

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONDRIEL L. JOHNSON,

Defendant-Appellant.

UNPUBLISHED

February 8, 2002

No. 227341

Wayne Circuit Court

Criminal Division

LC No. 99-009679

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, and sentenced as a second habitual offender, MCL 769.10, to a term of nine to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that trial counsel was ineffective for failing to obtain a voiceprint analysis of a tape recording and for failing to move to suppress his prior felony convictions. Because no *Ginther*¹ hearing was held, our review is limited to errors apparent in the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant's counsel was not ineffective for failing to obtain a voiceprint analysis of the tape recording. Even if voiceprint evidence is admissible for identification purposes, cf. *People v Tobey*, 401 Mich 141, 148; 257 NW2d 537 (1977), defendant has failed to show a reasonable probability that a voiceprint analysis in this case would have affected the outcome of his trial. Other than his unsupported allegation that the voice on the tape is not his, defendant has made no offering, with even the remotest of possibility, that an analysis of the voice recording would have been favorable to him. More importantly, defendant has not overcome the presumption that

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

counsel may not have pursued an analysis for reasons of trial strategy. An unfavorable analysis could have destroyed defendant's defense. And, even without an analysis, counsel was able to make a good argument to the jury that the voice on the tape did not sound like defendant, who testified at trial. Defendant has failed to meet his burden with regard to his claim that counsel was ineffective for failing to obtain a voiceprint analysis.

Defendant's complaint that counsel was ineffective for failing to move to suppress his previous 1980 and 1995 convictions also fails. A review of the record reveals that the jury did not learn of either conviction during trial. We cannot conclude that counsel's failure to move to suppress evidence that was never presented to the jury affected the outcome of defendant's case. In other words, there is no reasonable probability that the result of the proceeding would have been different had counsel moved to suppress the convictions. *Stanaway, supra*. We note that defendant argues that the prosecutor improperly asked him an open-ended question about his previous convictions, which led to defendant divulging that he was once accused of breaking into a telephone. Our review of the record reveals that the prosecutor's question was not improper. It was not open-ended. On the contrary, it conformed to MRE 609. Moreover, defendant's nonresponsive answer to the question was not highlighted or further pursued by the prosecution.

Defendant next argues that the trial court improperly prohibited the victim from testifying that, when the car was found, it was in the possession of someone other than defendant and that the title had been forged. Defendant argues that the trial court's ruling prevented him from pursuing his defense. We disagree. The trial court ruled that whether the victim's sister had learned a lesson from leaving the title to her car in the glove box was irrelevant. It further ruled that the victim could not testify about the recovery of the vehicle and the state of the title due to the lack of personal knowledge. The trial court's evidentiary ruling was not an abuse of discretion. MRE 602; *People v Allen*, 429 Mich 558, 567; 420 NW2d 499 (1988). Moreover, contrary to defendant's argument on appeal, the trial court never ruled that evidence of the forged title or the recovery of the vehicle was irrelevant to the case. Defendant could have elicited this information through the testimony of any other witness who had personal knowledge or through any other proper means. In *People v Herndon*, 246 Mich App 371, 410-411; 633 NW2d 376 (2001), the trial court made several adverse evidentiary rulings precluding hearsay evidence. The defendant argued on appeal that the trial court's rulings precluded him from pursuing his defense. *Id.* This Court rejected that argument and agreed that, because the defendant was able to pursue his defense through other witnesses and through the use of evidence other than the inadmissible hearsay, he was not deprived of his right to present a defense. In this case, the trial court properly precluded defendant from pursuing certain information through the victim. However, defendant could have pursued this information through other appropriate witnesses, e.g., the victim's sister who owned the car or the officer who recovered the stolen vehicle. Defendant failed to do so. He cannot now complain that the trial court deprived him of his right to present a defense.

Defendant subsequently argues that trial counsel was ineffective for failing to further pursue information about the forged title and the recovery of the car through other witnesses. He argues that the information would have enhanced his defense. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001) (citation omitted).

This Court will neither substitute its judgment for that of counsel regarding matters of trial strategy nor will it assess counsel's competence with the benefit of hindsight. *Id.*

In this case, trial counsel attempted to use the gaps in the case to defendant's advantage. He began his closing argument by commenting on the fact that the jury "didn't hear the whole" story and that there were "a lot of questions you probably have to ask and I'm not going into them." Counsel then argued that the evidence that was produced indicated that no carjacking had occurred and the entire episode was fabricated. On appeal, defendant has submitted a police report, which indicates that another man was found with the car and that individual made statements to police that he obtained the vehicle from two black men and a white woman, who purportedly sold the car to him for seventy-five dollars. Defendant argues that trial counsel could have and should have presented evidence that the car was in someone else's possession when it was recovered and that the title was forged by someone.

However, the record supports a conclusion that counsel's decision not to call additional witnesses or produce other testimony was a matter of trial strategy. First, the man arrested with the car described one of the males who sold the vehicle as being approximately six feet tall, 205 pounds, and about thirty-six years old. Defendant was six feet two inches tall, 195 pounds and thirty-eight years old at the time of the alleged carjacking. Unless there was a witness who could testify that defendant was not one of the men involved in selling the vehicle, any evidence about the sale of the vehicle may have led to unfavorable inferences against defendant that he sold the car after stealing it. Second, it was clear at trial that defendant was not found in possession of the vehicle. The victim testified that the stolen vehicle was recovered and was in her driveway when defendant arrived at her sister's house on a bicycle. Further evidence on the issue was unnecessary to allow defendant to make his arguments. Finally, the suggestion that the title was forged by someone was heard by the jury even though the prosecution's objection was sustained. Counsel, as previously noted, attempted to use the lack of the whole story to his advantage. Counsel may have determined that the mystery surrounding the title worked to his advantage. On appeal, defendant has not offered any information to support his position that, had the issues of the forged title and stolen vehicle been further pursued, the outcome of his case would have been different. He has not overcome the presumption that counsel's decisions with regard to the evidence were matters of trial strategy. *Garza, supra.*

Defendant next argues that the prosecution improperly questioned his girlfriend about why she failed to come forward with corroboration for his alibi at any time before trial. Defendant argues that the requisite foundational requirement for such questioning was absent in the case and that no inference should ever be drawn from the fact that a defense witness failed to go to the police with information. This issue is governed by *People v Phillips*, 217 Mich App 489, 492-496; 552 NW2d 487 (1996), wherein this Court held that no special foundational prerequisites are required before a prosecutor may question a witness about her failure to come forward with exculpatory evidence.

Defendant also complains that the prosecutor committed misconduct during closing argument. Defendant did not object to the alleged misconduct and, therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error requiring reversal. We reject defendant's claim that the prosecutor implied that he had some special knowledge that the testimony of defendant's girlfriend was not worthy of belief. A prosecutor may "argue from the

facts that a witness is credible or that the defendant or another witness is not worthy of belief.” *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor may also appeal to the jury’s common sense when arguing that the circumstances surrounding certain testimony renders the testimony believable or not believable. See, e.g., *People v Fisher*, 220 Mich App 133, 160; 559 NW2d 318 (1996). In this case, the prosecution appealed to the jury’s common sense when arguing that defendant’s girlfriend was not credible because she failed to come forward with the exculpatory testimony before trial. The argument was proper. In addition, when considered in light of defendant’s arguments, the prosecutor’s rebuttal argument did not improperly shift the burden of proof. The prosecutor’s rebuttal argument implicitly questioned why, if defendant’s alibi was so strong, he did not offer better corroborating evidence that would have been easy to present. In *People v Reid*, 233 Mich App 457, 478-479; 592 NW2d 767 (1999), this Court held that a similar rebuttal comment about lack of evidence that would have assisted the defendant’s case did not impermissibly shift the burden of proof.

Finally, defendant argues that he must be resentenced because of several sentencing errors. We disagree. First, the trial court properly determined that defendant was a second habitual offender. Defendant was arraigned on an habitual offender, second offense, charge. Defendant was notified of the precise conviction on which the prosecutor was relying for the purpose of sentence enhancement. MCL 769.13(2). Defendant did not challenge the validity of the conviction. Indeed, at sentencing, the prosecutor argued that the presentence investigation report (PSIR) contained evidence sufficient to support the habitual offender charge. Defendant did not dispute the information in the PSIR. The trial court subsequently sentenced defendant to eight to twenty years’ imprisonment. It then vacated the sentence and sentenced defendant as an habitual offender. The information in the PSIR was sufficient to establish the existence of the prior conviction, MCL 769.13(5), and the trial court’s words and actions at sentencing reveal that it accepted the information and determined defendant’s status as an habitual offender.

Second, defendant argues that, during sentencing, the trial court incorrectly mentioned that carjacking was a life term offense. This was not a mistake of law. MCL 750.529a(1) provides that carjacking is a “felony punishable by imprisonment for life or any term of years.”

Finally, defendant argues that his sentence is disproportionately high under the circumstances. Because defendant was sentenced within the applicable legislative sentencing guidelines range, review of the sentence is impermissible. MCL 769.34(10); *People v Babcock*, 244 Mich App 64, 72-73; 624 NW2d 479 (2000).

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad