

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DESHAWN JACKSON,

Defendant-Appellant.

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UNPUBLISHED

April 16, 1999

No. 205225

Genesee Circuit Court

LC No. 96-055072 FC

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of assault with intent to murder, MCL 750.83; MSA 28.278, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6). The trial court, applying a second offense habitual offender enhancement under MCL 769.10; MSA 28.1082, sentenced him to twenty-five to fifty years' imprisonment for each assault with intent to murder conviction, to two years' imprisonment for the felony-firearm conviction, and to two to five years' imprisonment for the felon in possession of a firearm conviction. We affirm.

Defendant claims that his trial counsel was ineffective for failing to procure the testimony of an alleged eyewitness, James Whitey, whom defendant named as the perpetrator of the assaults. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of the prevailing professional norms, and (2) that but for the attorney's error or errors, a different outcome could reasonably have resulted. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Moreover, there is a strong presumption that the attorney's actions constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Here, because an evidentiary hearing did not take place, we have no way of knowing what Whitey's testimony would have been. Therefore, we have no reasonable basis upon which to conclude that he would have helped to exculpate defendant. To the contrary, defendant's testimony that Whitey

committed the shootings implies that Whitey, if called as a witness, would have asserted his Fifth Amendment privilege against self-incrimination and thus would have added nothing to the trial. Without knowing whether Whitey would testify and without knowing what he would say if he did testify, we cannot conclude that his presence would have affected the jury's verdict. *People v Hyland*, 212 Mich App 701, 711; 538 NW2d 465 (1995), vacated on other grounds 453 Mich 902 (1996). Furthermore, because defendant's attorney did not testify about the reasons for Whitey's absence, we presume that this absence was part of a sound trial strategy. See *People v Mitchell*, 454 Mich 145, 165-166; 560 NW2d 600 (1997). Therefore, defendant has not established that his attorney was ineffective. See *Stanaway*, *supra* at 687-688.

Defendant argues that if his ineffectiveness claim fails, we should remand the case for an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant's request for a remand is untimely, however, under MCR 7.211(C)(1). Thus, in accordance with *People v Price*, 214 Mich App 538, 547, n 1; 543 NW2d 49 (1995), we decline to grant the request. Defendant is free to seek a *Ginther* hearing in the trial court if he so chooses, but we no longer have jurisdiction over his case. *People v Bright*, 126 Mich App 606, 610; 337 NW2d 596 (1983).

Next, defendant argues that the trial court committed error requiring reversal by erroneously instructing the jury on the requisite intent for the assault charges. He first objects to the underlined sentence in the following passage:

So, for the crime of Assault With Intent to Murder or Assault With Intent to do Great Bodily Harm or Felonious Assault, this means the prosecution must prove that the Defendant intended to kill or injure. With Assault With Intent to Murder it must be shown that he intended to kill. For the other – for Assault With Intent to do Great Bodily Harm it must be shown that he intended to do great bodily harm, and for Felonious Assault it must be shown that he intended to injure.

Defendant argues that the underlined sentence confused the jury by indicating that they could convict on any of the assault charges as long as they found the intent to kill *or* injure. We disagree with this argument. In reviewing jury instructions, the total instructions and “most certainly what was stated immediately before and following the alleged erroneous instruction” must be considered as a whole. *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985). As long as the instructions as a whole fairly presented the issues to the jury and protected the rights of the defendant, small imperfections do not constitute error. *People v Brown*, 179 Mich App 131, 135; 445 NW2d 801 (1989). Here, the underlined sentence served merely as an introduction to the following two sentences, in which the trial court set forth the different requisite intent for each charge. The use of such an introductory sentence was not an error requiring reversal.

Defendant additionally argues that the trial court erred by telling the jury that the crime of assault with intent to murder requires only the intent to injure. Because defendant did not object to this instruction below, it will warrant a new trial only if our examination of the entire record indicates that it caused a miscarriage of justice. See *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995), and *People v Graves*, 458 Mich 476, 484; 581 NW2d 229 (1998). We conclude that the instruction,

although erroneous, did not result in a miscarriage of justice. During closing arguments, the prosecutor twice informed the jury that assault with intent to murder required the intent to kill. Similarly, disregarding the erroneous instruction at issue, the trial court twice instructed the jury that assault with intent to murder required the intent to kill. Finally, the record reveals that during deliberations, the jury requested and was given a copy of the standard jury instructions for the offenses. In light of these five correct instructions, we cannot conclude that the one misstatement by the judge resulted in a miscarriage of justice, especially since the name of the offense itself – assault with intent to murder – conveys the requisite intent.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Barbara B. MacKenzie  
/s/ Gary R. McDonald