STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2004
V	No. 244549 Wayne Circuit Court
DERRICK GLENN THORNTON, Defendant-Appellant.	LC No. 01-012428-01

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for armed robbery, MCL 750.529 and possession of a firearem during the commission of a felony, MCL 750.227b. Defendant was sentenced to 81 months to ten years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction to be served consecutively. On appeal, defendant argues he was denied the effective assistance of counsel at trial, that the trial court errantly admitted irrelevant bad act evidence, and finally that the trial court imposed an invalid sentence. The prosecutor concedes the sentencing error and therefore we remand the case to the trial court for resentencing in accordance with this opinion. Aside from the sentencing issue, because the record does not support any of defendant's remaining claims on appeal, we affirm and remand for correction of the judgment of sentence.

On August 13, 2001, Hodari Lewis, aged seventeen at the time, and his friend Anthony Nixon, aged sixteen at the time were at a gas station in the area of Lakepointe and Roxbury in Detroit around midnight. After purchasing snacks at the gas station, Lewis and Nixon began walking back to Lewis' house down an alley. While in the alley, defendant appeared in the alley and blocked their path with two other men. Defendant pulled a gun and demanded Lewis' silver chain. One of the other individuals stood right next to Nixon. Defendant then pointed the gun at Lewis' head. Lewis started to take his chain off from around his neck when defendant hit him about the head with the barrel of the gun three or four times. Lewis then gave defendant the chain. As defendant turned, Lewis and Nixon ran in the other direction toward Lewis' home.

Lewis had several cuts around his eye and forehead. When he arrived home he told his mother about the robbery. Because his cuts were bleeding, Lewis' mother took him to emergency at Bon Secour Hospital where Lewis received six stitches. While Lewis was at the hospital, the police were contacted and arrived at the hospital to take Lewis' and Nixon's

statement about the robbery. Lewis explained that he did not know any of the people involved and gave a description of his attacker.

Defendant was later arrested and upon police questioning gave the following statement that was reduced to writing by the police and initialed by defendant:

> I was with Terrance, unknown last name, black male 22, six foot two, 160 pounds. And Curtis, unknown last name, five foot eleven, 180 pounds. We were walking on Morang towards Denby High School. We saw two guys walking down the alley. Terrance and Curtis stayed behind me. I walked up to the two guys and pulled out a chrome 9mm. I walked up and smacked one of the guys and hit him once or twice in the left temple with the gun. I reached for his platinum silver chain. He ducked away from me, so I hit him again. His friend said, just give him the chain. And then he started taking it off. And I grabbed it. And then Curtis, Terry and I took off. We split up and I went home.

After a jury trial, defendant was convicted as charged.

On appeal, defendant argues initially that he was denied the effective assistance of counsel at trial. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Strickland, supra* at 694. Furthermore, the defendant must overcome the strong presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Initially, defendant contends that defense counsel provided ineffective assistance by failing to present an alibi defense or produce an alibi witness at trial. We disagree. Because this Court denied defendant's motion to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record.[1] *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Claims of ineffective assistance of counsel are reviewed de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001).

A failure to call witnesses can constitute ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceeding. *Daniel*, *supra*, 207 Mich App 58. Now, for the first time on appeal, defendant claims that his mother and cousin would have testified defendant was with them at the time of the robbery. In support of this assertion defendant has appended affidavits to his brief. However, because this

[1] Judge White would have granted the motion for remand on the issue of ineffective assistance of counsel by failure to present an alibi defense. A panel of this Court having denied that motion with the record not having been supplemented, Judge White concurs in the majority opinion.

Court is limited on appeal to reviewing only the lower court record, MCR 7.210(A)(1), this newly presented information is not properly before us. *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000) (a party may not enlarge the record on appeal). Additionally, we find it curious that defendant testified on his own behalf at trial, and when asked about his involvement in the robbery stated only that he was not involved and did not offer any alibi information or make any specific claims about his whereabouts at the time of the crime. In light of defendant's own testimony at trial together with his signed confession, defendant has not demonstrated a reasonable probability that his mother's and cousin's testimony would have affected the outcome of the proceeding. Therefore, defendant was not deprived of this defense.

Next, defendant argues for the first time on appeal that he was denied the effective assistance of counsel because trial counsel failed to investigate and present an insanity defense. The record does not indicate what counsel investigated or failed to investigate. There is no evidence whatsoever regarding an insanity defense or any mental illness in the lower court record. Again, because this Court is limited on appeal to reviewing only the lower court record, MCR 7.210(A)(1), this newly presented information is not properly before us. *Williams, supra*, 241 Mich App 524 n 1. Because no evidentiary basis exists to support this claim aside from a lone assertion in his brief that defendant has a long psychiatric history, this claim fails.

Defendant also claims trial counsel was ineffective because counsel failed to move for suppression of defendant's statement. Defendant argues on appeal that his signed statement was the product of police compulsion and should have been suppressed. At trial defendant testified the police told him that the forms he was signing were release forms and that after he signed them he could go home. He testified that he thought the forms looked like release forms.[2] While testifying, defendant also stated he did not remember making the statement to police investigators but confirmed the signature on the written statement was his own. Based on the record evidence, trial counsel chose to attack the validity of the statement rather than seek suppression. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id*. Further, it is unlikely that the statement would have been suppressed.

Based on our review of the record, defendant was not denied the effective assistance of counsel. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant next argues that the trial court erred when it allegedly admitted irrelevant bad acts evidence contrary to MRE 404(b). "The trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion." *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). To preserve this issue, an aggrieved party must raise a timely objection. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Because defendant did not

[2] A review of the record reveals that defendant had completed high school and could read and write.

preserve this issue with an appropriate objection at trial, appellate relief is precluded absent a plain error affecting his substantial rights. *Id*. at 763-764.

Defendant argues specifically that the prosecutor's line of questioning of an investigator involved in the case ultimately revealed to the jury that defendant was in police custody and being questioned by police on an unrelated case. Defendant asserts that to the extent the trial court allowed this questioning, it was prejudicial to defendant and the trial court committed error. On the contrary, the trial court does not have a sua sponte duty to disallow "bad acts" testimony. See MRE 103(a)(1); MRE 404(b)(1); *People v Miller*, 186 Mich App 660; 465 NW2d 47 (1991).

Defense counsel never objected to the line of questioning and in fact even pursued this line of evidence through cross-examination of the investigator mentioning another situation. Defense counsel again referred to another situation during direct examination of defendant. Defense counsel specifically asked defendant whether he had been given his rights "on some other situation" rather than "for this particular situation" again revealing to the jury that defendant was in police custody and being questioned by police on an unrelated case. Defendant's argument is disingenuous because he argues that only the prosecutor and the trial court are responsible for revealing defendant was being questioned on an unrelated case by police, when defendant's counsel elicited similar evidence and defendant himself testified regarding the same information. Further, defendant has not shown that an error even occurred and if it did, he has not demonstrated how he was prejudiced by the error. Defendant has failed to show a plain error affecting his substantial rights.

Finally, defendant argues that his sentence violates the rule of *People v Tanner*, 387 Mich 683, 199 NW2d 202 (1972). The prosecutor concedes this argument. Defendant was sentenced to eighty-one months' to ten years' imprisonment. Pursuant to *Tanner*, a minimum sentence cannot exceed 2/3 of the maximum sentence. Hence, defendant's sentence violates *Tanner* by one month, and defendant's minimum sentence shall not exceed eighty months to comply with *Tanner*. Accordingly, we remand for correction of the judgment of sentence to eighty months on the minimum sentence. *People v Thomas*, 447 Mich 390, 391; 523 NW2d 215 (1994).

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio