

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESMOND MOORE,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 202446

Recorder's Court

LC No. 96-006282

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). These convictions stem from the beating and “stomping” of a fifteen year old boy by defendant, along with four friends, while holding a firearm by his side. Defendant was sentenced to 3 ~~1/2~~ to 10 years’ imprisonment for the assault with intent to commit great bodily harm less than murder conviction, and the mandatory two years’ imprisonment for the felony-firearm conviction, the two sentences to run consecutively. We affirm.

On appeal, defendant argues that he was denied the effective assistance of counsel. We disagree. Defendant has not fully preserved this issue for review by moving for a new trial or an evidentiary hearing before the trial court. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Thus, our review is limited to the existing record. *Id.* To justify reversal under the state and federal constitutions for claims of ineffective assistance of counsel, a defendant must affirmatively demonstrate that counsel’s performance was objectively unreasonable and that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997); *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

Defendant first argues that he was denied effective assistance of counsel because his trial counsel was unprepared for trial. We disagree. Defendant has failed to demonstrate how precisely he was prejudiced by defense counsel’s alleged lack of preparation. *People v Caballero*, 184 Mich App

636, 650; 459 NW2d 80 (1990). Moreover, upon review of the record, this Court

concludes that defense counsel was, in fact, fully prepared for trial. Defense counsel's cross-examination of the witnesses reveals that he was familiar with the facts of the case and that he was able to elicit various inconsistencies in the witnesses' testimony.

Defendant next argues that his trial counsel was ineffective because he failed to emphasize testimonial inconsistencies during closing argument. We disagree. When read in its entirety, the record shows that defense counsel capably argued the evidence in support of the principal defense, i.e. that defendant was present at the scene but did not participate in the assault upon the victim. In fact, contrary to defendant's argument, defense counsel expressly emphasized several of the inconsistencies which defendant mentions in his brief on appeal. Further, closing argument is a matter of trial strategy and we refuse to substitute our own judgment for that of defense counsel in matters of trial strategy. *Caballero, supra*, at 640. Defendant has not overcome the presumption that defense counsel's choice of tactics during closing argument was sound trial strategy. Accordingly, defendant has not justified reversal of his convictions by demonstrating that his counsel's performance was ineffective and that, but for such ineffective performance, the result of the proceedings would have been different. *Mitchell, supra*, at 158.

Defendant also argues that there was insufficient evidence to support his felony-firearm conviction. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 269-270; 380 NW2d 11 (1986). In order to convict the defendant of felony-firearm, the prosecution must prove that the defendant carried or possessed a firearm during the commission of any felony or attempted felony. *Wayne County Prosecutor v Recorder's Court Judge*, 406 Mich 374, 397; 280 NW2d 793 (1979); MCL 750.227b; MSA 28.424(2). Michael Halliburton identified defendant as one of the men who was carrying a gun and assaulting the victim. During the assault, the victim himself saw defendant, within one foot of him, holding a gun by his side and yelling "bitch." Ruth Halliburton watched the assault from her bedroom window and saw four men with guns surrounding the victim and beating him. Defendant testified that he was not carrying a gun that night nor were any of his friends. However, the trial court did not find defendant's testimony believable, and credibility is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). We will not resolve the matter anew. *Id.* Accordingly, viewed in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant carried or possessed a firearm during the commission of the assault upon the complainant. *Petrella, supra*, at 369-70; *Wayne County Prosecutor, supra*, at 397.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Richard A. Bandstra

/s/ Stephen J. Markman