STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM WESLEY DEPUE,

Defendant-Appellant.

UNPUBLISHED
May 2, 1997

No. 178456
Washtenaw Circuit Court
LC No. 93-1461-FH

Before: Holbrook, Jr., P.J., and White and A. T. Davis*, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of operating a motor vehicle under the influence of liquor (OUIL), third offense, MCL 257.625(7)(d); MSA 9.2325(7)(d), and operating a motor vehicle with a suspended license, second offense, MCL 257.904(1)(c); MSA 9.2604(1)(c).[1] Defendant then pleaded guilty of habitual offender, fourth, MCL 769.12; MSA 28.1084. The trial court sentenced defendant to three years, four months to five years' imprisonment for the OUIL conviction. After vacating that sentence, the court sentenced defendant to four years, three months to twenty years' imprisonment for the habitual offender conviction, to be served consecutively to a previous sentence. The court sentenced defendant to one year in the county jail for the operating a vehicle with suspended license conviction, to be served concurrent to the habitual offender sentence. We affirm.

Defendant advances two arguments that prosecutorial misconduct denied him a fair trial. He first argues that the prosecutor denied him a fair trial by cross examining a defense witness, Ms. Hammond, regarding her failure to tell police that defendant was not the driver of the car, and by arguing to the jury that the witness had a duty to do so, while objecting to testimony from another defense witness, Ms. Hinson, that Hinson had told police that defendant was not driving.

Both parties cite *People v Fuqua,* 146 Mich App 250, 255-256; 379 NW2d 442 (1985), in which this Court noted that the credibility of an alibi witness may be attacked with cross-examination and argument showing that the witness failed to come forward with the alibi account before trial when it

* Circuit judge, sitting on the Court of Appeals by assignment.

would have been natural to do so. While reversing the defendant's conviction on other grounds, the *Fuqua* court noted that on retrial there must be some showing on the record as to why it would have been natural for the alibi witness to relate the information to the police. The court noted that in a New York case, *People v Dawson*, 50 NY2d 311; 428 NYS2d 914; 406 NE2d 771 (1980), the court permitted such an attack on the credibility of a defense witness only if the prosecution laid a foundation showing that the witness was aware of the charges against the defendant and their nature, that the witness had reason to recognize that he or she possessed exculpatory information, that the witness had a reasonable motive to exonerate the defendant, and that the witness was familiar with the means to make such information available to the police. The *Fuqua* Court noted that the *Dawson* court also required the trial court to give a cautionary instruction that the witness had no duty to come forward and tell his or his story, and the court barred such an attack on the credibility of a defense witness if the witness had been advised by the defense attorney not to tell his or her own story to the police. *Id.* at 255.

While arguing that we should decline to follow *Fuqua* and instead adopt a rule that such questioning is improper, as articulated in *United States v Young*, 463 F2d 934 (CA DC, 1972), defendant argues that even applying *Fuqua*, the prosecutor failed to lay a foundation regarding why it would be natural for Hammond to go to the police. Plaintiff, however, argues that each of the four foundational elements of *Fuqua* were satisfied by Hammond's testimony.

During the pendency of this appeal, this Court decided *People v Phillips*, 217 Mich App 489; 552 NW2d 487 (1996). The *Phillips* Court noted that under Supreme Court Administrative Order No. 1996-4, it was not bound by *Fuqua*, and that the analysis of *Fuqua* was not persuasive. While agreeing with the *Dawson* court's concern that the trier of fact be assisted in its effort to determine whether the testimony of an alibi witness was an accurate reflection of the truth or, instead, a recent fabrication, the *Phillips* Court disagreed that the prosecutor must lay any particular foundation before questioning a witness who has not come forward before trial. *Id.* at 494. The Court concluded that the credibility of an alibi witness, regarding both the alibi account and the failure to come forward earlier with that account, should not be taken from the jury through the imposition of special foundational requirements, and thus ruled that the trial court did not err in overruling the defense counsel's objections to the cross-examination questions at issue. *Id.* at 496.

Even assuming that the prosecutor failed to satisfy the foundational requirements of *Fuqua*, under *Phillips* no such foundation is required. We recognize that the *Phillips* Court noted that the prosecutor in *Phillips* did not argue or imply that the alibi witnesses had a duty to come forward to tell their stories earlier. *Phillips, supra* at 496, n2. However, while defendant argues that the prosecutor here argued to the jury that Hammond had a duty to inform the police of her account, our review of the record reveals no such argument. Thus, we find no error in the prosecutor's cross-examination of Hammond.

Defendant also argues that the trial court erroneously sustained the prosecutor's objection on hearsay grounds to Hinson's testimony that she told a police officer who came to the apartment complex after defendant was arrested that she, not defendant, had been driving the car. Defendant's sole argument on appeal is that because Hinson was both the declarant and the witness, the testimony

was not hearsay. In making this argument, defendant ignores MRE 801(c)'s provision that hearsay is a statement other than one made by the defendant **while testifying**. Defendant does not argue that the statement was admissible under 801(d)(1)(b). We observe that the statement may very well have been admissible under this section. We are satisfied, however, that any error in failing to admit the statement was harmless. Defendant's argument thus fails.

Defendant next argues that the prosecutor engaged in misconduct by stating during closing argument that "He [defendant] was driving, tells the officer he's driving," when there was no such fact in evidence and that this constituted personal vouching for defendant's guilt. We conclude that reversal is not warranted

Defense counsel objected immediately to the prosecutor's statement and asked to approach the bench. The jury was excused and defendant moved for a mistrial. The trial court denied the motion but gave the following cautionary instruction upon the jury's return:

> Ladies and gentlemen, just a cautionary instruction at this time.
>
> There has been no testimony in this case as to the Defendant telling Officer Maxwell that he was driving the vehicle on the night in question.
>
> You may make any proper inference as to whatever the testimony was and whatever, regarding what the Defendant said. However, you should disregard any suggestion that the Defendant told Officer Maxwell that he was driving.

A prosecutor may not make a statement of fact to the jury which is not supported by the evidence. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Although the prosecutor's remark was inappropriate, we have read the entire trial transcript and conclude that under all the circumstances, the trial court's cautionary instruction prevented the feared prejudice. *Willet v Ford Motor Co*, 400 Mich 65, 72; 253 NW2d 111 (1977).

Defendant next argues that he was denied a fair trial and the effective assistance of counsel where his trial counsel failed to produce the garage personnel to testify to repairing the brakes on the car at issue, thus depriving defendant of the proof necessary to establish a crucial part of his defense.

To establish ineffective assistance of counsel a defendant must show that counsel's performance fell below prevailing professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Stanaway, supra,* 446 Mich at 687-688. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *Id.* at 687. Trial counsel's decision whether to call witnesses is presumed to be a matter of trial strategy, and the failure to call a particular witness can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995) vacated in part on other grounds, 458 Mich 900 (1996). A defense is substantial only if it might have affected the outcome of the trial. *Id.* This Court's review of a claim of ineffective

assistance of counsel is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

We reject defendant's argument. The record reveals that defendant was not deprived of proof of the above defense because testimony that the brakes were repaired was elicited from Hinson. We thus conclude that defendant was not deprived of a substantial defense and has not established that he was denied effective assistance of counsel.

Defendant's final argument is that his sentence is disproportionate. Because sentencing guidelines do not apply to habitual offender sentences, appellate review of such sentences is limited to whether the trial court abused its discretion in imposing the sentence. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The trial court properly considered defendant's extensive criminal history, which included eleven prior convictions relating to the operation of a motor vehicle while intoxicated, and arrived at a sentence that was not disproportionate to the offense and offender.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Alton T. Davis

[1] After defendant's judgment of sentence was entered, this statute was amended and section 1(c), became 1(b).