

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MCARTHUR JUNIOR POWELL,

Defendant-Appellant.

UNPUBLISHED

March 2, 2010

No. 290525

Wayne Circuit Court

LC No. 08-012764-FC

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction of carjacking, MCL 750.529a. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant Jajuan Gardner testified that he took his daughter to a Payless store in Detroit to purchase shoes. As he left the store, he saw an individual, who he identified as defendant, inside Gardner's pickup truck, along with a woman. Gardner approached them, opened the door to the truck, and told defendant to get out. Instead, defendant threw the truck into gear and tried to drive away. Defendant in fact placed the truck into neutral, and succeeded only in revving the engine. Defendant managed to get the truck into reverse gear as Gardner continued to fight for control of the truck, while hanging partly outside the truck. After a continued struggle, involving movement of the truck into and out of a nearby street, Gardner managed to get defendant out of the truck with the assistance of a Payless employee and detained him until the police arrived.

Defendant testified that he did not intend to steal the truck but was instead trying to assist a woman by starting the truck with a screwdriver.

Defendant first argues that the evidence was insufficient to sustain his carjacking conviction where complainant was not present in or near the vehicle when he entered it to allegedly steal it, and where he did not gain exclusive control of the truck. We disagree.

We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The prosecution presented sufficient evidence to support defendant's conviction. The parties' arguments, which revolve around the definition of presence and what constitutes the "taking" of an automobile, are based on an older version of MCL 750.529a. This statute was amended effective July 1, 2004. As of the date of defendant's 2008 offense, MCL 750.529a provided in pertinent part:

(1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

(2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

In this context, a larceny is the taking and asportation of the vehicle without the owner's consent with the intent to deprive him of it permanently. CJI2d 18.4a(3); *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004).

Viewing the evidence presented in the light most favorable to the prosecution, we find that the prosecution presented sufficient evidence to establish a violation of MCL 750.529a. Gardner testified that defendant was in the process of committing a larceny of his truck when Gardner tried to stop him and defendant forcibly resisted Gardner's lawful attempt to "recover the motor vehicle." The trial court found that defendant intended to take the truck, despite his protestations to the contrary; this finding is supported by Gardner's testimony concerning defendant's continued struggle for control of the truck. See *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) (Minimal circumstantial evidence is sufficient to prove a defendant's intent).

Defendant next argues that trial counsel provided ineffective assistance when he allowed and encouraged defendant to testify that he had previously been convicted of unlawfully driving away an automobile (UDAA), and had experience stealing cars. He contends that defense counsel's action in opening the door to otherwise inadmissible and highly damaging evidence denied defendant the effective assistance of counsel. We disagree.

Defendant did not move for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*¹ hearing before the trial court; therefore, his claim of ineffective assistance of counsel is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id.*

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*, quoting *Solmonson*, 261 Mich App at 663-664.

In his opening statement, defense counsel stated that the prosecutor's evidence would fail to establish that defendant intended to steal the victim's vehicle; rather, it would show that defendant was trying to help someone. Defendant's testimony was consistent with this defense. In addition, the inclusion of this evidence was clearly strategic on the part of defendant and defense counsel. Defendant insisted that he was not trying to steal Gardner's vehicle, but was trying to assist a woman whom defendant thought was the rightful owner of the vehicle. From the context, defendant's testimony concerning his previous criminal experience was apparently designed to show why defendant knew how to start the truck with a screwdriver. Admittedly, counsel likely could have elicited the information that defendant possessed this skill without revealing the basis for his knowledge. However, as plaintiff points out, counsel also chose to use defendant's criminal history during closing argument in an attempt to show that defendant was, at most, guilty of the lesser offense of UDAA, in part because while defendant was a car thief, he was only a car thief, and had "no reputation of hurting anybody." We will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen did not work does not constitute ineffective assistance of counsel. *Id.*

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

Under the circumstances, we find that defendant has not shown that counsel rendered ineffective assistance.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Alton T. Davis