

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

BOU NOU,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

February 16, 1999

No. 211883

Ottawa Circuit Court

LC No. 93-017064 FC

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and carrying a concealed weapon, MCL 750.227; MSA 28.424. He subsequently pleaded guilty of being an habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to enhanced concurrent prison terms of twenty-five to seventy-five years for the assault conviction and two to ten years for the CCW conviction. The prosecutor appeals by leave granted the order granting defendant's motion for a new trial on the ground that defendant was denied the effective assistance of counsel. Defendant cross-appeals as of right. We reverse the order granting a new trial and reinstate defendant's convictions and sentences.

Defendant, his younger brother, Bin Nou, and his friends, John Moore and Sok Chhay, all of whom were members of the Crips street gang, went to a restaurant after hearing that several individuals at the restaurant had disparaged the Crips. Defendant confronted Joe Martinez in the parking lot of the restaurant. This verbal confrontation quickly escalated into an all-out melee, with defendant and his companions engaging in fisticuffs with a number of restaurant employees. During this melee, Martinez received three stab wounds, one to the stomach with an accompanying liver injury, one to the chest which severed an artery in one of his lungs, and one in the left buttock.

I

To establish ineffective assistance of counsel, a defendant must show that counsel made an error so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense. *People v Mitchell*, 454 Mich 145, 156; 560

NW2d 600 (1997). To establish the requisite prejudice, a defendant must show that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defense counsel failed to provide a strategic reason for not moving in limine to prevent prosecution witness Mike Theleman from testifying before the jury that he knew defendant from jail. Identity was a key issue in this case. Indeed, defendant's theory of defense was that Martinez was stabbed by one of the other Crips' members involved in the fight, either Bin Nou or Sok Chhay. Because identity was a key issue, the prosecutor had to explore with each witness to the melee whether the witness had prior contact with defendant. When the prosecutor explored with Theleman at defendant's preliminary examination Theleman's past contact with defendant, Theleman volunteered that he had spent time in jail with defendant. Given Theleman's preliminary examination testimony and defendant's theory of the case, defense counsel could reasonably have anticipated that the prosecutor would explore in front of the jury Theleman's ability to identify defendant and that Theleman would again volunteer that he spent time in jail. Moreover, trial counsel should have known that such testimony is generally inadmissible and unfairly prejudicial. See e.g., *People v Deblauwe*, 60 Mich App 103, 104-105; 230 NW2d 328 (1975); *People v Wallen*, 47 Mich App 612, 613-614; 209 NW2d 608 (1973). Accordingly, trial counsel's failure to move in limine to exclude such testimony at trial constituted conduct outside the range of reasonable professional assistance and, therefore, constituted constitutionally-deficient representation. *Mitchell*, *supra* at 145; *People v Fenner*, 136 Mich App 45, 47-50; 356 NW2d 1 (1984).

We cannot conclude, however, that defendant suffered the requisite level of prejudice to sustain his ineffective assistance of counsel claim. The references to defendant's prior jailing constitute isolated references to prior criminal activity. Such references fail to create sufficient prejudice to warrant reversal. *Wallen*, *supra* at 613. Moreover, the jail references were not offered in a context that directly or indirectly suggested that defendant had any prior criminal convictions. The references also were not made in a context that emphasized the fact that defendant had been jailed on a prior occasion, but instead were made in a context that emphasized the fact that Theleman had had sufficient prior contact with defendant to make his identification of defendant reliable. In the absence of a repeated attempt to impress upon the jury that defendant had committed other crimes, sufficient prejudice to warrant reversal generally does not exist. *Wallen*, *supra* at 613. Further, the jury repeatedly heard that defendant was a member of the relatively notorious Crips gang. In light of this testimony, it is unlikely that the jury's image of defendant was substantially tainted by the isolated revelation that he may have had some sort of prior criminal record.

In light of these considerations, all of which diminished the potential prejudicial impact of the jail references, it is not reasonably probable that the result of defendant's trial would have been different had defense counsel acted to keep the jail references from the jury. *Messenger*, *supra* at 181. Accordingly, the trial court erroneously concluded that trial counsel rendered ineffective assistance of counsel by failing to move in limine to exclude any testimonial reference to defendant having been jailed.

