

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKO LARON LOTT,

Defendant-Appellant.

UNPUBLISHED

May 19, 1998

No. 196955

Ingham Circuit Court

LC No. 96-069916-FH

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

PER CURIAM.

Defendant was convicted by jury of possession with intent to deliver less than fifty grams of a controlled substance. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced to eight to forty years’ imprisonment. He appeals as of right and we affirm his conviction, but remand for correction of the presentence investigation report.

Defendant first argues that defense counsel’s failure to object to inadmissible drug profile testimony constituted ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show 1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, 2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, and 3) the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Relying on *People v Hubbard*, 209 Mich App 234, 242; 530 NW2d 130 (1995), defendant argues that drug profile testimony is inadmissible when used for the improper purpose of proving a defendant’s guilt. However, the instant case is distinguishable from *Hubbard*. First, unlike the drug profile testimony given by an expert witness in *Hubbard*, the testimony in the instant case was given by an investigating officer who based his deductions on his own professional experience as it related to his personal knowledge of the event. Second, in the instant case, unlike *Hubbard*, there was direct evidence showing defendant to be in actual possession of the cocaine. Third, a defense witness provided similar testimony on cross-examination. We therefore conclude that defendant failed to

establish that the allegedly deficient performance prejudiced him, and his claim of ineffective assistance of counsel fails.

Defendant next argues that the trial court abused its discretion when it permitted the prosecutor to impeach a defense witness with evidence of a prior conviction, contrary to MRE 609. We disagree. The trial court correctly found that the witness's conviction for breaking and entering was only two years old, the crime was punishable by more than one year in prison, and the crime involved an element of theft. The court concluded that the recent nature of the crime and the willful theft aspect gave it "significant probative value on the issue of credibility." Having determined that the requirements of MRE 609 were satisfied, the trial court did not abuse its discretion when it admitted evidence of the prior conviction for impeachment purposes only.

Defendant also claims that during the prosecution's closing arguments, the prosecutor improperly bolstered the credibility of its own witnesses, attacked the credibility of defense witnesses, and denied defendant a fair trial by referring to him as a liar and a drug dealer. No objection having been made in the trial court, this issue is unpreserved and will be reviewed only to determine whether the asserted error affected the outcome of the proceedings or whether a curative instruction could have rectified any error. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Prosecutors are afforded great latitude when making their arguments, and they may argue "all reasonable inferences from the evidence as it relates to their theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Closing arguments will be reviewed in the context in which they were made in order to determine whether the defendant was denied a fair trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). There was evidence that supported the prosecutor's assertion that defendant lied to the police when asked about the contents of the pill container he was carrying at the time of his arrest. When arguing that defendant intended to deliver the cocaine, the prosecutor emphasized the evidence supporting her theory. These comments were proper and did not deny defendant a fair trial. Moreover, the prosecutor did not improperly bolster the credibility of its witness when she suggested to the jury that it could rely on one police officer's testimony, or when she cited testimony given by defendant's mother corroborating the officer's earlier testimony. Lastly, the credibility of defendant's mother was not improperly attacked by the prosecution's reference to testimony that she was struggling with a substance abuse problem or that her testimony was inconsistent with that of another defense witness. The prosecutor's arguments were reasonable inferences based on the evidence presented at trial. *Bahoda, supra* at 282. Accordingly, there was no error.

Defendant also contends that the trial court failed to make corrections to the presentence investigation report after upholding defense counsel's challenges to certain information contained in the report. Defendants have a statutory right to challenge information contained in the presentence investigation report, MCL 771.14; MSA 28.1144, and when such challenges are made, the trial court must strike information from the report relating to any challenges it sustains. *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995). After listening to the prosecution's witnesses testify as to the accuracy of the information, the trial court rejected some of defendant's

challenges, but found that other challenges were valid. Because the presentence investigation report was not corrected to reflect the valid challenges, we remand to the trial court so that the information can be stricken and an amended copy can be sent to the Department of Corrections. *Id.*, 202. Resentencing is unnecessary since the trial court mentioned that the conviction was defendant's third, not fourth, thereby demonstrating that the sentence imposed was determined independent of the information that should have been stricken from the report.

Lastly, defendant claims that the sentence is disproportionate to the crime and circumstances surrounding the offense. Sentencing issues are reviewed for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). The sentencing guidelines are inapplicable when a defendant is sentenced under the supplemental drug enhancement statute, MCL 333.7413(2); MSA 14.15(7413(2)). *People v Williams*, 205 Mich App 229, 231; 517 NW2d 315 (1994). Defendant was sentenced to a term of eight to forty years' imprisonment. The trial court noted defendant's extensive juvenile and adult record. Under these circumstances, we find no abuse of discretion.

Affirmed but remanded for correction of the presentence investigation report. We do not retain jurisdiction.

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