STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2003
v	No. 238127 Calhoun Circuit Court
PAUL FRANCES JONES, Defendant-Appellant.	LC No. 01-002172-FH

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of unlawfully driving away an automobile (UDAA), MCL 750.413, and third-degree retail fraud, MCL 750.356d(4), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was observed driving a car that belonged to complainant. Complainant had not given anyone permission to drive her car. Two of complainant's co-workers observed the car on the street, followed it to a parking lot, and called the police. The witnesses pointed out defendant to the police as defendant left a dollar store. The police confronted defendant, who denied that he owned a car in the parking lot. Defendant was arrested, and was found to have merchandise from the dollar store concealed on his person. Defendant testified and conceded that he was guilty of stealing merchandise from the dollar store; however, he denied that he stole complainant's car. He admitted that he drove the car to the dollar store and that he did not have complainant's permission to do so. Defendant stated that he did not know complainant and maintained that he got the car from a woman he knew as "Spring."

During closing argument defense counsel argued that no evidence showed that defendant intended to steal the car. Counsel contended that the evidence showed nothing more than that defendant used the car without authority.

The trial court instructed the jury on the principal offense of UDAA and on the lesser-included offense of use of an automobile without authority and without intent to steal, MCL 750.414. The jury found defendant guilty of UDAA and third-degree retail fraud. The trial court sentenced defendant as a fourth habitual offender to concurrent terms of three to seven years for UDAA, with credit for 156 days, and ninety-three days for retail fraud, with credit for ninety-three days.

Defendant moved in the trial court for a new trial, and sought an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). He contended that trial counsel rendered ineffective assistance by failing to grasp the elements of UDAA and by failing to call alibi witnesses. The trial court denied defendant's motion, finding that the arguments presented by defendant did not justify holding a *Ginther* hearing.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*., 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The elements of UDAA are: (1) possession of a vehicle; (2) driving the vehicle away; (3) the act of driving the vehicle away is done willfully; and (4) the possession and driving away must be done without authority or permission. The offense of UDAA does not require an intent to steal, i.e., to permanently deprive the owner of his property. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993).

The elements of using an automobile without authority and without intent to steal are that: (1) the defendant obtained lawful possession of the vehicle; (2) the defendant used the vehicle beyond the authority granted to him; (3) the defendant intended to use the vehicle beyond the authority granted to him; and (4) the defendant knew that he did not have the authority to use the vehicle in the manner that he did. MCL 750.414; *People v Hayward*, 127 Mich App 50, 60-61; 338 NW2d 549 (1983).

To be guilty of UDAA, the defendant must have taken initial possession of the vehicle in an unlawful manner. Use of a vehicle without authority and without intent to steal applies if the defendant got initial possession of the vehicle in a lawful manner but then used it in a manner he knew was unauthorized. CJI2d 24.4.

Defendant argues that trial counsel rendered ineffective assistance at trial by misapprehending the elements of UDAA and contending that the offense included an intent to steal and by failing to call various alibi witnesses. We disagree. A review of counsel's closing argument reveals that counsel was asserting that because the evidence did not establish that defendant took possession of the vehicle in an unlawful manner, a conviction of using an automobile without authority was appropriate. Counsel's use of the term "intent to steal" constituted trial strategy. We do not substitute our judgment for that of counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

However, notwithstanding counsel's argument, complainant's testimony that no one had permission to use her car supported a finding that defendant did not gain possession of the car in a lawful manner because "Spring" could not have had lawful possession of the car. The fact that a strategy may not have succeeded does not mandate a conclusion that the strategy constituted

ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has not demonstrated that counsel's use of the term "intent to steal" resulted in prejudice. *Carbin, supra*.

Furthermore, defendant has not substantiated his claim that counsel rendered ineffective assistance by failing to call alibi witnesses because he has not indicated what any alibi witness might have testified to at trial. Under the circumstances, defendant has not overcome the presumption that counsel rendered effective assistance at trial. *Rockey, supra*.

Finally, defendant argues that the trial court erred in calculating the number of days of sentence credit to which he was entitled. He does not specify the basis for his contention that the trial court's calculation was erroneous; therefore, we deem this issue abandoned. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette