

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY C. SHIFFER,

Defendant-Appellant.

UNPUBLISHED

May 24, 2011

No. 296375

Ingham Circuit Court

LC No. 09-000230-FH

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of possession of marijuana, MCL 333.7403(2)(d), disturbing the peace, MCL 750.170, and two counts of resisting arrest resulting in injury, MCL 750.81d(2). We affirm.

Defendant's conviction arose out of his aggressive behavior at a Lansing City Council meeting. A police officer escorted defendant from the meeting, and, with the assistance of another officer, placed defendant under arrest. Defendant punched and kicked at the officers; both were injured during the altercation. The police took defendant to jail, where they found a bag of marijuana seeds in his pocket.

The trial court held a competency hearing and found that defendant was not legally insane. Trial counsel objected to a finding of criminal responsibility and stated that defendant wanted the court to provide and pay for an independent evaluation by a psychologist from New York. The trial court denied the request, stating, "I do not find good cause for bringing in any other examiner, at least not one paid by the county."

At trial, defendant's counsel pursued a jury nullification theory and defendant, in effect, admitted to committing the alleged crimes.

Defendant now argues that he was deprived of the effective assistance of counsel. Specifically, defendant argues that his trial counsel failed to pursue an insanity defense, failed to investigate defendant's mental health history, and failed to make a reasonable request for an independent evaluation. Defendant asserts that but for these errors there is a reasonable probability that the outcome of his trial would have been different. We disagree.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “A trial court’s findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo.” *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). If a defendant does not request an evidentiary hearing on a claim of ineffective assistance of counsel, our review is limited to the apparent errors in the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). In this case, defendant requested a remand for an evidentiary hearing, but this Court denied defendant’s request. Therefore, our review is limited to errors apparent in the record. *Id.*

“To demonstrate ineffective assistance of counsel, defendant must show that his attorney’s conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial.” *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Additionally, “defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). “Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial.” *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (2000). The failure to reasonably investigate the case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). To establish prejudice, defendant must show that but for counsel’s deficient assistance, it is reasonably probable that the outcome of the trial would have been different. *Strickland*, 466 US at 694.

Defendant’s trial testimony demonstrates that defendant wanted trial counsel to pursue a jury nullification theory.¹ Therefore, counsel’s “decision to follow his client’s wishes and argue [jury nullification] rather than raise an insanity defense was a matter of trial strategy.” *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). The fact that a strategy is unsuccessful does not mandate a conclusion that its use constituted ineffective assistance. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987). Defendant has not overcome the presumption that trial counsel’s decision was sound trial strategy. *Carbin*, 463 Mich at 600.

¹ Defendant provided his trial counsel with several Revolutionary War-era quotations, which defendant requested that trial counsel present in closing argument. The quotations related to jury nullification concepts. The trial court refused to allow trial counsel to present the quotations to the jury. Moreover, defendant testified that he attended the council meeting with the intention of engineering his arrest for possession of marijuana. Defendant asserted that his mission was to restore liberties by opposing drug prohibition laws and contended that he acted in self-defense because he was resisting tyranny just as soldiers did in the Revolutionary War.

Further, defendant has not shown that “he made a good-faith effort to avail himself of the right to present” the insanity defense. *Ayres*, 239 Mich App at 22. Counsel knew that defendant had an extensive history of mental health difficulties; however, defendant had been found incompetent to stand trial on only one occasion. Moreover, counsel’s request that the trial court appoint an independent examiner to assess defendant was denied by the trial court. It would have been futile to bring the request a second time. Counsel was not required to make a futile request. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). In addition, defendant’s actions at the council meeting accomplished his stated goal, i.e., engineering his arrest. The record does not support a conclusion that asserting the insanity defense might have made a difference in the outcome of the trial. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant has failed to carry his burden of overcoming the presumption that his counsel rendered effective assistance. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Therefore, he is not entitled to relief.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O’Connell
/s/ Patrick M. Meter