

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL JOHN HUTCHINS,

Defendant-Appellant.

UNPUBLISHED

April 29, 2004

No. 246175

Calhoun Circuit Court

LC No. 02-002733-FH

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

A jury convicted defendant Daniel John Hutchins of three counts of third-degree criminal sexual conduct involving a person aged thirteen to fifteen years, MCL 750.520d(1)(a). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to three concurrent sentences of seven years to twenty-two years and six months in prison. Defendant appeals his convictions and sentences, and we affirm.

Defendant argues that the trial court erred when it allowed the jury to pose questions to witnesses after those questions were first screened by the trial court. Defendant acknowledges that he failed to object to this procedure at trial; accordingly, we will review this issue for a plain error affecting defendant's substantial rights.¹ As defendant himself concedes, juries are permitted to ask questions of witnesses should the trial court wish to allow the jury to do so; whether a jury will be permitted to submit questions is left to the discretion of the trial court. *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972). Because the trial court had the discretion to allow the jurors to submit questions, we hold that its decision to do so did not constitute error, and therefore, that there is no plain error requiring reversal.²

¹ *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). Reversal is not required unless there is plain error, defined as a "clear or obvious" error, that affected the outcome of the trial. *Id.* Reversal is required only where the plain error results in the conviction of an actually innocent defendant, or where the error seriously affects the fairness or integrity of the proceedings. *Id.* at 763.

² Defendant acknowledges that it is permissible to allow jurors to ask questions of witnesses, but asks us to do away with this long-standing practice. Were we possessed of the authority to
(continued...)

Defendant also maintains that he was denied the effective assistance of trial counsel because counsel stipulated (1) to the existence of defendant's prior felony conviction of unauthorized driving away of an automobile ("UDAA"), MCL 750.413, and (2) that the prosecutor had the right to impeach defendant on the basis of that conviction pursuant to MRE 609. Defendant failed to move for a new trial or a *Ginther*³ hearing in the trial court, which "precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant must show that his counsel's performance "was below an objective standard of reasonableness under prevailing professional norms" and that a reasonable probability exists that the outcome of the proceedings would have been different but for counsel's errors. *Id.* at 659. Defendant must also "overcome a strong presumption that the assistance of his counsel was sound trial strategy." *Id.* Evidence of a prior conviction may be used to impeach the credibility of a witness under the following circumstances: (1) "the crime contained an element of dishonesty or false statement," or (2) if the crime (a) "contained an element of theft," (b) was "punishable by imprisonment in excess of one year," and (c) the trial court "determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs the prejudicial effect." *People v Nelson*, 234 Mich App 454, 460-461; 594 NW2d 114 (1999), quoting MRE 609(a). Here, we hold that defendant has not overcome the "strong presumption" that his trial counsel's decision was "sound trial strategy." *Sabin (On Second Remand)*, *supra* at 659. Defendant testified in his own defense, and the prosecution sought to impeach defendant with the evidence of his UDAA conviction on cross-examination; as a result of defense counsel's stipulation, the prosecution stated that there was no need to examine defendant regarding the conviction. Accordingly, defense counsel's decision could reasonably be interpreted as a strategic move to keep the prosecutor from asking defendant about the conviction in open court. Moreover, in light of the other evidence against defendant, were we to find the performance of defendant's trial counsel to be ineffective, we would nevertheless hold that defendant was not prejudiced by counsel's performance.

Further, defendant contends that the trial court made a clerical error in entering its judgment of sentence. During sentencing, the trial court stated that it was sentencing defendant as a second habitual offender, but the judgment of sentence indicates that defendant was sentenced as a third habitual offender. Defendant asks us to remand this case to the trial court for correction of this alleged clerical error. However, our review of defendant's presentence investigation report indicates that defendant was, indeed, convicted of two prior felonies, and that the judgment of sentence is therefore correct. Because a court speaks through its written orders and not through its oral pronouncements, *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997), and because the judgment of sentence correctly reflects defendant's habitual offender status, we hold that there is no need to remand this case.

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overrule the binding precedent of our Supreme Court, which we are not, we would decline to do so here.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973)

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Bill Schuette