

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACKIE LEE MACK,

Defendant-Appellant.

UNPUBLISHED

May 4, 2004

No. 245057

Midland Circuit Court

LC No. 02-001062-FC

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, supported by alternative theories of premeditated murder and felony murder. He was sentenced to life imprisonment without the possibility of parole. He appeals as of right. We affirm.

I

Defendant first argues that the trial court improperly allowed the prosecution to impeach him with his prior conviction for receiving or concealing stolen property. Defendant asserts that the trial court erroneously concluded that the offense of receiving or concealing stolen property contains an element of dishonesty or false statement and, therefore, the conviction was routinely admissible for the purpose of impeachment under MRE 609(a)(1). Defendant contends that receiving or concealing stolen property is more properly considered a theft crime for purposes of MRE 609 and that, therefore, the admissibility of his prior conviction was subject to the balancing test for such crimes set forth in MRE 609(a)(2).

Generally, we review a trial court's decision to allow impeachment evidence of a prior conviction for an abuse of discretion. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992); see also *People v McDaniel*, 256 Mich App 165, 167; 662 NW2d 101 (2003). However, because we conclude that any error in admitting defendant's prior conviction would not provide a basis for relief under the standard for preserved nonconstitutional error, we find it unnecessary to resolve whether, for purposes of admission under MRE 609(a), the offense of receiving or concealing stolen property is more properly considered a crime involving theft or dishonesty.

A preserved nonconstitutional error is not a ground for reversal unless, after examining the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), our Supreme Court equated outcome-determinative error, as discussed in *Lukity*, *supra*, with a showing that it is more probable than not that the error undermined the reliability of the verdict. Here, as explained below, any error by the trial court in admitting defendant's prior conviction for purposes of impeachment did not undermine the reliability of the verdict.

Although we do not dispute that defendant's testimony, and thus his credibility, was an important aspect of his defense, we note that defendant himself raised doubts regarding his veracity during his testimony at trial. For instance, defendant acknowledged during his testimony that before learning that the victim's car and body had been found he lied to police regarding the victim's manner of dress and reason for leaving the home of defendant's girlfriend on the morning of her murder. Although initially telling police that the victim was fully dressed and had left the home alone en route to an appointment after dropping him off from a brief trip to a local restaurant, defendant testified during trial that the victim left the home in her pajamas after finding the home locked upon returning with him from a trip to a local park where the two had engaged in consensual sexual intercourse. Defendant also acknowledged lying to police with respect to which of the two were driving when they left the home of defendant's girlfriend in the victim's car. Although acknowledging that he initially told police that the victim had driven the car both to and from the home, defendant testified at trial that it was he who drove the victim's car to and from the park, and that in order to do so he was required to move the driver's seat to its furthest position back.

In conjunction with these acknowledgements, other evidence at trial also raised questions regarding the truth of defendant's testimony. A forensic pathologist who examined the victim's body estimated that the victim died sometime during the early morning hours of December 13, 2001, the very time defendant acknowledged last seeing the victim alive. Also, the mother of the victim testified that the victim "could not see" without wearing either her glasses or contact lenses. However, while defendant claimed that the victim drove from the home of his girlfriend alone after dropping him off, the victim was found wearing neither her glasses nor her contact lenses, despite those items being present inside bags found in the car. Moreover, in contrast to testimony that the victim was required to keep her vehicle's driver's seat close to the steering wheel in order to drive, the seat was found to be in its furthest position back at the time the vehicle was discovered by police. Defendant's blood was also found on the pajamas worn by the victim on the evening before her disappearance.

Given this testimony and evidence, and considering that the prosecution failed to even mention defendant's prior conviction for receiving and concealing stolen property during closing argument, we find no basis to conclude that it is more probable than not that error in permitting defendant to be impeached with evidence of the prior conviction, if any at all occurred,

undermines the reliability of the jury's verdict. *Snyder, supra*. Accordingly, defendant is entitled to no relief. *Id.*; *Lukity, supra*.

II

Defendant next argues that the prosecution violated his right to due process by not disclosing his prior conviction for aggravated assault to defense counsel until after the defense presented a character witness to testify regarding defendant's peaceful nature.¹ Defendant also argues that the trial court abused its discretion by admitting the evidence without considering the prosecutor's conduct in this regard. We disagree. As a question of law, we review de novo the question whether a defendant's right to due process has been violated. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

Defendant has not cited, nor have we found, any authority holding that due process requires a prosecutor to disclose a defendant's prior convictions to defense counsel. While the prosecution has a broad duty to disclose exculpatory evidence to a defendant, see *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992), the evidence of defendant's prior aggravated assault conviction was not exculpatory. In any event, a defendant must show prejudice to the defense to establish a due process violation. *People v McGee*, 258 Mich App 683, 700; 672 NW2d 191 (2003). In this regard, we see no basis to impose a general duty on the prosecution to disclose a defendant's prior convictions to the defense. Indeed, it would be reasonable to expect that a defendant would know of his prior convictions. Also, where the defense presents, pursuant to MRE 404(a)(1), a witness to testify that the defendant has a character trait for peacefulness, the prosecutor may respond by cross-examining the witness about "reports of relevant specific instances of conduct." See MRE 405(a).

Defendant argues that the prosecutor's late disclosure of the aggravated assault conviction was in violation of an agreement that the parties had reached prior to trial. This issue was not clearly presented below. At the time defense counsel raised an objection to the use of the conviction during cross-examination of the first character witness, the first argument made was that the conviction might have been of some person other than defendant or that the prior assault might have involved different circumstances. When the trial court allowed further argument on this issue, defense counsel vaguely mentioned "certain representations" made by the prosecutor in the context of a pretrial conference and a motion in limine and argued that the prosecutor had violated those representations. However, defendant did not, and does not on appeal, point to record evidence to support or develop this argument.

¹ For purposes of this discussion, we assume that, contrary to plaintiff's argument, the aggravated assault consideration first came to light after the first character witness testified on direct examination as to defendant's peaceful nature. However, the record is not clear on this issue.

For these reasons, we conclude that defendant has not established any prejudice based on this issue. Further, even if prejudice was established, we note that, again, the prosecutor failed to even mention defendant's prior aggravated assault conviction during closing argument and we would find no basis to conclude that it is more probable than not that any error that occurred here so undermined the reliability of the jury's verdict that defendant is entitled to relief. *Snyder, supra; Lukity, supra.*

III

Defendant also argues that his conviction should be reversed because Detective Cholcher's testimony that defendant told him, "I did it," in reference to the victim's killing, should have been suppressed as the fruit of an illegal arrest. He also contends that trial counsel was ineffective for failing to challenge the legality of the arrest. We conclude that defendant is not entitled to relief based on either contention. With regard to the unpreserved issue of defendant's challenge to the legality of his arrest, relief is available only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, reversal is warranted only if such plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* With regard to the ineffective assistance of counsel claim, we review a trial court's factual findings for clear error, while its resolution of questions of constitutional law is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant asserts that the warrant underlying his arrest was not supported by probable cause and, alternatively, that there was not probable cause to support a warrantless arrest. We need not consider the validity of the arrest warrant because defendant has not shown plain error with regard to the existence of probable cause to support a warrantless arrest.²

A police officer is allowed to make an arrest for a felony based on probable cause to believe the person being arrested committed the felony, even without an arrest warrant. *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). There is probable cause to support such an arrest if "the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *Id.* As an initial matter we note that there is no basis here for finding plain error with regard to the validity of defendant's arrest because, due to defendant's failure to

² We note that it is immaterial whether the police subjectively relied on the arrest warrant to any extent in arresting defendant or whether they subjectively contemplated that the arrest was justifiable as a warrantless arrest. A police officer's action is not invalidated because the officer lacks the state of mind hypothesized by the reasons providing a legal justification for the officer's actions if the circumstances objectively justify the officer's actions. *People v Oliver*, 464 Mich 184, 200; 627 NW2d 297 (2001).

timely raise this issue below, the police may have had information that supported the existence of probable cause to arrest defendant that was never made part of the record. For example, hearsay evidence that is inadmissible at trial might nevertheless properly form part of the basis for probable cause to make an arrest. See *People v Manning*, 243 Mich App 615, 621-622; 624 NW2d 746 (2000).

Furthermore, even disregarding the possibility of additional factors supporting a warrantless arrest, the trial testimony, if accepted as credible, reflects that the police had probable cause to arrest defendant for the victim's killing at the time Detective Cholcher placed him under arrest. Defendant acknowledges that he was the last person known to have seen the victim alive. Also, as noted above, there was testimony that defendant told the police that the victim was dressed in street clothes when she left, but her body was found dressed in only a pajama top. From this, the police reasonably could have inferred that defendant lied when he described how the victim was dressed, which would be consistent with an attempt by defendant to conceal having killed the victim. In addition, trial testimony indicated that the police knew that defendant failed to attend a scheduled interview after the victim's body was found, even though he told Detective Cholcher that he would attend the interview, which provided an additional factor indicative of consciousness of guilt. This trial testimony reflects that the information known to the police when defendant was arrested was sufficient to justify a fair-minded person in believing that defendant committed the murder so as to provide probable cause to support defendant's arrest. *Kelly, supra*. Thus, defendant has not established plain error with regard to the legality of his arrest.

Turning to defendant's ineffective assistance of counsel claim, the record reflects that he did not present testimonial evidence in support of his claim that his arrest was not supported by probable cause. Moreover, as previously discussed, the trial testimony indicated that there was probable cause for defendant's arrest. Thus, defendant has failed to establish the factual predicate for his ineffective assistance of counsel claim, because he has not provided an evidentiary basis for challenging the credibility of the testimony indicating that his arrest was supported by probable cause. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (defendant bears burden of establishing factual predicate for ineffective assistance of counsel claim).

IV

Defendant next argues that Detective Cholcher's testimony regarding defendant's incriminating statement should have been suppressed because it was obtained in violation of his Fifth Amendment right to remain silent. Again, we disagree. In reviewing an alleged violation of a defendant's right to remain silent, "[w]e review the record de novo, but the trial court's factual findings are reviewed under the clearly erroneous standard." *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). Defendant's argument is based on Detective Cholcher's testimony at the suppression hearing that, after he told defendant he would like to ask him "some questions to find out what happened," defendant said, "I really got nothing to say." Defendant

contends that Detective Cholcher failed to honor his assertion of his right to remain silent by proceeding to read him *Miranda*³ warnings, thereby indicating that he would proceed with questioning him. In *Adams, supra*, in rejecting a claim that the defendant's right to remain silent was violated, this Court held that a police detective was permitted to continue interviewing the defendant because he "did not unequivocally invoke his right to remain silent or his right to counsel." *Id.* at 234. Contrary to defendant's argument here, his statement, "I really got nothing to say," did not amount to an unequivocal assertion of his right to remain silent. Rather, this statement, given in response to Detective Cholcher's indication that he wanted to interview defendant, could reasonably be taken as merely expressing that defendant did not have anything important to add to his earlier statements, or that he lacked meaningful information about the victim's death. It was not an unequivocal assertion of his right to remain silent such as an express statement that he did not wish to be questioned further or to continue speaking with the police. Thus, defendant has not established a violation of his right to remain silent.

V

Defendant next asserts that the prosecutor made an improper remark during rebuttal argument and asked the jury to sympathize with the victim when he asked the jury to "[t]ell [the victim] you hear her." Because defendant did not object to this remark below, our review is limited to plain error affecting defendant's substantial rights. *People v Abraham*, 256 Mich App 265, 274-275; 662 NW2d 836 (2003). We conclude that defendant has not established plain error with regard to this issue. This Court has stated that "a prosecutor may not appeal to the jury to sympathize with the deceased and [her] family." *Id.* at 273. However, in *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987), this Court, while recognizing that arguments that "are little more than an appeal to the jury's sympathy for the victim are improper," rejected the defendant's argument that the prosecutor's remarks that there should be "some meaning to [the victim's] death" and "a sense of justice after he died" were improper. In reaching this conclusion, the Court noted that the defendant mischaracterized the prosecutor's remarks by taking them out of context and that the prosecutor's entire closing argument asked the jury to examine all the evidence and "if the evidence indicated defendant's guilt beyond a reasonable doubt, a guilty verdict would provide a sense of justice for the tragic death of an innocent bystander." *Id.* at 386. Similarly, in this case, the prosecutor's rebuttal argument as a whole focused on discussing evidence that showed defendant was guilty. The challenged remark regarding the jury "telling" the victim that it heard her might plausibly be viewed as a metaphorical way of asking the jury to do justice by convicting defendant based on evidence establishing his guilt. In light of *Hedelsky*, we conclude that there was no plain error with regard to the challenged remark.

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

VI

Defendant, who was charged with open murder, next argues that the finding of first-degree felony murder in this case should be set aside because felony murder is not properly included within an open murder charge. Because defendant did not preserve this issue by raising it below, appellate relief is available only for plain error that affected his substantial rights. *Carines, supra*. Defendant has not established error, plain or otherwise.

In *People v McKinney*, 65 Mich App 131, 134-136; 237 NW2d 215 (1975), this Court, relying on *People v Page*, 198 Mich 524; 165 NW 755 (1917), held that a defendant may properly be convicted of first-degree felony murder based on an open murder charge. In *Page*, the Court rejected the defendant's claim of error because the information in that case did not directly state that the charged murder was committed while a robbery was being perpetrated or attempted. The Court's decision was based on a predecessor statute that does not differ materially from the present open murder statute, MCL 767.71. *Page, supra* at 535. Defendant does not address either *Page* or *McKinney* in his brief on appeal. Moreover, the authority that defendant does discuss is not on point and does not undermine the continued vitality of the pertinent holdings in *Page* and *McKinney*. Accordingly, we hold that defendant's conviction of first-degree felony murder was properly within the scope of the open murder charge in this case.

VII

Finally, defendant argues that he is entitled to relief under a cumulative error theory with regard to the admission of his prior receiving or concealing stolen property and aggravated assault convictions and the prosecutorial remark discussed previously. However, reversal based on cumulative error is warranted "only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002). As discussed above, defendant has not established error with regard to the use of his prior aggravated assault conviction. Moreover, with regard to admission of his conviction for receiving or concealing stolen, we have already concluded that any error in the admission of that evidence was harmless, i.e., not prejudicial, under the standard for review of preserved nonconstitutional error. Accordingly, given that defendant has not established plain error with regard to his unpreserved claim of an improper remark by the prosecutor, there is no basis for a finding of cumulative error that denied defendant a fair trial.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald