STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK TATUM, JR.,

Defendant-Appellant.

UNPUBLISHED
June 22, 2004

No. 248037
Calhoun Circuit Court
LC No. 02-003879-FC

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

PER CURIAM.

Defendant appeals as of right his conviction for unarmed robbery, in violation of MCL 750.530. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 40 to 270 months' imprisonment. We affirm.

This case arises out of defendant's robbery of a gas station. The gas station attendant testified that at approximately 7:30 a.m., a man entered the store, put a "t-shirt-type hood" over his head, came around to her side of the counter, held a knife to her mid-section, and demanded that she open the cash register. The attendant described the robber as a black male with a medium build, who was taller than her height of 5'6", and was wearing a t-shirt and jean shorts. The robber had fashioned something to cover his face by cutting holes for his eyes in what appeared to be a yellow rag or t-shirt. The attendant was unable to positively identify defendant at trial. However, the attendant's account of events and description of the robber were corroborated by the gas station's surveillance camera tape.

The attendant testified that the robber took money from the register, and started to leave when a customer drove up in front of the store. In the process of taking some additional money that had fallen onto the floor, the robber picked up some deposit slips from the previous day. When the customer, John Mattingly, entered the store, the attendant told him that the store had been robbed, and that defendant had a knife. Mattingly told the attendant to call the police while he attempted to get the robber's license plate number.

Mattingly testified that as he was driving up to the gas station, he saw a black male approaching the door to the gas station; the man was approximately 5'8" or 5'9", and had a yellow cloth covering part of his face. As Mattingly entered the store, defendant was leaving the store; defendant told Mattingly to "get the hell out of my way." As Mattingly passed defendant, he observed two-thirds of defendant's face; one-third of it was covered with the yellow cloth.

He saw the left side of defendant's face, including defendant's left ear, eye, and part of defendant's nose and mouth. Mattingly was able to positively identify defendant at trial. As defendant walked across the parking lot, Mattingly observed some money fall out of his hand. Mattingly got into his car and followed defendant, who got into a burgundy-colored car, and drove away. Mattingly made a mental note of the license plate number, returned to the gas station, and gave the number to the gas station attendant. Mattingly had not lost sight of defendant from the time defendant left the gas station until the time he got into the burgundy car. Mattingly had not seen defendant before that day, and had no vendetta against him.

Detective Lavern Brann testified that he was on his way to work when he heard radio traffic about the robbery, including a description of the suspect, his vehicle, and the address of the vehicle's registered owner, 83 Walters; Brann radioed Detective Brad Wise and asked him to meet at that address. Brann testified that a vehicle matching the description of the suspect's vehicle turned in front of his car near 83 Walters. The driver was a black male wearing a blue shirt; at trial, Brann positively identified defendant as the driver. Defendant drove into the garage at 83 Walters at approximately 7:40 a.m. Brann testified that the gas station was approximately a ten to twelve minute drive from 83 Walters. As defendant was getting out of the car, the police approached him and arrested him. After being advised of his rights, defendant stated something to the effect of: "oh, hell, no; you've got me locked up for the only one I've done." The police found $951 of "wadded up" money, $1.10 in coins, and receipts with the gas station's name and address on them in defendant's pockets. $81 was recovered from a dirt lot adjacent to the gas station. The police also found pieces of the yellow t-shirt on the road between the gas station and 83 Walters. The t-shirt said "Henderson family reunion," the name of the registered owner of the vehicle that lived at 83 Walters.

Defendant admitted that he lived at 83 Walters, but contended that no one by the name of "Henderson" lived there. Defendant maintained that on the day of the robbery, he went to a gas station other than the one where the robbery occurred, and then went to a car wash to give clothing to a homeless man, and to dispose of his son's soiled diapers. According to defendant, Mattingly, whom he admittedly had never met before, approached him in his car, confronted him about leaving the clothing at the end of the car wash building, and threatened to call the police. Defendant testified that he was insulted, that the confrontation was of a racial nature, and that Mattingly informed defendant that he had taken down his license plate number.

Defendant testified that he generally carries a large amount of cash on his person, which comes from his and his father's disability payments. On the day of the robbery, he was carrying $950. Defendant denied robbing the gas station, denied having deposit slips from the gas station in his pockets, and denied making the incriminating statement attributed to him by the police.

Defendant first argues that his due process rights were violated when the trial court erroneously sustained the prosecutor's hearsay objections to defendant's testimony concerning the alleged verbal altercation between defendant and Mattingly. Whether defendant's right to due process was violated is a question of law that we review de novo. US Const, Am V; Const 1963, art 1, § 17; *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). In a criminal case, due process generally requires that a defendant have an opportunity to be heard in his defense, which includes the right to offer testimony. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). In order "to establish a due process violation, a defendant must

prove prejudice to his defense," and "whether an accused is accorded due process depends on the facts of each case." *Id*. at 700.

