

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 14, 2013

v

DEON DERRELL LINDSEY,  
  
Defendant-Appellant.

No. 310503  
Saginaw Circuit Court  
LC No. 11-036235-FH

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Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of unlawful possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and unlawful possession of marijuana MCL 333.7403(2)(d). He was sentenced to time served for the marijuana conviction, five years' imprisonment for the felony-firearm convictions, and 40 months to 15 years' imprisonment for the remaining convictions.<sup>1</sup> He appeals by right, and we affirm.

Defendant's convictions arise from an argument with the victim, a woman with whom he was romantically involved. The victim was outside with her children when defendant arrived in a vehicle driven by a female. Defendant did not introduce the driver to the victim, and the couple argued. The victim testified that she told defendant to leave her home, and defendant swung his fist at her. Because she moved away, defendant nicked the victim in the lip area. The victim asserted that she locked defendant out of the home and called the police. When interviewed by police, the victim did not wish to pursue charges, but wanted defendant removed from her home. The police would have complied with the victim's request and transported defendant elsewhere, but one of the victim's daughters yelled out that defendant had a gun. Defendant was arrested, and a search incident to arrest also revealed the presence of narcotics.

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<sup>1</sup> Defendant was acquitted of the charge of domestic assault, MCL 750.81, and one-count of felony-firearm, MCL 750.227b. He was sentenced as a habitual offender, fourth offense, MCL 769.12, but does not challenge his sentences on appeal.

Defendant testified on his own behalf. He acknowledged a criminal history. However, defendant denied that he possessed the firearm. He testified that the victim was jealous and vindictive and planned to have defendant arrested. Specifically, defendant testified that the victim asked him to sell a gun for her. She arranged for someone to meet with defendant to purchase the gun. The victim purportedly told defendant that she did not want the gun in the presence of her youngest child, a curious little boy, and believed that defendant, a man, would receive a better price for the weapon than she could. Defendant testified that he was only outside for a few minutes when police arrived and arrested him. He denied possessing the weapon, claiming that he merely acted as an intermediary at the victim's request. However, in the course of his testimony, defendant admitted to having marijuana and a mixture of cocaine and baking soda on his person. He appeals by right.

Defendant first contends that he was deprived of the effective assistance of counsel because the defense of temporary innocent possession of a firearm was not presented to the jury. We disagree. Whether a defendant was deprived of his constitutional right to the effective assistance of counsel is reviewed de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). When no Ginter<sup>2</sup> hearing was held, appellate review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). To support a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's representation was deficient and that there is a reasonable probability that, but for the deficiency, defendant would not have been convicted. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011) (footnote omitted). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). The burden of establishing the factual predicate for his claim of ineffective assistance is on the defendant. *People v Ratcliff*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2013), slip op p 3.

In the present case, a review of the lower court record reveals that trial counsel challenged the possession of the weapon. Specifically, defendant testified that the gun was stolen by the victim's friend Earl, and it belonged to the victim. She asked defendant to sell the gun because she did not want the gun in the home with her young children, and she believed that defendant, as a man, could obtain a better price. Defendant testified that he merely acted as an intermediary for the victim, and in closing argument, defense counsel argued that defendant did not have the right to exercise dominion and control over the weapon. The fact that trial counsel did not attack the possession element in the manner requested on appeal is not a mistake apparent on the record. *Payne*, 285 Mich App at 188. Moreover, the record evidence indicates that defendant could not satisfy the defense of temporary innocent possession. *People v Dupree*, 284 Mich App 89, 108; 771 NW2d 470 (2009) (Opinion by M. J. KELLY, J.), aff'd 486 Mich 693 (2010). Defendant failed to establish that there was an imminent threat to the young child when he could have ensured that the weapon was unloaded. *Id.* Additionally, there was record

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<sup>2</sup> *People v Ginter*, 390 Mich 436, 443; 212 NW2d 922 (1973).

evidence that the victim had family residing in the apartment complex, and defendant had friends in the complex. He simply could have requested that someone else take possession of the weapon to prevent his commission of a violation of law. Thus, defendant negligently placed himself in the situation when there was a reasonable alternative to taking possession. *Id.* Accordingly, defendant failed to establish the factual predicate for the claim of ineffective assistance or a mistake apparent on the record.

Next, defendant contends that trial counsel was ineffective for introducing evidence of other bad acts and failing to object to the prosecutor's introduction of improper bad act evidence. We disagree. Assuming without deciding that improper bad acts evidence was admitted, defendant failed to establish that there is a reasonable probability that, but for the deficiency, defendant would not have been convicted. *Unger*, 278 Mich App at 242. In his testimony, defendant admitted that marijuana and a mixture of cocaine and baking soda was found on his person. Although defendant testified that he did not possess the weapon, the jury rejected his testimony. Moreover, the reasons for admission of the evidence and failing to object to the evidence are not mistakes apparent on the record and cannot overcome the presumption of trial strategy. *Johnson*, 293 Mich App at 90; *Payne*, 285 Mich App at 188.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell