STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONYA ANTWON DAVIS,

Defendant-Appellant.

UNPUBLISHED
July 30, 2009

No. 282081
Wayne Circuit Court
LC No. 06-006063-FC

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c) (sexual penetration in circumstances involving commission of another felony) and MCL 750.520b(1)(e) (sexual penetration by an actor armed with a weapon), armed robbery, MCL 750.529, carjacking, MCL 750.529a, 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. Defendant was sentenced to 13 to 20 years' imprisonment for each of the first-degree criminal sexual conduct convictions, 13 to 20 years' imprisonment for the armed robbery conviction, 13 to 20 years' imprisonment for the carjacking conviction, 40 to 60 months' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm but remand for amendment of the judgment of sentence.

Defendant first argues that he was denied the effective assistance of counsel by his trial counsel's failure to fully investigate why Artis Brown, his neighbor, would contact the police and by failing to move for the appointment of a DNA expert and to pursue DNA testing of Artis's son because there was DNA of an unknown donor found on the victim's thighs. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Although defendant's counsel did move for a new trial, the motion was not made in conjunction with the issues

presented on appeal pertaining to ineffective assistance of counsel. Also, defendant filed a motion to remand for a *Ginther* hearing, but this motion was denied. Generally we review factual findings for clear error and constitutional questions de novo. *Id.* However, because this issue is not preserved, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

"A defendant is entitled to have his counsel investigate, prepare, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present that defense and that the defense was substantial. *Id*. However, "[d]efendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Dixon*, *supra* at 396. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy, as is a decision concerning what evidence to highlight during closing argument." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (internal citations omitted). A court will not second-guess counsel on matters of trial strategy, nor will it review counsel's competence with the benefit of hindsight. *Id*.

At trial, the prosecution's forensic biology expert testified that there was no sperm found from testing the swabs from the victim. He also testified that the only DNA, which did not belong to the victim, was recovered from the victim's thigh, but that defendant was excluded as being a match to this DNA. Thus, the DNA evidence presented at trial did not implicate defendant, but rather, tended to support his argument that he did not commit the crime. Therefore, defendant was not deprived of a substantial defense by his counsel's decision not to move for an appointed DNA expert, who would have presumably also testified that the DNA at the scene was not defendant's.

Additionally, pursuing a motion to have Brown's son's DNA taken and then compared to the DNA on the thigh of the victim could have placed defendant in danger by showing that Brown's son was not the perpetrator. This result would have practically eliminated the possibility that Brown's son was the perpetrator. Defense counsel's decision not to request DNA testing was likely based on this concern of creating detrimental evidence that did not otherwise exist. By not excluding Brown's son, defense counsel was able to create doubt regarding incriminating statements that defendant allegedly made to Brown and propose that Brown was only trying to protect her son. Defense counsel extensively cross-examined Brown on these issues and defense counsel also argued during closing argument that there was no physical

evidence that linked defendant to the crime, while emphasizing how defendant was excluded as the unknown donor of skin cells found on the victim's thigh. Furthermore, a post-trial motion requesting that the trial court order DNA testing of Brown's son was denied. Defendant has failed to overcome the strong presumption that counsel's performance was sound trial strategy, *Dixon*, *supra* at 396, and therefore, defendant was not denied the effective assistance of counsel.

Defendant also argues that he was placed in double jeopardy by his two convictions for first-degree criminal sexual conduct when there was only evidence of one penetration. Defendant contends that one of these convictions should be vacated. The prosecution agrees that defendant was improperly convicted of two counts of first-degree criminal sexual conduct, but contends that the proper remedy is to amend the judgment of sentence to reflect that defendant was convicted of one count of first-degree criminal sexual conduct, but under different theories. We agree that defendant was improperly convicted and conclude that the prosecution's proposed remedy is proper.

We review double jeopardy questions de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). However, because this issue is not preserved, defendant must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The Double Jeopardy Clauses of the federal and state constitutions prohibit a criminal defendant from being placed twice in jeopardy for a single offense. *People v Mackle*, 241 Mich App 583, 592; 617 NW2d 339 (2000). As part of its protection, the double jeopardy clause prohibits multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

In this case, defendant was convicted of two counts of first-degree criminal sexual conduct under the theories of sexual penetration in circumstances involving commission of another felony, MCL 750.520b(1)(c), and sexual penetration by an actor armed with a weapon, MCL 750.520b(1)(e). However, there was only evidence of one instance of penetration. The instant case is analogous to *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), where this Court concluded that separate convictions and sentences for both premeditated murder and felony murder, both of which arose from a single instance of criminal conduct, violated the rule against double jeopardy. *Id*. at 220. This Court remedied the double jeopardy violation by directing the lower court to amend the judgment of sentence to reflect a single conviction and a single sentence for a crime that was supported by two separate theories. *Id.* at 221-222.

In another analogous case, this Court, in *Mackle*, *supra* at 601, followed the *Bigelow* Court, and remanded for amendment of the judgment of sentence where there were 12 first-degree criminal sexual conduct convictions for six penetrations under two different theories. This Court ordered that the amendment of the judgment of sentence reflect that six counts of first-degree criminal sexual conduct were supported by two alternate theories and that the other six first-degree criminal sexual conduct convictions be vacated. *Id*.

Therefore, following *Bigelow*, *supra*, and *Mackle*, *supra*, we remand for the administrative task of amending the judgment of sentence to reflect that defendant was only convicted and sentenced for one count of first-degree criminal sexual conduct, but under the

theories of sexual penetration in circumstances involving commission of another felony and sexual penetration by an actor armed with a weapon.

Affirmed but remanded for amendment of the judgment of sentence. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello