

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL EUGENE EMERSON,

Defendant-Appellant.

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UNPUBLISHED

June 22, 2004

No. 248331

Jackson Circuit Court

LC No. 02-006441-FC

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

PER CURIAM.

Defendant, Randall Eugene Emerson, appeals as of right his conviction by jury of two counts of assault with intent to commit murder, MCL 750.83. This case stems from a 1992 shooting in Jackson, Michigan. Defendant argues that he was denied effective assistance of counsel and that the trial court abused its discretion when it admitted evidence of defendant's assault with intent to rob while armed conviction, MCL 750.89. Defendant was sentenced<sup>1</sup> to two concurrent prison terms of 300 to 600 months. We affirm.

**I. FACTS**

On November 2, 1992, two men attempted an armed robbery at a Jackson gas station. During the robbery attempt, two employees of the gas station sustained gunshot wounds to the face. Neither employee (the only witnesses to the crime) was ever able to identify defendant or the other man convicted from this incident, Demetrius Givans.

Givans was prosecuted for this offense in 1994, and pleaded guilty to two counts of assault with intent to rob while armed, MCL 750.89. Carl Roberts, formerly a Jackson Police detective, testified that defendant was not charged with this crime in 1992 because at the time Givans refused to testify against defendant. Nearly ten years later, shortly before the statute of limitations was due to expire, Givans changed his mind about testifying against defendant. In this case, he testified that on November 2, 1992, he and defendant decided to rob a gas station in order to obtain money to help defendant's brother get out of jail. Givans was to go into the store

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<sup>1</sup> Defendant was sentenced under the 1988 judicial sentencing guidelines due to the date of the offense.

and ask for cigarettes and when the clerk opened the register, they would steal the money. Givans stated that before they entered the gas station he examined defendant's .22 caliber gun because it was so shiny that he didn't believe it was real. Givans testified that when they entered the store, he asked for cigarettes, but before the clerk could answer, defendant stepped out from behind Givans and shot the clerk. Defendant then shot the other employee.

Defendant testified on his own behalf that he did not know where he was on November 2, 1992, but that he did not commit this crime. He further testified that he and Givans had not been friends since September of 1992. This testimony was impeached by the prosecutor who introduced evidence that on October 27, 1992 defendant and Givans committed assault with intent to rob while armed together.

## II. EVIDENCE OF PRIOR ASSAULT CONVICTION

Defendant argues that the admission of his assault with intent to rob while armed conviction was improper character evidence and improper impeachment. He contends that the trial court abused its discretion because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and because the trial court failed to apply the balancing test set forth in MRE 609. We disagree.

### A. Standard of Review

We review a trial court's decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

### B. Analysis

Defendant's argument is based on MRE 609, that provides evidence of a prior conviction may be admissible for impeachment purposes if it is an offense involving dishonesty or a false statement, or, after a balancing test, in the case of an offense involving theft. MRE 609(a); *People v Parcha*, 227 Mich App 236, 244-246; 575 NW2d 316 (1997). However, we note that MRE 609 is not the only evidentiary basis for prior conviction evidence, but rather, MRE 609 only applies to general impeachment evidence. *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985). Evidence of prior convictions may still be admissible for other purposes, such as to rebut specific statements of a defendant who testifies at a trial. *Id.* When offered for the narrow purpose of rebutting specific testimony rather than to attack credibility in general, MRE 609 is inapplicable. *Id.* at 417.

Defendant testified that he and Givans had discontinued their association in the fall of 1992. Upon further questioning, he estimated that he had "not hung out" with Givans after September of 1992. The prosecution then introduced evidence that defendant and Givans had been convicted of assault with intent to rob while armed stemming from an incident that happened on October 27, 1992, just one week before the instant offense took place. Prior to trial, the court cautioned the attorneys not to mention this conviction.

As with any type of rebuttal evidence, it is limited to only relevant evidence, MRE 401, and to situations where the trial court determines that the probative value of the evidence is not substantially outweighed by its prejudicial effect, MRE 403. *Id.* at 415. The incident from which the present case arose occurred on November 2, 1992, just one week after the incident underlying defendant's assault with intent to rob while armed conviction. Establishing a relationship between defendant and Givans in the week preceding this crime is germane. Here, there was conflicting testimony from Givans and defendant about whether they were friends at the time of the crime. Thus, the resolution of this discrepancy with independent evidence of their continuing consortium a week before the crime was highly relevant.

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. "Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod and rem'd 450 Mich 1212 (1995). Any relevant evidence will be damaging to some extent. Evidence is unfairly prejudicial if "a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, or it would be inequitable to allow the proponent of the evidence to use it." *Id.* at 75-76. Evidence that is unfairly prejudicial is evidence that injects considerations extraneous to the merits of the case, i.e., bias, sympathy, anger, or shock. *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994). As to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, the determination is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

We find that the inherent prejudicial effect of the evidence did not substantially outweigh the probative value in discrediting defendant's claim that he and Givans were not friends at the time of this crime. Certainly the fact that defendant previously was convicted of an assault with intent to commit armed robbery stemming from an incident that occurred only one week before this incident undermines defendant's testimony that he hadn't been friends with Givans since September 1992. Thus the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

Furthermore, the trial court instructed the jury:

There's been evidence that the Defendant was involved in another criminal activity with Demetrius Givans. You can not use that incident to convict the Defendant of the charges you are now considering. It must not be determined that if he was involved in that incident that he was involved in the present incident.

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We hold that the trial court did not abuse its discretion when it allowed the prosecution to refute defendant's testimony that he had not associated with Givans since September of 1992. Even if he was merely mistaken about the timing of his parting of ways with Givans, defendant's testimony was misleading to the jury. Defendant opened the door to the prosecutor's questioning. Therefore, evidence of defendant's prior conviction was admissible for the narrow

purpose of refuting defendant's testimony even though such evidence would not have been admissible under MRE 609 to generally impeach defendant's credibility.

Further, an abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Thus, the trial court did not abuse its discretion in admitting the evidence.

### III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he received ineffective assistance of counsel because his attorney failed to object to the testimony of a prosecution witness that implicated defendant in other criminal activity and because his attorney failed to properly advise defendant about the use of a prior conviction to impeach defendant's testimony. We disagree.

#### A. Standard of Review

When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The defendant must make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *Rodriguez, supra*, unless the details of the alleged deficiency are apparent on the already-existing record, *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Here, the details of the alleged deficiency are included in the existing record.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

#### B. Analysis

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Generally, 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, *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80

L Ed 2d 674, reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 2d 864, on rem 737 F2d 894 (CA 11, 1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

### 1. Failure to Object to Testimony

Thomas Hicks was incarcerated with defendant in county jail in 1992. During his testimony, Hicks related that he asked defendant why he was in jail. According to Hicks, defendant explained that he had escaped from a juvenile home by stabbing an elderly guard, but was caught. Defense counsel did not contemporaneously object to this testimony, but did move for a mistrial based on this testimony the following day. The trial court denied the motion, but offered a curative instruction. Even if counsel had objected contemporaneously, the remedy would still have been a curative instruction. Thus, defense counsel would not have achieved a different result had objection been timely.

Furthermore, by not objecting contemporaneously, defense counsel may have been exercising trial strategy in trying to downplay the significance of the testimony. An objection at the time would have drawn the attention of the jury. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has failed to demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; that there is a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different, *Strickland, supra*; and that the resultant proceedings were fundamentally unfair or unreliable, *Rodgers, supra* at 714.

### 2. Failure to Advise on the Perils of Perjury

Defendant testified that he and Givans had discontinued their association in the fall of 1992. The prosecution then introduced evidence that defendant and Givans had been convicted of assault with intent to rob while armed stemming from an incident that happened on October 27, 1992. Defendant asserts that his lawyer unequivocally told him that this prior conviction would not be brought up at trial. While arguing his motion for a mistrial, defense counsel professed to have been ineffective because he gave defendant this advice.

Here, defense counsel could not have anticipated that defendant would perjure himself so that this conviction would be used to impeach defendant's specific testimony. Had defendant truthfully and accurately answered the prosecutor's question, his prior conviction would not have been introduced. Thus, any deficiency in the presentation of the defense arose from defendant's own misconduct. "There is no right, constitutional or otherwise, to testify falsely." MRPC 3.3(a)(4).

Although Michigan case law addressing this specific topic is lacking, an Ohio appeals court commented, "Defendant's claim amounts to an assertion that his counsel should have advised him not to lie to the grand jury. Attorneys do have ethical and legal obligations but those obligations will not permit a client to hold an attorney responsible for the client's wrongdoing." *State v Hughes* 1990 WL 187941, 2 (Ohio App 3 Dist, 1990). Justice requires

that he be held responsible for his misdeeds and will not permit him to shift the blame to his lawyer. *Id.*

Defendant has failed to demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *Strickland, supra.* Counsel cannot reasonably be expected to anticipate that his client will lie under oath. Defendant's argument that he did not receive effective assistance of counsel is without merit.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Bill Schuette