

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN SMITH,

Defendant-Appellant.

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UNPUBLISHED

February 23, 2010

No. 289688

Wayne Circuit Court

LC No. 08-009667-FH

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was acquitted of additional charges of felonious assault, MCL 750.82. He was sentenced to probation for two years for the felon in possession conviction, to be served concurrently with a two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from an altercation in which a companion, Rickey Guyden, accosted Edwin Snerling with a gun. According to Snerling, Guyden later passed the gun to defendant while Guyden and Snerling engaged in a fistfight. Snerling, his brother Derrie Jacobs, and Snerling's mother all testified that defendant pointed the gun at both Snerling and Jacobs during the altercation. The police did not recover a gun. Snerling testified that he saw a third male who was with Guyden and defendant return to the area and retrieve something from the high grass in front of a house. Snerling's mother and brother saw that the item was a gun.

Defendant argues that trial counsel was ineffective for failing to investigate and call Shineka Stephens to testify at trial. "Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; \_\_\_ NW2d \_\_\_ (2009) (citation omitted). Because an evidentiary hearing was not held, this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

The existing record does not establish that counsel was deficient for failing to investigate or call a witness. On appeal, defendant has submitted Stephens's affidavit, which indicates that she was present at the scene with defendant, Guyden, and the third male. According to Stephens's affidavit, defendant did not possess a gun and just watched the fight. However, the affidavit is not part of the lower court record, and therefore, this Court may not consider it for the purpose of granting defendant's request for a new trial. *Seals*, 285 Mich App at 20-21.

Defendant alternatively requests this Court to remand this case for an evidentiary hearing. This Court previously denied an earlier motion to remand, *People v Smith*, unpublished order of the Court of Appeals, entered September 18, 2009 (Docket No. 289688), and we again decline defendant's request for a remand. A defendant seeking a remand for an evidentiary hearing is generally required to support his claim with an affidavit or offer of proof of the facts to be established at a hearing. MCR 7.211(C)(1)(a). The affidavit presented here does not indicate whether defense counsel was informed of Stephens's status as a potential witness before trial, whether she knew of Stephens's existence and failed to investigate or interview her, or whether she interviewed Stephens and found that she was not credible. Thus, the offer of proof does not establish the facts necessary to evaluate whether defense counsel's performance was deficient with respect to Stephens. "Moreover, the failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *Seals*, 285 Mich App at 21 (citation omitted). We note that defense counsel's strategy at trial was to acknowledge defendant's brief possession of the gun, but to argue that he did not use it to commit an assault. This strategy was partly successful because the trial court acquitted defendant of felonious assault. Defendant notes that defense counsel's attempt to persuade the trial court to acquit defendant of felon in possession was legally deficient in light of decisions holding that momentary innocent possession is not a defense. See *People v Dupree*, 284 Mich App 89; 771 NW2d 470 (2009), lv granted \_\_\_ Mich \_\_\_; 773 NW2d 261 (2009); *People v Hernandez-Garcia*, 477 Mich 1039; 728 NW2d 406 (2007). But in light of the testimony of the three prosecution witnesses who all testified that defendant possessed the gun, counsel's choices were limited. The assertion of a defense of questionable merit does not demonstrate that counsel was ineffective. It is the failure to assert a defense of substantial merit that establishes deficient performance. Defendant here has not overcome the presumption of sound trial strategy, nor demonstrated that remand for an evidentiary hearing is warranted.

For his last claim of error, defendant argues that his dual convictions for both felon in possession of a firearm and felony-firearm violate the constitutional double jeopardy protection against multiple punishments for the same offense. This argument has been squarely rejected by both this Court and our Supreme Court. See *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003), and *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001). Further, defendant's reliance on a federal district court decision is misplaced, because that decision has since been reversed by the Sixth Circuit Court of Appeals. See *White v Howes*, 586 F3d 1025 (2009). Accordingly, we reject this claim of error.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Alton T. Davis