

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAIRI SHARIF SANDERS,

Defendant-Appellant.

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UNPUBLISHED

July 9, 2002

No. 231001

Genesee Circuit Court

LC No. 00-005700-FC

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of carjacking, MCL 750.529a, conspiracy to commit carjacking, MCL 750.157a and MCL 750.529a, assault with intent to commit murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced, as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of 300 to 600 months each for the carjacking and conspiracy convictions, 360 to 720 months for the assault conviction, 57 to 120 months each for the CCW and felon in possession convictions, and a consecutive 2-year term for the felony-firearm conviction. We affirm.

We reject defendant's claim that he is entitled to a new trial because trial counsel rendered ineffective assistance when he advised defendant against testifying. "To prove a claim of ineffective assistance of counsel . . . a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*<sup>1</sup> hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

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

During trial, there was evidence that a latent fingerprint lifted from the carjacked vehicle matched defendant's fingerprint. Defendant claims that, had he testified, he would have explained that "his fingerprint could have been found in the [carjacked] vehicle because he was employed as a car detailer." Defendant asserts that the only reason he did not testify at trial was because counsel erroneously advised him that he would be impeached with his prior convictions if he testified.

Initially, we note that it is not apparent from the record that such advice was given. *Ginther, supra*. However, even if we presume that counsel did advise defendant as he claims, reversal is not required. The decision whether to call a defendant to testify is considered a matter of trial strategy and this Court will not substitute its judgment for that of trial counsel in a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Moreover, contrary to defendant's suggestion, defense counsel's alleged advice that defendant's prior convictions could be used against him for impeachment purposes was not plainly "erroneous." Defendant acknowledges that, had he testified, it was probable that his prior felony conviction involving fraud could have been used to impeach him. MRE 609(a)(1). Further, subject to MRE 403 balancing, the court had discretion to admit evidence of defendant's prior conviction for assault with intent to commit armed robbery. See *People v Cross*, 202 Mich App 138, 147; 508 NW2d 144 (1993).<sup>2</sup> Additionally, even if defendant's prior convictions were deemed inadmissible, defendant has also failed to show that his testimony would have changed the outcome of the proceedings. At most, defendant's explanation of how his fingerprint could have landed on the carjacked vehicle would have set up a credibility contest with complainant, who was "positive" that defendant was the perpetrator.<sup>3</sup>

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<sup>2</sup> We note that, contrary to defendant's claim, his prior assault conviction would not have been inadmissible simply because the conviction occurred sometime in 1994 and the instant crimes occurred in 1999, i.e., an age factor of between four to five years. MRE 609(c) only prohibits introduction of evidence of convictions "if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." Defendant's prior conviction is within the range of time permitted by MRE 609(c).

<sup>3</sup> Complainant had the opportunity to view defendant's face before she went into the store, when she came out of the store, and during the assault when they "were inches away from each other." Complainant also testified that, when she identified defendant during the lineup, there was absolutely no question in her mind that he was the perpetrator. A police officer, who was present during the lineup, testified that complainant positively identified defendant without hesitation. Also, defendant's accomplice testified that defendant committed the offense, and the accomplice's father testified that his son had previously told him that he committed a carjacking with defendant.

Further, with regard to defendant's fingerprint being found on the carjacked vehicle, there is nothing in the record, and defendant does not assert on appeal that he had any previous contact with the carjacked vehicle. Indeed, complainant testified at trial that the car, which belonged to her live-in boyfriend, was purchased approximately two months before it was stolen and, to her knowledge, he did not allow anyone else to drive the car. Complainant also testified that her boyfriend's family owns a car wash, where the car is washed, and that defendant was not employed at the car wash.

We also reject defendant's claim that the trial court erred in failing to grant his motion for a mistrial. We review a trial court's grant or denial of a motion for a mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). A motion for mistrial should be granted only if there is an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996).

During trial, complainant indicated, for the first time, that she believed that she had attended high school with defendant approximately five years previously. Defendant claimed in the trial court that he was entitled to a mistrial because, had the defense been aware of complainant's prior knowledge of defendant, it would have moved to suppress the in-court identification on the basis that the lineup was improper given complainant's prior knowledge of defendant.

We find that the trial court did not abuse its discretion by denying defendant's motion for a mistrial because there was an insufficient showing of an irregularity that prejudiced defendant's rights and impaired his ability to receive a fair trial. As the trial court noted, complainant testified that she saw defendant during the crime and at the lineup, but neither caused her to recall that she may have attended school with him. Complainant confirmed during trial that she did not recall defendant's face from high school, but only recognized the name when she was served with a subpoena after she had identified him. Complainant testified that there is no possibility that her previous knowledge of defendant influenced her identification of him.

Further, defendant was able to effectively raise the prior knowledge issue in front of the jury. Defense counsel cross-examined complainant regarding her prior knowledge of defendant. During closing argument, defense counsel addressed the alleged weaknesses in complainant's identification of defendant, including the effect that her prior knowledge of defendant could have had on her identification of him as the assailant. Finally, at the conclusion of the trial, the court included in its instructions to the jury CJI2d 3.06 (witness credibility) and CJI2d 7.8 (identification), which apprised the jury of the proper considerations in determining whether to accept or reject eyewitness identifications. Under these circumstances, we conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial.<sup>4</sup>

Affirmed.

/s/ Donald E. Holbrook, Jr.  
/s/ Hilda R. Gage  
/s/ Patrick M. Meter

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<sup>4</sup> We note that, even if the pretrial identification procedure could be considered tainted because of complainant's prior knowledge of defendant, the record established that there was an independent basis to admit complainant's in-court identification of defendant. See *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977); *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).