

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKLIN RICHARD WULFF,

Defendant-Appellant.

UNPUBLISHED

June 28, 2012

No. 303275

Jackson Circuit Court

LC No. 10-006279-FH

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following jury trial, of domestic violence, third offense, 750.81(2), (4). Following his conviction, defendant filed a motion for remand to determine whether he was denied the effective assistance of counsel. We granted the motion. *People v Wulff*, unpublished order of the Court of Appeals, entered November 3, 2011 (Docket No. 303275). After a *Ginther*¹ hearing, the trial court determined that defendant was not entitled to a new trial. For the reasons stated in this opinion, we affirm.

Defendant argues that he is entitled to a new trial because he was denied effective assistances of counsel. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation omitted).

Defendant argues that counsel was deficient because counsel failed to remove a male juror who had retired from the MDOC after working as a corrections officer for 21 years, and because counsel failed to object or move for a mistrial after the victim testified that defendant had his probation transferred. Defense counsel has wide discretion as to matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court has consistently

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

explained that it will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant asserts that he specifically told trial counsel that he had had negative experiences with the juror in question while he was incarcerated and that he wanted the juror removed. However, trial counsel testified at the *Ginther* hearing that defendant was comfortable with the juror, never indicated that he had encountered the juror while incarcerated and never raised any concerns regarding the juror. The trial court found trial counsel's testimony more credible, and there is nothing in the record to suggest that his findings were clearly erroneous. See *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859, amended on other ground 481 Mich 1201 (2008).

Further, as the trial court correctly noted, counsel's decision to not remove the juror was a matter of trial strategy. Counsel stated that he wanted as many men on the jury as possible. He was looking for "regular guys," and felt that the juror would be fair and impartial. Counsel also did not believe that there was a basis upon which he could remove the juror for cause. Contrary to defendant's argument, the juror's status as a retired corrections officer did not automatically disqualify him from serving on a jury. *People v Robert*, 162 Mich App 60, 64; 412 NW2d 244 (1987) ("The fact that juror Mayotte was a police officer is not of itself sufficient to warrant an inference of bias."); see also MCR 2.511(D) (challenges for cause). Additionally, counsel felt that his peremptory challenges could be better used on other potential jurors.

Finally, even if trial counsel should have sought to remove the juror, defendant cannot establish that there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, 466 US 687-688. The record contains no evidence that the juror failed to base his verdict on the evidence and instructions from the court. Therefore, we cannot conclude that defense counsel's strategic decision prejudiced his client. Consequently, defendant is not entitled to relief on the basis of this argument.

Next, defendant argues that counsel was deficient for failing to object or move for a mistrial after a witness indicated to the jurors that defendant was on probation. The trial court, however, correctly noted that the reference to defendant's probationary status was not a violation of the agreement defendant had with the prosecutor. The agreement covered defendant's parole status, not his probationary status. Further, even if the reference to defendant's probationary status was a violation of the agreement, it was made as part of nonresponsive answer to defense counsel's question. "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled on other grounds in *People v Wright*, 477 Mich 1121, 730 NW2d 720 (2007). Thus, a motion for a mistrial would have been meritless, and counsel is not required to advocate a meritless position. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Additionally, counsel articulated a legitimate trial strategy for not objecting and seeking a mistrial. Counsel testified that he believed that the victim did not do particularly well on the witness stand and that an objection would have likely resulted in an instruction that would have served as a reminder of the damaging reference. Counsel did not feel that a mistrial was in his client's best interest in light of his positive view of the jury that had been selected. As an

experienced attorney, counsel was aware that “there are times when it is better not to object and draw attention to an improper comment.” *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008) (citation omitted). That counsel’s strategy did not work does not render his performance deficient. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Affirmed.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens