STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 288217 Lake Circuit Court
DONALD NELSON CLEMENS, JR., Defendant-Appellant.	LC No. 08-004622-FH

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of operation of a vehicle while under the influence of liquor (OUIL), third offense, MCL 257.625, and one count of resisting and obstructing a police officer, MCL 750.81d(1). Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

A prosecution witness testified that he observed defendant's car swerving on the road on the afternoon of March 16, 2008. According to the witness, defendant's car then turned, pulled off the road, and struck a mailbox. Defendant appeared to be intoxicated, and the witness contacted the police to report defendant's behavior.

As the witness was contacting the police, defendant backed his vehicle into a snowy yard and got stuck. He walked to a nearby house, returned with a shovel, and was attempting to free his car from the snow when Lake County Sheriff Deputy Donald Maiville arrived. Maiville testified that defendant did not notice his arrival. Maiville spoke to defendant, who appeared to have a hard time standing up and was stumbling around. Defendant said he was trying to back into his driveway but got stuck. Defendant appeared to Maiville to be "highly intoxicated." His eyes were glassy and red, his speech was slurred, and he smelled of intoxicants.

In response to the prosecutor's question at trial concerning whether Maiville then directed defendant to do anything, Maiville stated:

> At that point, we engaged in a brief conversation. Like, again, I had asked what had happened. I had also brought up the fact of him hitting a mailbox, which he stated to me he didn't recall hitting any mailbox, but that if he hit a

> mailbox that he was sorry. Through the course of the conversation, he proceeded to ask me why I was doing this to him and that he was going to go back to prison. And I asked him, you know, for doing what, and–

The prosecutor interrupted Maiville and again asked him whether he had directed defendant to go anywhere. Maiville testified that he asked defendant to stand next to the vehicle's driver's side door while he checked the VIN number, but that defendant left and went into a house, where he began smoking a cigarette. Maiville took defendant outside and told him to stop smoking, but defendant continued to smoke. Maiville reached out to grab the cigarette from defendant, and defendant grabbed Maiville's arm and started to turn away. Both Maiville and defendant fell to the ground as they struggled for the cigarette. After defendant refused field sobriety tests, he was arrested. Two Breathalyzer tests taken at the jail showed that defendant had a .26 blood alcohol level. The prosecutor also presented testimony from another police officer and a jail corrections officer who stated that defendant appeared to be intoxicated.

II. Introduction of Defendant's Prior Incarceration

First, defendant argues that he was denied a fair trial by the introduction of his statement that he had been incarcerated. He maintains that this was improperly admitted evidence of a prior bad act under MRE 404b. He acknowledges that defense counsel did not challenge this evidence, and he maintains that counsel rendered ineffective assistance by failing to do so.

Defendant did not challenge the introduction of his statement concerning his previous incarceration and, thus, the issue was not preserved. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). We review unpreserved evidentiary issues for plain error affecting defendant's substantial rights. *Id.* Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

No *Ginther*[1] hearing was held; thus, our review of defendant's claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

> Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (internal citations omitted).]

References to a defendant's prior incarceration generally are inadmissible. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Yet, we note that even if Maiville's

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

brief reference to defendant's statement regarding his prior incarceration were erroneous, defendant was not prejudiced by the error because it did not affect the outcome of the trial. After Maiville gave his non-responsive answer, the prosecutor skillfully continued the questioning of Maiville without pause, returning the focus to defendant's actions during the immediate encounter and downplaying the error's significance to the jury. In addition, given the strong evidence of defendant's guilt, reasonable jurors would have found the defendant guilty beyond a reasonable doubt even if the unresponsive evidence of defendant's criminal history had been suppressed. Under the circumstances, defendant cannot show outcome-determinative error. See *People v Coleman*, 210 Mich App 1, 7; 532 NW2d 885 (1995); *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

Likewise, defendant cannot show that he is entitled to relief due to trial counsel's failure to object to Maiville's testimony. It is conceivable that counsel did not want to draw attention to the fleeting reference and chose to remain silent rather than highlight the issue and trust the jurors to follow a curative instruction. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). We will not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). In addition, given the strength of the evidence presented, defendant cannot show that any error by counsel on this point was outcome-determinative.

III. Trial Court's Response to Jury Request

Next, defendant argues that the trial court erred when it refused to answer a question submitted by the jury. After deliberating for nearly an hour, the jury submitted two requests. First, it asked to rehear the testimony of the first witness, and his testimony was replayed. In response to the second request, the trial court provided the following answer:

> The second question is that you needed to know when the first phone call came into dispatch and how long it took for officers to arrive. I or no one else is really allowed to give any additional facts that the witnesses haven't already testified to. So the best suggestion I have is to really, you know, try and, you know, go through your notes and refresh your memory as best you can. But—But I can't add any testimony. I'm not allowed to do that.
>
> So—So—So I guess with—with that in mind, I think I'd, you know, send you back to your jury room, then, so . . . .

Defendant maintains that the jury was, in effect, requesting Maiville's testimony and argues that the jury should have been given the opportunity to at least hear that testimony to clear up its questions and aid in its deliberations. Defendant acknowledges that defense counsel did not object to the trial court's statement and maintains that counsel was ineffective for failing to do so.

We disagree. The trial court's response was not clearly erroneous. The trial court properly stated that it could not add to the evidence presented at trial. Maiville's testimony did not include when dispatch first received the emergency call. Maiville only testified regarding when he received the dispatch to go to the scene and that he arrived five minutes later. The jury's request could have been read as a request to rehear other parts of Maiville's testimony, but

this was not clear from the language the jury used. Further, the jury knew how to request to rehear the testimony of a witness because it had just done so. Contrary to defendant's assertion, the trial court did not foreclose the possibility of replaying Maiville's testimony. Thus, the trial court did not clearly err. MCR 6.414(J).

We further find that counsel did not render ineffective assistance. Given that the trial court's response to the actual request was appropriate, and the trial court did not prevent the jurors from rehearing Maiville's testimony, defendant cannot show that trial counsel acted in an objectively unreasonable manner by not raising an objection at that time.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis