,

Defendant-Appellant.

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UNPUBLISHED

January 10, 2008

No. 274870

Macomb Circuit Court

LC No. 2006-002960-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of malicious destruction of fire or police property, MCL 750.377b, and resisting and obstructing a police officer, MCL 750.81d(1), entered after a jury trial. He was sentenced to one year in jail, to be followed by a term of three years' probation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The police responded to an incident in which defendant allegedly pointed a gun at his neighbor. Defendant resisted arrest, and subsequently damaged the interior of a police vehicle.

During voir dire, defense counsel asked if any potential juror would assume that defendant was guilty if defendant did not testify. The potential juror identified as Juror 80, or the juror in seat 10, stated in response, "That might be." When asked if he could set the bias aside, the Juror 80 said, "If it goes on, I imagine I can do that." Juror 80 also said that he would hold related incidents against defendant,<sup>1</sup> but would not hold any unrelated prior incidents against defendant. The trial court explained the presumption of innocence, and then asked Juror 80, "You can follow the law as I give it to you, correct?" Juror 80 replied, "Correct." Defense counsel neither exercised a peremptory challenge nor requested that Juror 80 be removed for cause.

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<sup>1</sup> By "related incidents", Juror 80 seemed to mean incidents that involved the same victim and/or arose out of the same transaction.

The jury convicted defendant of malicious destruction of fire or police property and resisting and obstructing a police officer, but could not reach a decision on the charge of felonious assault, MCL 750.82, a charge resulting from defendant's alleged confrontation with his neighbor. The trial court sentenced defendant to one year in jail with credit for 37 days, to be followed by a term of three years' probation.

A criminal defendant has the right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20. A juror may be excused for cause if he has demonstrated a bias for or against a party, if he shows a state of mind that would prevent him from rendering a just verdict, or if he has opinions that would improperly influence his verdict. MCR 2.511(D). As a general rule, the determination whether to excuse a juror for cause is within the discretion of the trial court. However, if a party shows that a prospective juror falls within one of the grounds listed in MCR 2.511(D), the trial court is without discretion, and that person must be excused. *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that he was denied a fair trial and the effective assistance of counsel<sup>2</sup> because the trial court failed to remove Juror 80 for cause, and because counsel failed either to move for Juror 80's removal for cause, or to use a peremptory challenge to remove Juror 80 from the panel. We disagree.

Initially, Juror 80 stated that he "might" assume that defendant was guilty if defendant did not testify, and that he would hold "related" incidents against defendant. However, under questioning by the trial court, Juror 80 stated unequivocally that he would base his decision on the law as given to him by the trial court. Apparently, the trial court found this statement to be credible, and on that basis determined that defendant had not established that Juror 80 was biased or would be unable to render a just verdict. The trial court would not have been required to remove Juror 80 for cause, either on its own motion or in response to a motion from defense

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<sup>2</sup> Defendant did not seek a new trial based on the issue of ineffective assistance, and did not move to remand this case to the trial court for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

counsel. MCR 6.412(D)(2). See also *People v Lee*, 212 Mich App 228, 249; 537 NW2d 233 (1995). Thus, defense counsel cannot be deemed to have afforded ineffective assistance by failing to seek Juror 80's removal for cause. Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Defendant was not denied a fair trial by the juror's presence.

Defense counsel could have used a peremptory challenge to excuse Juror 80. We can presume that counsel's decision to not do so was trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Nothing on the record before us supports a conclusion that had this particular juror been removed, it is reasonably probable that the result of the proceedings would have been different. In fact, the jury was unable to reach a decision on the charge of felonious assault, one of two charges, the other being malicious destruction of fire or police property, that carried a maximum term of four years in prison. Defendant has failed to overcome the presumption that counsel rendered effective assistance. *Rockey, supra* at 76.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski