

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE JUNIOR MCCANTS,

Defendant-Appellant.

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UNPUBLISHED

December 17, 2009

No. 286214

Wayne Circuit Court

LC No. 07-024952

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of 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, as a second habitual offender, MCL 769.10, to 8 to 20 years for his armed robbery and carjacking convictions, three to five years for his felon in possession of a firearm conviction and two years for his felony-firearm conviction. Defendant appeals as of right. We affirm, but remand for the ministerial task of correction of the judgment of sentence.

I. Ineffective Assistance of Counsel

Defendant's first issue on appeal is that he was denied the effective assistance of counsel. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). This Court reviews the trial court's factual findings for clear error and reviews its constitutional determinations de novo. *Id.* As defendant did not establish a testimonial record regarding the ineffective assistance of counsel claim at a *Ginther*<sup>1</sup> hearing, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's

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

performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel must investigate, prepare, and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 33; 608 NW2d 132 (1999). This Court, however, will not substitute its judgment for the judgment of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's decision whether to call or question witnesses is presumed to be a question of strategy. *Id.*

Based on the existing record, defendant is unable to demonstrate ineffective assistance of counsel. Defendant argues that trial counsel's failure to produce alibi witnesses, or any defense at all, was deficient performance and ultimately resulted in prejudice. Given the evidence on the record, it is clear that trial counsel was aware of the alibi witnesses and was making a strategic decision not to call them. Instead, counsel focused on cross-examining the prosecution's witnesses. He asked Carlson Jackson, the owner of the car that was carjacked, many questions regarding Jackson's identification of defendant and his perception during the carjacking. Through his questioning, trial counsel highlighted inconsistencies between Jackson's testimony at trial and his prior statements to the police immediately after the incident. In particular, Jackson testified at trial that defendant was wearing a short sleeve white shirt during the carjacking even though he told police that the perpetrator was wearing dark clothing. Moreover, trial counsel's questions appeared to be, in part, successful as the jury, during its deliberations, requested to rehear testimony related to the identification of defendant. Without knowing what the alibi witnesses would have said, there is no evidence that trial counsel's decision not to have the alibi witnesses testify was below an objective level of reasonableness or that the outcome would have been different if they had testified. Therefore, defendant has not overcome the presumption that counsel provided effective assistance of counsel.

## II. Clerical Error

Next, defendant argues that there was a clerical error on the Judgment of Sentence and the case should be remanded to amend the Judgment of Sentence to reflect a sentence of three to five years' imprisonment for defendant's conviction of felon in possession of a firearm rather than 3 to 20 years. We agree. This issue was not preserved at the lower court, and, therefore this Court reviews for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Under plain error review, this Court asks whether a plain error was committed and whether defendant's substantial rights were affected. *Id.* To establish that an error affected substantial rights, the defendant must generally show that the error affected the outcome of the proceedings. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* at 766-767.

We remand the case to the trial court to amend the Judgment of Sentence to reflect a sentence of three to five years' imprisonment for defendant's felon in possession of a firearm conviction, the stated sentence that was imposed at sentencing. The clerical error here is a plain error that affects defendant's substantial rights. Without amending the Judgment of Sentence, defendant's maximum sentence would be significantly greater than the actual sentence imposed by the trial court at sentencing. Such an outcome would seriously undermine the fairness of the proceedings. Moreover, the prosecution concedes that a clerical error was made that should be remedied. Therefore, we remand the case to the trial court for the sole purpose of amending the Judgment of Sentence.

Affirmed, but remand for entry for an amended Judgment of Sentence reflecting a sentence of three to five years for defendant's conviction of felon in possession of a firearm conviction. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ David H. Sawyer  
/s/ Donald S. Owens