

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAVERT HARVEY,

Defendant-Appellant.

UNPUBLISHED
February 28, 2008

No. 276691
Wayne Circuit Court
LC No. 06-012528-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to rob while armed, MCL 750.89, but acquitted him of a charge of carjacking, MCL 750.529a(1). Defendant appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant first argues that the prosecutor committed misconduct by presenting misleading or false testimony from Dominick Pryor, defendant's alleged accomplice during the incident underlying this case, regarding the existence and nature of Pryor's plea agreement, which included a requirement to provide testimony against defendant. Because this issue was not raised below review is only for plain error affecting substantial rights. *People v McGhee*, 268 Mich App 600, 630; 729 NW2d 508 (2005).

We conclude that defendant is not entitled to relief based on this issue, because the prosecutor's conduct did not affect defendant's substantial rights. While the prosecutor's conduct could easily be viewed as involving the elicitation of misleading testimony suggesting that Pryor was not testifying under a plea agreement, defense counsel powerfully elicited during cross-examination that Pryor in fact was testifying under a plea agreement that granted him substantial concessions. Further, it is most likely that, if this matter had any effect on the jury, the effect was to defendant's benefit by making it appear that both Pryor and the prosecutor were dishonest during Pryor's direct examination.

Defendant also argues that trial counsel was ineffective for asking Pryor on cross-examination if Pryor had carjacked another car the night before the incident underlying this case. Defendant asserts that that question opened the door to the prosecutor asking Pryor if defendant was with him the previous night and if defendant knew how Pryor got that car, which reflected negatively on defendant's character. We disagree.

Because defendant did not raise this issue below review is limited to the existing record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was deficient, and (2) a reasonable probability exists that but for the deficient performance the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). There is a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 600.

We conclude that trial counsel's conduct constituted sound trial strategy. Defendant was charged with both assault with intent to rob while armed and carjacking. Kemonie Hinkle's testimony indicated that defendant was actively involved in attempting to rob Hinkle's person while Pryor threatened Hinkle with a gun, but that defendant walked away before Pryor took Hinkle's car. Thus, by asking questions designed to elicit that Pryor committed a previous carjacking, trial counsel could reasonably have been attempting to suggest to the jury that the carjacking in this case was likely Pryor's own idea and, accordingly, that defendant should be acquitted of the carjacking charge. Indeed, trial counsel's conduct in this regard may well have been successful, given that defendant was acquitted of the carjacking charge. Given Hinkle's testimony, trial counsel could reasonably have viewed it as improbable that the jury would acquit defendant of the assault with intent to rob while armed charge, and thus decided to focus most strongly on trying to obtain an acquittal on the carjacking charge. Accordingly, defendant has not established that trial counsel's conduct was outside the bounds of sound trial strategy.

Finally, defendant's statement of the question presented and heading for the ineffective assistance issue indicates an argument that counsel was ineffective in failing to object to the prosecutor's misleading presentation of evidence, presumably referring to the prosecutor's conduct during Pryor's direct examination. However, it is apparent that trial counsel's failure to object was within the bounds of sound trial strategy. Rather than object, trial counsel effectively allowed the prosecutor to appear to be suggesting that there was no plea agreement for Pryor's testimony, and that Pryor had not received a benefit in return for his testimony. Trial counsel then proceeded to demonstrate on cross-examination that Pryor in fact testified pursuant to a plea agreement that granted him valuable concessions. This course of conduct allowed trial counsel to effectively indicate to the jury that both Pryor and the prosecutor had been attempting to mislead the jury during Pryor's direct examination. Trial counsel could reasonably have determined that this conduct was more beneficial to the defense than interposing an objection that might have lead to the prosecutor revealing the truth about the plea agreement during direct examination, and thereby denying trial counsel this opportunity to undermine the credibility of Pryor and the integrity of the prosecutor in the eyes of the jury.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Alton T. Davis