

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE D. PENNINGTON,

Defendant-Appellant.

UNPUBLISHED

February 21, 2003

No. 237029

Wayne Circuit Court

LC No. 00-012967-01

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Defendant was convicted of one count of possession of 50 to 224 grams of cocaine, MCL 333.7403(2)(a)(iii). He was sentenced as a second-offense habitual offender, MCL 769.10, to ten to thirty years' imprisonment. He appeals as of right. We affirm.

First, defendant challenges portions of the jury instructions. However, we note that defendant's trial counsel affirmatively indicated satisfaction with the jury instructions. Accordingly, defendant has waived appellate review of the jury instructions. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

In addition, defendant contends that trial counsel's failure to object to the jury instructions deprived him of his constitutional right to effective assistance of counsel. A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *Id.* at 423.

In the instant matter, we note that the challenged jury instructions were nearly identical to the respective model jury instructions. Accordingly, we are not persuaded that trial counsel was deficient in failing to object to the jury instructions. Moreover, "[e]ven if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Here, we believe that the jury instructions fairly presented the issues and sufficiently protected defendant's rights. In fact, in light of the substantial evidence of defendant's guilt, it does not appear that the jury instructions, even if imperfect, negatively

impacted the outcome of the proceedings. *Snider, supra* at 423-424. As a result, defendant was not deprived of his constitutional right to effective assistance of counsel. *Id.*

Next, defendant challenges the trial court's failure to have a sidebar conference recorded. A failure "to record a small portion of a trial, such as one bench conference or even a number of bench conferences, rarely results in reversible error." 31 ALR5th 704, § 2(a), p 718. Further, defendant fails to cite any purported error that was forfeited on appeal because the sidebar conference was not recorded. In other words, the failure to record will not impact appellate review of defendant's conviction. Moreover, there is absolutely no indication that the failure to record the one sidebar conference influenced the jury's findings. Consequently, we reject defendant's assertion that trial counsel's failure to ensure that the sidebar conference was recorded deprived him of his constitutional right to effective assistance of counsel. *Snider, supra* at 423-424.

Affirmed.

/s/ William C. Whitbeck, C.J.

/s/ Richard Allen Griffin

/s/ Donald S. Owens