

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JERMAINE WALKER,

Defendant-Appellant.

UNPUBLISHED

October 24, 2006

No. 263859

Wayne Circuit Court

LC No. 05-003804-01

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for carrying a concealed weapon (CCW), MCL 750.227. Defendant was sentenced to 77 days in jail and two years' probation. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that he was denied the effective assistance of counsel due to trial counsel's failure to object to the trial court's instructions to the jury and request additional instructions regarding the CCW exception applicable to vehicles without trunks. We disagree. The question of whether the defendant has been deprived of the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because defendant failed to move for a new trial or seek an evidentiary hearing before the trial court, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000); *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

Effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To support his claim of ineffective assistance of counsel, the defendant must show that (1) the counsel's performance fell below an objective standard of reasonableness according to the prevailing professional norms, and (2) the error was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). When claiming deficient performance, the defendant must show that his counsel's action did not constitute sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). A counsel's error is prejudicial if there is a reasonable probability that, but for that error, the result of the proceedings would have been different. *Id.* at 167; *People v*

Watkins, 247 Mich App 14, 30; 634 NW2d 370 (2001). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984)).

Defendant was convicted of carrying a concealed weapon. MCL 750.227(2) provides:

A person *shall not carry a pistol* concealed on or about his or her person, or *whether concealed or otherwise, in a vehicle operated or occupied by the person*, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license. [Emphasis added; see also *People v Hernandez-Garcia*, 266 Mich App 416, 418; 701 NW2d 191 (2005); *People v Biller*, 239 Mich App 590; 609 NW2d 199 (2000).]

MCL 750.231a provides some exceptions to this statute. The pertinent sections state:

Subsection (2) of section 227 does not apply to any of the following:

* * *

(d) To a person while transporting a pistol for a lawful purpose that is licensed by the owner or occupant of the motor vehicle in compliance with section 2 of 1927 PA 372, MCL 28.422, and the pistol is *unloaded in a closed case designed for the storage of firearms in the trunk* of the vehicle.

(e) To a person while transporting a pistol for a lawful purpose that is licensed by the owner or occupant of the motor vehicle in compliance with section 2 of 1927 PA 372, MCL 28.422, and the pistol is *unloaded in a closed case designed for the storage of firearms* in a vehicle that *does not have a trunk* and is *not readily accessible* to the occupants of the vehicle. [MCL 750.231a(1)(d), (e) (emphasis added).]

Defendant does not dispute the fact that he was carrying a pistol in a vehicle operated by him. He admits that he carried the gun in the glove compartment. However, he argues that he was prejudiced by his counsel’s failure to object to the trial court’s instructions to the jury, which referred only to subsection (d) of MCL 750.231a(1), and request that the jury receive instructions regarding subsection (e). Defendant argues that this error resulted in an automatic conviction. We disagree. On the basis of the existing record, defendant failed to show that his counsel’s performance fell below an objective standard of reasonableness and that the error was so prejudicial that he was denied a fair trial.

First, trial counsel’s failure to object to the jury instruction regarding the exception applicable to vehicles with trunks did not amount to deficient performance. Defendant bears the burden of proof that counsel’s failure to act was not a sound tactical decision. *Mitchell, supra* at 156. Defendant testified that he unfolded the back seats of his car to make room for the transmission of a stored car. The area between the back of the seat and the back of the trunk

became accessible, arm length, from the front of the car. Thus, defendant argues that his car did not have a conventional trunk, and counsel's error cannot be considered sound strategy. However, counsel is not required to advocate a meritless position. *Mack, supra* at 130. Subsection (d) of MCL 750.231a(1) refers to vehicles that have trunks, not "conventional" trunks. When the language of a statute is clear, "no further construction is necessary or allowed to expand what the Legislature clearly intended to cover." *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). *The Random House College Dictionary* (1997) defines "trunk" as "a large compartment, usually in the rear of an automobile, for holding luggage, a spare tire, etc." Laying down the seats that separate the trunk from the rest of the car does not destroy the existence and purpose of the trunk. Thus, the jury instruction regarding vehicles with trunks was correct.

Second, trial counsel's failure to request an instruction regarding the exception applicable to vehicles without trunks does not amount to deficient performance. Assuming arguendo that defendant's vehicle did not have trunk, trial counsel's failure to request the instruction can be viewed as trial strategy. The request would have been meritless because the facts did not meet the exception provided by subsection (e) of MCL 750.231a(1). When the vehicle does not have a trunk, the pistol must be unloaded, be contained in a closed case designed for the storage of firearms, and "not readily accessible to the occupants of the vehicle." MCL 750.231a(1)(e). Defendant's pistol was unloaded, and the trigger lock was on. However, although the magazine and the bullets were contained in a box, the gun was not contained in a closed case designed for the storage of firearms. The gun was located in the glove compartment, which is not a case designed for the storage of firearms. The fact that the trigger lock was on can hardly amount to being contained in a box or wrapper. Also, the pistol was readily accessible to defendant. Defendant testified that, while driving, he was able to take the gun from the glove compartment, and the magazine and the bullets from the trunk area, and throw them out the car window. Thus, defendant had easy access to the gun, the magazine, and the bullets. Moreover, when defendant took the pistol, the magazine, and the bullets to throw them out the car window, they were more than "readily accessible"—they were in defendant's actual possession. Thus, defendant did not overcome the presumption that counsel's performance was effective.

Finally, defendant failed to show that trial counsel's failure to object and request additional jury instructions was so prejudicial that he was denied a fair trial. After the trial court instructed the jury regarding the exception stated in MCL 750.231a(1)(d), a juror asked: "[i]f the gun is not in the trunk as you say- -." The court answered that it was for the jury to determine whether the gun was in the trunk. The juror then asked the court to go over the exception again. Defendant argues that prejudice is demonstrated by the juror's question. Defendant argues that the failure to instruct the jury regarding subsection (e) of MCL 750.231a(1) resulted in an automatic conviction because the jury, possibly finding that defendant's car did not have a trunk, had no choice but to convict defendant. However, defendant failed to show a reasonable probability that, but for his counsel's error, the result of the proceedings would have been different. Regardless of whether defendant's vehicle had a trunk, defendant failed to meet the other elements required by the exceptions. As shown above, defendant failed to meet the exception provided in MCL 750.231a(1)(e) because the pistol was not contained in a closed case designed for the storage of firearms and it was readily accessible. Furthermore, MCL 750.231a(1)(d) does not apply because the gun was not in the trunk, but in the glove

compartment. Thus, there is no reasonable probability that, but for counsel's error, the result would have been different. Based on a review of the record, defendant was unable to demonstrate ineffective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens