

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVERNIS LYNELL JOHNSON,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 262522

Saginaw Circuit Court

LC No. 04-024544-FH

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

A jury convicted defendant Alvernus Johnson of assault with a dangerous weapon,¹ carrying a concealed weapon,² felon in possession of a firearm,³ and possession of a firearm during the commission of a felony.⁴ The trial court sentenced Johnson as a fourth habitual offender to concurrent prison terms of 3 to 15 years' imprisonment for his convictions of assault, carrying a concealed weapon, and felon in possession of a firearm. The trial court also sentenced him to a mandatory consecutive two-year prison term for possession of a firearm during the commission of a felony. Johnson appeals as of right, claiming that his trial counsel rendered ineffective assistance. We affirm.

I. Basic Facts And Procedural History

On the afternoon of May 6, 2004, Darrell Young and classmate Roland Whitehead were walking through the neighborhood near their school. A car pulled up, and Johnson and two other passengers got out, yelling obscenities. Johnson pointed what appeared to be a sawed-off shotgun at Young. Young kept walking, and the situation ended without further incident. Young and Whitehead reported the incident. Johnson claims that he never pointed a gun at Young but was holding a baseball bat during the encounter. Detective Joseph Grigg testified at trial that,

¹ MCL 750.82.

² MCL 750.226.

³ MCL 750.224f.

⁴ MCL 750.227b.

when interviewed, neither of the two passengers in the car ever mentioned anything about a baseball bat.

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Johnson argues that he was denied effective assistance of counsel (1) when his attorney failed to make a hearsay objection to Grigg's testimony regarding his interview of the two passengers, and (2) when his attorney did not seek to stipulate to Johnson's prior felony convictions, which would have kept their nature from the jury. Because they are unpreserved, we will consider these claims only to the extent that counsel's claimed mistakes are apparent on the record.⁵

B. Legal Standards

To establish a claim of ineffective assistance of counsel, “the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the “counsel” guaranteed by the Sixth Amendment.”⁶ The defendant must also establish that the deficiency was prejudicial by showing, with reasonable probability, that “the result of the proceeding would have been different” absent the error.⁷ “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”⁸

C. Failure To Object

Johnson argues his counsel rendered ineffective assistance by failing to make a hearsay objection when Detective Grigg testified that he did not hear mention of a baseball bat when interviewing the passengers in the car. However, because a hearsay objection would not have been proper, we conclude that Johnson's counsel's performance was not deficient.

“Hearsay” is a *statement*, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.⁹ The Michigan Rules of Evidence define a “statement” as “an oral or written assertion,” or “nonverbal conduct of a person, if it is intended by the person as an assertion.”¹⁰ The passengers in the car clearly did not intend to make any assertions when failing to mention a baseball bat when interviewed. Because Detective Grigg's challenged testimony did not contain any “statements,” a hearsay

⁵ *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

⁶ *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

⁷ *Id.*

⁸ *Id.*

⁹ MRE 801(c) (emphasis added).

¹⁰ MRE 801(a).

objection would have been improper. Therefore, counsel's failure to object did not deprive Johnson of the effective assistance of counsel.¹¹

D. Refusal To Stipulate To Prior Felonies

Johnson also argues he was denied the effective assistance of counsel when his attorney did not seek a stipulation that Johnson had prior felony convictions, which would have kept the jury from learning the nature of those convictions. The jury heard that Johnson had been convicted three times for larceny in an automobile. However, the jury did not hear any details of these crimes. In not requesting a stipulation, Johnson's attorney may have been acting pursuant to a "sound trial strategy."¹² He may have reasonably wanted the jury to be aware of this information. If he had simply stipulated that Johnson was a felon, the jury would have been free to speculate that perhaps his prior convictions were for assaults or other violent crimes. Instead, the jury understood that Johnson's prior convictions were for non-violent offenses. Thus, the failure to stipulate was not prejudicial to Johnson. It is not likely that the jury, upon hearing that Johnson was on probation and had been convicted of larceny in a motor vehicle, perceived Johnson in a more negative light than it would have if it had simply heard that he had been convicted of three unnamed felonies. Because Johnson's counsel was not deficient and his failure to request a stipulation did not result in prejudice, Johnson was not deprived of effective assistance of counsel.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette

¹¹ See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (“[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile.”).

¹² See *Carbin*, *supra* at 600.