Defendant argues that the trial court erroneously sustained the prosecutor's objections on hearsay grounds, because defense counsel was not offering Mattingly's statements to prove the truth of the matter asserted, but rather, to prove that Mattingly in fact made the alleged statements. Defendant correctly states that while MRE 801(c) defines hearsay as an out-of-court statement offered into evidence to prove the truth of the matter asserted, "where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay." *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993).

Nonetheless, a careful review of the record reveals that defendant was able to give a full account of his version of events, which supported his theory of the case that he was framed by the police and Mattingly. That is, the jury heard defendant's testimony that Mattingly confronted him, threatened to call the police, called him a racial epithet, and informed defendant that he had taken down his license plate number. Defendant's testimony reiterating Mattingly's confrontational comments about defendant leaving clothing at the end of the car wash building was not excluded on the basis of hearsay; indeed, the trial court agreed that Mattingly's comments were not hearsay. Defendant's testimony that Mattingly threatened to call the police was not excluded on the basis of hearsay: the prosecutor belatedly objected to that portion of defendant's testimony, and the trial court acknowledged that defendant had already responded and directed the parties to move on. While the trial court sustained the prosecutor's objection to defendant's testimony concerning specific insults allegedly made by Mattingly to defendant on the basis that the testimony constituted hearsay, defense counsel rephrased the question and elicited testimony that Mattingly called defendant a racial epithet. Again, the prosecutor belatedly objected, and the trial court acknowledged that defendant had already responded and directed the parties to move on. Defense counsel then elicited testimony as to the specific racial epithet used. Again, the prosecutor belatedly objected, and while the trial court stated that it would sustain the objection, the objectionable testimony had already been elicited, and therefore the trial court directed the parties to move on. Defense counsel then elicited testimony that Mattingly told defendant that he wrote down defendant's license plate number. Again, the prosecutor belatedly objected, and while the trial court stated that it would sustain the objection, the objectionable testimony had already been elicited, and therefore the trial court again directed the parties to move on.

In light of this record, defendant cannot prove prejudice against his defense; he was allowed to present his theory of the case, that he was framed by the police and Mattingly. MRE 103(a). Accordingly, defendant is not entitled to relief on this basis.

Defendant next argues that the trial court erred in allowing the prosecutor to impeach him with his previous conviction for attempted forgery. He also contends that trial counsel was ineffective for failing to challenge the admission of such evidence. We conclude that defendant is not entitled to relief based on either contention.

Generally, we review a trial court's decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). However, because defendant failed to preserve this issue for appeal by objecting to the

admission of his prior conviction for impeachment purposes, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, defendant must show prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id*. 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). Here, we are convinced that any error by the trial court in admitting defendant's prior conviction for impeachment purposes did not affect the outcome of the lower court proceedings.

> MRE 609 provides in pertinent part:
>
> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs the prejudicial effect.
>
> (b) Determining Probative Value and Prejudicial Effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the convictions similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

Because attempted forgery appears to involve an element of dishonesty or false statement, it was arguably admissible for impeachment purposes without further consideration. MRE 609(a)(1); *People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988). See also *People v Worden*, 91 Mich App 666, 683; 284 NW2d 159 (1979), stating that fraud is inherent in forgery. However, because we conclude that any error in admitting defendant's prior conviction would not provide a basis for relief under the standard for unpreserved nonconstitutional error, we find it unnecessary to resolve whether, for purposes of admission under MRE 609(a), the offense of

attempted forgery is more properly considered a crime involving dishonesty or false statement, or theft.

Although we do not dispute that defendant's testimony, and therefore his credibility, was an important aspect of his defense, we note that defendant acknowledged his prior conviction for attempted forgery when he was 17 years old, and explained that he had since matured and was now an honest 32-year-old. Indeed, in closing argument, defense counsel argued that defendant pleaded guilty to the prior offense of attempted forgery because he was guilty, but that he was not guilty of committing the robbery in the instant case. We find no basis to conclude that error in permitting defendant to be impeached with evidence of his prior conviction affected the outcome of the lower court proceedings, especially in the context of the overwhelming evidence of his guilt. *Carines, supra* at 763. Accordingly, defendant is not entitled to relief on this basis.

Turning to defendant's ineffective assistance of counsel claim, the record reflects that defense counsel did not object to the admission of defendant's prior conviction for attempted forgery for purposes of impeachment. However, defense counsel used defendant's admission and explanation of the prior crime to support the claim that defendant did not commit the crime in the instant case. That is, defense counsel argued that defendant admitted that he committed attempted forgery because he was guilty, that he had matured since that time, and that he is maintaining that he did not commit the armed robbery in the instant case because he did not in fact do so. Therefore, defendant has failed to establish that counsel's performance fell below an objective standard of reasonableness, and he is not entitled to relief on this basis.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette