

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK MCGEE,

Defendant-Appellant.

UNPUBLISHED
November 9, 2001

No. 228702
Wayne Circuit Court
LC No. 00-000921

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for aggravated stalking, MCL 750.411i, firearm discharge in a building, MCL 750.234b, carrying a concealed weapon, MCL 750.227, malicious destruction of property less than \$200, MCL 750.377a(1)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to three to five years' imprisonment for the aggravated stalking conviction, two to four years' imprisonment for the firearm discharge in a building conviction, and two and one half to five years' imprisonment for the carrying a concealed weapon conviction, these three sentences to run concurrently. Defendant's sentence for the malicious destruction of property conviction was suspended, and defendant was sentenced to two years' imprisonment for the felony-firearm conviction, the other sentences to run consecutive to the sentence for the felony-firearm conviction. We affirm.

Defendant argues that he was denied the effective assistance of counsel. Because defendant did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

“To establish a claim of ineffective assistance of counsel, the defendant must 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.” *Snider, supra* at 423-424, citing *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). “The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy.” *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). “[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately

mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant contends that defense counsel effectively pleaded guilty on behalf of defendant to the carrying a concealed weapon charge by stating in closing argument that the defense had "no argument" with respect to that charge. We disagree. One of the arresting officers testified that when he searched defendant for weapons, defendant directed him to defendant's left jacket pocket. The officer then recovered a .45 caliber handgun from defendant's left jacket pocket. This testimony was corroborated by the testimony of the other arresting officer. Therefore, defense counsel may have concluded that it was more credible to concede the charge of carrying a concealed weapon in light of the evidence presented, and to argue against the more serious charges. See *People v Wise*, 134 Mich App 82, 97-99; 351 NW2d 255 (1984). This decision was a matter of trial strategy which we will not second-guess on appeal. *Pickens, supra* at 330.

Next, defendant argues that defense counsel failed to mention the aggravated stalking charge during closing argument. It is apparent from the record that defense counsel's strategy was to discredit the prosecution witnesses. Although defense counsel did not specifically refer to the aggravated stalking count in his closing argument, his attempts to discredit the prosecution witnesses also pertained to the aggravated stalking charge. *Pickens, supra* at 330.

Defendant also argues that his counsel was ineffective because he "made no motions for any hearings." The decision whether to file motions "clearly falls within the categories of professional judgment and trial strategy[.]" *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Defendant questions the legality of the police search of defendant and the seizure of the gun, but offers no supporting evidence. Based upon our review of the record we do not conclude that counsel's failure to request an evidentiary hearing on the lawfulness of the search and seizure constitutes ineffective assistance of counsel.

Defendant also faults his counsel's failure to call any witnesses on his behalf. Specifically, defendant argues that counsel was ineffective for failing to contact or use any of defendant's alleged alibi witnesses, thereby depriving defendant of an alibi defense. The decision whether to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Failure to call witnesses will only constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *Id.* A defense is substantial if it might have made a difference in the outcome of the trial. *Id.* In this case, defendant indicated on the record that he did not wish to testify. Further, defendant does not identify witnesses who should have been called to testify, nor does he indicate the substance of the purported testimony. Accordingly, defendant cannot establish that counsel deprived him of a substantial defense. See *People v Leonard*, 224 Mich App 569, 593; 569 NW2d 663 (1997).

Defendant also asserts that the waiver of the preliminary examination amounted to ineffective assistance of counsel. We disagree. Defendant signed a written waiver of a preliminary examination. We are not persuaded on the record before us that the waiver of the preliminary examination was error or that but for the alleged error, there was a reasonable probability that the judge would not have convicted defendant. *Snider, supra* at 423-424.

Additionally, defendant maintains that his counsel was ineffective because counsel let defendant “languish in jail for 173 days before trial.” Defendant does not specify what action he believes his attorney should have taken in this regard. To the extent that defendant implies that counsel should have moved for dismissal based upon the delay, i.e., the “180-day rule,” MCL 780.131(1); *People v Falk*, 244 Mich App 718, 719-720; 625 NW2d 476 (2001), defendant’s claim is not supported by the record. Fewer than one hundred eighty days elapsed between the date of defendant’s arrest and the date of trial.

Lastly, defendant argues that defense counsel did not have a trial strategy and did not effectively cross-examine the witnesses. We disagree. Defense counsel cross-examined the victim regarding various statements she made and argued the inconsistencies of her statements. Defendant’s cross-examination of witnesses was not for the benefit of the prosecution as alleged, but amounted to a trial strategy to discredit the prosecution’s witnesses. *Pickens, supra* at 330.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael R. Smolenski

/s/ Michael J. Talbot