With regard to the testimony of prosecution witness Albert Rosales, Rosales volunteered a vague reference to defendant's "record" without identifying the nature of the record, i.e. criminal record or assaultive history. Defense counsel indicated that he failed to object to this statement as a matter of trial strategy. The failure to object may constitute sound trial strategy, particularly where an objection would draw attention to a prejudicial statement. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995); *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996); *Wallen*, *supra* at 614. On the instant record, defendant has failed to rebut the presumption that the lack of an objection was sound trial strategy, particularly where an objection would have drawn the jury's attention to an otherwise innocuous, ambiguous and volunteered reference to defendant's "record." *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

With regard to police detective Roger VanLiere's testimony that defendant expressed concern about being imprisoned if he was charged with a weapon's offense, trial counsel again indicated that he failed to object as a matter of trial strategy. Defendant has failed to rebut the presumption that the lack of an objection constituted sound trial strategy where any objection would have drawn the jury's attention to testimony that was too vague and ambiguous for jurors to surmise that defendant was referencing his probationary status when he made the statement. *Barnett*, *supra* at 338.

Because defendant failed to sustain his claim of ineffective assistance of counsel, we find that the trial court abused its discretion when it granted defendant's motion for a new trial. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998); *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

II

On cross-appeal, defendant asserts that the trial court abused its discretion by denying defendant's new trial motion premised on additional claims of ineffective assistance of counsel. Specifically, defendant first argues that his trial counsel was ineffective because he failed to seek the admission of a police report prepared by officer Simmons in which the officer reported that defendant's brother, Bin Nou, admitted to stabbing Martinez in the leg. Defendant asserts that the statement was admissible as a statement against penal interest under MRE 804(b)(3). Additionally, defendant argues that his counsel was ineffective because he failed to seek the admission of a June 17, 1993, transcript of a plea proceeding in the juvenile court that memorialized Bin Nou's plea of guilty to assault with intent to do great bodily harm less than murder and his admission to "stabb[ing] Joe [Martinez] in the leg." Defendant asserts that the transcript was admissible as a statement against penal interest under MRE 804(b)(3) and as former testimony under MRE 804(b)(1).

Both MRE 804(b)(1) and (3) require, as a prerequisite for admission, that the declarant be unavailable as a witness. MRE 804(b). Defendant correctly points out that an exercise of the Fifth Amendment privileges by a declarant renders that declarant unavailable for purposes of MRE 804(b). *People v Richardson*, 204 Mich App 71, 74; 514 NW2d 503 (1994). Defendant failed to present any evidence at the motion hearing, however, that Bin Nou would have invoked his Fifth Amendment privilege against self-incrimination if called to testify. Consequently, defendant has failed to establish that Bin Nou was unavailable and, thereby, that the documentary evidence he believes should have been

offered was admissible. *People v Blankenship*, 108 Mich App 794, 797; 310 NW2d 880 (1981). Having failed to demonstrate the admissibility of this documentary evidence, defendant has failed to establish that counsel provided constitutionally-deficient representation by failing to seek its admission. *Mitchell, supra* at 156.

Defendant further argues that trial counsel was ineffective for failing to call Bin Nou as a witness on his brother's behalf. Defendant failed to present any evidence at the motion hearing that would support a conclusion that Nou would have testified or that Nou would have testified consistently with his admission to the police or to the juvenile judge who took his plea. Absent a record from which it could be concluded that Nou would have testified consistently with his prior admissions, defendant has failed to demonstrate that he received ineffective assistance of trial counsel. *Messenger, supra* at 181.

Defendant next asserts that trial counsel was ineffective because he failed to introduce into evidence a prior inconsistent statement made by prosecution witness John Moore to the police identifying Sok Chhay as the person who stabbed Martinez for the purpose of impeaching Moore's subsequent identification of defendant as the individual who stabbed Martinez. Our review of the record discloses that trial counsel extensively cross-examined Moore with regard to his prior inconsistent statement. In light of this extensive cross-examination, the admission of the written statement would merely have placed cumulative evidence before the jury. Defense counsel's failure to introduce cumulative evidence is presumed to be trial strategy. *Mitchell, supra* at 163. Defendant has not rebutted this presumption. Counsel's failure to seek the introduction of the written statement was not error on this record and, therefore, the record lacks a factual basis from which it may be concluded that counsel's performance was constitutionally-deficient and that counsel's performance undermined confidence in the reliability of the verdict. *Mitchell, supra* at 156; *Messenger, supra* at 181.

Defendant also asserts that trial counsel was ineffective because he failed to impeach Moore, who testified that he received no consideration for his testimony, with a written recommendation for leniency made by Detective VanLiere in a written report. Defendant failed to establish that Moore had any knowledge of VanLiere's recommendation, that Moore's decision to testify was motivated by the recommendation, or that the prosecutor's office had adopted the recommendation. Absent evidence that Moore knew of the recommendation and was testifying under a reasonable expectation that the recommendation would be honored, defendant has failed to rebut the presumption of trial strategy. *Mitchell, supra* at 163.

Because defendant failed to sustain his ineffective assistance of counsel claims, we find that the trial court did not abuse its discretion when it denied defendant's motion for a new trial based on these claims. *Fink*, 456 Mich at 458.

III

Defendant contends that the trial court abused its discretion by denying defendant's motion for new trial premised on claims of prosecutorial misconduct. Defendant failed to object during trial to the remarks of the prosecutor that he now asserts were improper. Accordingly, we review defendant's claims de novo and will not reverse in the absence of an objection if a curative instruction would have

eliminated the prejudicial effect of the remarks or if the failure to grant the requested relief would result in a miscarriage of justice. *Messenger, supra* at 179-180.

Defendant argues that his due process rights were violated because the prosecutor's challenged remarks reflect that the prosecutor sought to convict defendant for the same crime for which Bin Nou had already been convicted by advancing a theory of defendant's culpability that was inconsistent with the theory of culpability used to convict Bin Nou. Defendant's argument is unsupported in the record. Bin Nou's plea-based conviction in the juvenile court was based on his admission that he stabbed Martinez in the left buttock. A reading of the prosecutor's closing argument as a whole in this case, *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991), reveals that the prosecutor repeatedly and almost exclusively argued that the jury should return a verdict of guilty on the assault with intent to commit murder charge because the evidence established beyond a reasonable doubt that defendant stabbed Martinez in the stomach, causing liver injury and inflicting a potentially fatal wound. On this record, the prosecutor sought to convict defendant for a separate crime by employing a theory of culpability supported by the evidence adduced at trial and not at odds with defendant's brother's inculpatory admission in the prior juvenile proceedings.

Defendant also argues that his due process rights were violated because the challenged remarks of the prosecutor constitute an intentional injection of falsehoods into the proceedings for the purpose of misleading the jury.

A criminal prosecution must comport with prevailing notions of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. *People v Lester*, ___ Mich App ___, ___ NW2d ___ (No. 199269, issued 10/23/98). To this end, the duty of the prosecutor is to seek justice, not merely to convict. *People v O'Quinn*, 185 Mich App 40, 43; 460 NW2d 264 (1990). Accordingly, a prosecutor may not intentionally misrepresent a material fact to the jury. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

To the extent that the prosecutor's argument conveyed to the jury that Bin Nou did not have a knife and did not stab Martinez, the prosecutor misrepresented a fact to the jury in light of testimony presented by the prosecutor that Bin Nou held a knife during the fight with Martinez and in light of Bin Nou's confession and conviction. The misrepresentation was likely intentional, in light of the prosecutor's recently secured plea-based conviction against Nou. Additionally, the misrepresentation was material where the theory of defense was that Bin Nou or Sok Chhay stabbed Martinez. On this record, the prosecutor violated his professional duty when he argued to the jury that Nou had no knife and did not stab Martinez.

The question thus becomes whether a miscarriage of justice will result if this Court fails to grant defendant's requested relief. *Cross, supra* at 143-144. Although the prosecutor argued that Nou did not have a knife and did not stab Martinez, he also backed away from the absolute nature of the statement by then asserting that if Nou did stab Martinez, then nobody saw the act. Additionally, the jury was instructed that statements made by the prosecutor during closing argument do not constitute evidence and that the jury's verdict must be based solely on the evidence. Finally, as explained above, the prosecutor repeatedly emphasized to the jury that his theory of culpability was that defendant

stabbed Martinez in the stomach. For these reasons, it is unlikely that the jury was swayed by the misstatement of fact such that the integrity of the proceedings or verdict were compromised.

Finally, the prosecutor's argument to the jury that defense counsel was trying to confuse the jury does not constitute a personal attack on defense counsel and does not shift the focus from the evidence to defense counsel's personality where the remark was made during rebuttal argument and charged that defense counsel had inaccurately summarized the evidence by excluding references to testimony that demonstrated defendant's guilt and emphasizing evidentiary weaknesses that were irrelevant to a determination of defendant's guilt or innocence. *People v Phillips*, 217 Mich App 489, 499; 552 NW2d 487 (1996).

Because we conclude that no miscarriage of justice will result from our failure to grant defendant's requested relief, it follows that the trial court did not abuse its discretion when it denied defendant's new trial motion premised on prosecutorial misconduct claims.

The order granting defendant a new trial is reversed and defendant's convictions and sentences are reinstated.

/s/ Michael J. Kelly

/s/ Roman S. Gibbs

/s/ E. Thomas Fitzgerald