

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKIE LEE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

November 13, 2001

No. 224774

Kalamazoo Circuit Court

LC No. C 99 9866 FC

Before: K.F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for armed robbery, MCL 750.529; felony-firearm, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. We affirm.

Defendant's sole argument on appeal is that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A presumption exists that "counsel's conduct falls within the wide range of reasonable professional assistance." (Citing *Strickland v Washington*, 466 US 668, 689; 80 L Ed 2d 674; 104 S Ct 2052 (1984)). As a starting point, a strong presumption exists that trial counsel's actions amount to sound trial strategy. *Toma, supra* at 302.

Here, defendant argues that his trial counsel should have offered to stipulate that defendant was ineligible to possess a firearm. Although defense counsel, at defendant's *Ginther*¹ hearing, justified her decision upon defendant's unwillingness to cooperate with plaintiff and his fear of a conspiracy, she also admitted that she did not recall even discussing the possible effects of not stipulating with defendant. We acknowledge that the potential for prejudice, with no countervailing opportunity for benefit, also suggests that failing to stipulate did not constitute trial strategy. By forcing plaintiff to call a witness to testify about the nature of defendant's felony record, as opposed to merely stipulating that defendant had a felony record, defendant was subjected to the prejudice of having the jury know that his prior conviction was for felony assault

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

with a dangerous weapon. We cannot discern any possible benefit of allowing the jurors to hear this information, especially absent a limiting instruction. See *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Moreover, if defense counsel offered to stipulate to this fact, the court would have been obliged to allow the stipulation. See *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997) (holding that the trial court abused its authority by refusing to accept defendant's stipulation.)

A claim of ineffective assistance of counsel, however, also requires a defendant to show that, but for his or her attorney's actions, a different result is probable. *Toma, supra* at 302-303.

A review of the record reveals significant evidence establishing defendant's guilt. Before the robbery, defendant asked an employee about the restaurant's security, as well as how much money was on hand. Also, before the robbery, defendant told his sister that he was going to come into a lot of money. On the day of the robbery, defendant told a witness that he was going to rob the restaurant that night. At that time, defendant had a gun and a mask akin to those used in the robbery. After the robbery, authorities discovered that defendant concealed clothes like those worn in the robbery in his sister's car.

Although this Court recognizes that at least one of the witnesses had a reason to lie about defendant's role in the robbery, defendant's own sister, who had no reason to lie, corroborated that witness' testimony. In any event, these questions of fact and honesty, the credibility of witnesses, and weighing the evidence lie within the jury's province. *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999).

In light of the considerable weight of the evidence against him, defendant does not sufficiently establish that "but for counsel's error, the result would have been different." *People v Lee*, 243 Mich App 163, 184-185 (2000). We therefore conclude that evidence regarding defendant's prior conviction for felony assault with a dangerous weapon, as opposed to merely stipulating that defendant was previously convicted of some unspecified felony, carried a minimal impact.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald