STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ZAKIR HAKIM,

Defendant-Appellant.

UNPUBLISHED
December 16, 1997

No. 196269
Wayne Juvenile Court
LC No. 93-310379

Before: O'Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Following an adjudication hearing, defendant was found responsible for breaking and entering a dwelling with intent to commit a felony, MCL 750.110a(3); MSA 28.305(a)(3). He was placed on probation. Defendant now appeals as of right to this Court. We affirm.

On July 5, 1995, defendant and another minor, Mohammed Elabed, illegally entered the house of another. Defendant gained entry to the house when Elabed climbed through an open window and let defendant in through the front door. When they noticed police officers approaching the house, defendant and Elabed, who had taken some credit cards from the house, ran out the back door and climbed over a fence. They were subsequently apprehended by a police officer, and defendant was charged with the aforementioned crimes.

Defendant's first argument on appeal is that the prosecutor committed misconduct by communicating with Elabed outside the presence of the witness' counsel. The relevant rule of professional conduct provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. [MRPC 4.2.]

As far as this Court can discern, the "communication" to which defendant refers concerns the prosecutor's questions to the witness at defendant's adjudication hearing.

The comment section accompanying MRPC 4.2 states that the prohibition is not limited to communication with parties to a case, but to any person who is represented by counsel in the matter. *Id.* Thus, assuming that the witness was still represented by his counsel at the time of defendant's hearing, the witness would be part of the class protected by the rule. However, the comment section does not specify the type of situation the committee had in mind when it provided an exception for communications with an adverse party when "authorized by law to do so." Thus, the question for our resolution is whether the prosecutor's questioning of the witness at defendant's adjudication hearing was a type of communication prohibited by the rule or whether the communication was authorized by law.

Our review of the concerns and goals underlying the rules of professional conduct lead us to conclude that the communication is authorized. As the Michigan Supreme Court has noted, MRPC 4.2 aims to prevent overreaching by attorneys and to ensure the proper functioning of the legal system. *People v Green,* 405 Mich 273, 291; 274 NW2d 448 (1979). Similarly, in *People v Patterson,* 39 Mich App 467, 475; 198 NW2d 175 (1971), a panel of this Court quoted the committee's statement that "it is incumbent upon a lawyer not to attempt clandestinely to practice coercion on a party who is represented by counsel." While these concerns and goals are undoubtedly important, they are irrelevant in the present case because the prosecutor questioned the witness in open court. The prosecutor's actions were not "clandestine" and were monitored by the appropriate authorities. Therefore, we hold that the prosecutor's questioning was communication authorized by law and was not a violation of MRPC 4.2.

Defendant next argues that that the lower court inadequately informed Elabed about the privilege against self-incrimination before the accomplice testified against defendant at defendant's adjudication hearing. Const 1963, art 1, § 17. We find that defendant lacks standing to make this argument because the Fifth Amendment privilege against self-incrimination is personal and cannot be asserted on behalf of another. *People v Safiedine,* 152 Mich App 208, 212; 394 NW2d 22 (1986).

Similarly, defendant next argues that the prosecutor committed misconduct in failing to inform the same witness of his right against self-incrimination. Initially, we note that defendant has waived this issue for appellate review. Appellate review of prosecutorial misconduct is generally precluded absent objection by counsel at the trial level. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, while the prosecutor and the judge discussed on the record whether the witness had waived his privilege not to testify, defense counsel neither contributed to the discussion nor objected to the witness' testimony before or after the discussion. However, were we to review this issue, we would conclude that the prosecutor did not engage in misconduct. While it is true that a lawyer may not knowingly offer inadmissible evidence or call a witness knowing that the witness will claim a valid privilege not to testify, *People v Dyer,* 425 Mich 572, 576; 390 NW2d 645 (1986), our resolution of the self-incrimination question leads us to conclude that the prosecutor did not err in questioning the witness in open court.

Defendant's final argument is that his counsel was ineffective. First, defendant argues that his counsel erred in failing to object to Elabed's testimony. Defendant asserts that his counsel was unprepared for the witness' testimony because the prosecutor had not filed a witness list and because defense counsel had not interviewed the witness and had not attended the pretrial hearing at which the witness pleaded guilty. When claiming ineffective assistance due to defense counsel's unpreparedness,

a defendant must show prejudice resulting from the lack of preparation

because the failure to interview a witness does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). After reviewing the record, we conclude that defendant's brief statements about this allegation do not indicate that he was prejudiced by his counsel's failure to interview the witness.

Second, defendant argues that his counsel was ineffective by failing to raise the witness' right against self-incrimination or right to counsel. Although the privilege against self-incrimination is held by the witness alone, the witness is not the sole judge of whether the testimony may be incriminating. *Dyer, supra* at 578. However, for the reasons already discussed, no privilege against self-incrimination remained either for the witness to claim or for defense counsel to judge. Therefore, defense counsel could not be ineffective for failing to object to the witness' testimony on this basis. Also, as noted above, the prosecutor's questions to the witness during the hearing constitute communication that is authorized by law. Therefore, defense counsel did not err in failing to object to the witness' testimony.

Third, defendant argues that his counsel erred in eliciting damaging testimony from Elabed about their joint effort and decision to break into the house. In a similar vein, defendant also argues that his counsel was ineffective by eliciting damaging testimony from the police officer regarding the fact that the two responding officers called to defendant and Elabed to stop running and that the suspects were close enough to hear the officers' calls. We do not believe that counsel's actions were erroneous. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be a matter of trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). Defense counsel's closing statement reveals that her strategy in eliciting factual details from defendant's accomplice and the police officer was to point out the deficiencies in the prosecutor's case against defendant and to gain enough specific facts to support her theory that defendant abandoned his intent to commit home invasion. Thus, defense counsel did not deny that defendant was at the scene or even that defendant may have initially aided in breaking into the house. The fact that defendant disagrees with his counsel's strategy or that counsel may have elicited some unexpected answers from the witnesses does not compel a finding that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Stanaway, supra* at 687-688.

Even assuming arguendo that counsel's questioning of these two witnesses was erroneous, defendant has not established a reasonable probability that, but for counsel's error, the result of the proceedings would have been different or that the result of the proceeding was fundamentally unfair or unreliable. *Stanaway, supra*. The evidence against defendant was overwhelming and included the neighbor's eyewitness testimony, the accomplice's testimony during direct examination, and defendant's own testimony placing him at the scene. In short, we find that none of the allegations of ineffective assistance of counsel warrant reversal.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Richard A. Bandstra