STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2008
v	No. 273087 Livingston Circuit Court
JASON RYAN NORTON, Defendant-Appellant.	LC No. 05-014901-FH

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right from his conviction of perjury, MCL 750.422. The trial court sentenced defendant to 38 months to 15 years in prison, to be served consecutively to defendant's sentence in another case. We affirm in part, vacate in part, and remand.

Defendant's perjury conviction arose from his testimony given in a prior criminal trial in which he was convicted of driving with a suspended license. During that trial, defendant claimed under oath that a friend had driven him to court on the day of the trial. However, a police officer testified that he had seen defendant driving a vehicle up to the courthouse. The trial court ordered that the friend be brought to the courtroom. The friend confirmed the officer's testimony, stating that defendant had driven to court and that the friend had been a passenger. The prosecutor subsequently charged defendant with perjury, and the present case ensued.

Defendant presents five arguments on appeal. First, defendant claims that the trial court violated his constitutional right to confrontation by allowing testimonial evidence from the prior trial, the friend's testimony, to be read into evidence at the perjury trial. A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). However, preliminary questions of law that are implicated in deciding whether to admit evidence, such as whether a rule of evidence or the constitution precludes admissibility, are reviewed de novo. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that an out-of-court statement by a witness that is testimonial in nature is inadmissible under the Confrontation Clause, US Const, Am VI, unless the witness is

unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness.

It is difficult for us to discern from the record of the previous trial whether defendant, who was acting as his own counsel, was actually given an opportunity to cross-examine his friend after the trial judge did the lone questioning. Further, it is difficult for us to conclude that the friend was "unavailable" when it appears that he was in a courtroom hallway during the perjury trial. After he was located, defendant's friend did in fact testify in the perjury trial in a manner consistent with his testimony, earlier read into evidence, from the previous trial. Accordingly, assuming error in allowing the testimony to be read into evidence, it was rendered harmless beyond a reasonable doubt. *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005). Defendant was ultimately permitted the opportunity to exercise his right of confrontation.

Defendant makes an accompanying argument that the trial court erred in allowing admission of both the in-person testimony by the friend and his previous statement because it resulted in the admission of a prior consistent statement. MRE 801(d)(1) indicates that a prior consistent statement of a witness is not hearsay if the declarant, here the friend, testified at trial and was subject to cross-examination and the statement was offered to rebut an express or implied charge that the declarant was fabricating. Here, the consistent out-of-court statement was ultimately the friend's testimony given in the previous trial that was read into evidence at the perjury trial. It cannot be disputed that the friend's live testimony was admissible, and to the extent that the jury should not have heard pre-confirmation of that testimony, any error was harmless because of the live testimony and the other overwhelming evidence of guilt. MCL 769.26; *Lukity*, *supra* at 495.[1]

Next, defendant argues that the trial court erred by allowing a police officer to testify that defendant's testimony in the prior trial was untruthful, thereby expressing an opinion that defendant was guilty. We review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[I]t is clear that a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense." *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). The officer did not specifically express an opinion or state that defendant was guilty of perjury, and the statement that defendant lied was factual in nature based on personal observations and not the expression of a pure opinion. Regardless, the officer was permitted to testify regarding defendant's denial in the previous prosecution that he was driving the vehicle, and the officer could testify about witnessing defendant operate the vehicle. Any reasonable person of average intelligence would certainly infer from this testimony alone that defendant was lying, and the fact that the officer further testified that defendant was lying clearly did not prejudice defendant. Moreover, there was overwhelming evidence that defendant committed perjury. Thus, the outcome of the proceedings was not affected, and the integrity of the proceedings were not

[1] We do note that, despite the unusual posture of this case relative to the chronology in which the evidence was admitted, the friend did testify, he was subject to cross-examination, and defendant's position, by virtue of the defense presented, implied that his friend was lying.

compromised, nor was defendant actually innocent. *Carines, supra* at 763. Accordingly, reversal is unwarranted.

Defendant's third and fourth challenges concern the judgment of sentence. We reject defendant's contention that the judgment of sentence is unclear as to whether the perjury sentence is to be served consecutively or concurrently to a sentence on a criminal sexual conduct conviction. An amended judgment of sentence clearly indicates that the sentences are to be served consecutively. As to defendant's challenge to the trial court's assessment of attorney fees against him in the amount of $850, we agree that the trial court erred in assessing attorney fees without first taking into consideration defendant's ability to pay. This Court has held that a trial court may not order a defendant to pay attorney fees relative to the costs of his court-appointed counsel unless there is some indication that the court considered the defendant's current and foreseeable ability to pay. *People v Dunbar*, 264 Mich App 240, 255-256; 690 NW2d 476 (2004). On February 8, 2008, our Supreme Court in *People v Carter*, 480 Mich __; __ NW2d __ (2008) (Docket No. 134687), denied the prosecutor's application for leave after first hearing oral arguments regarding the soundness of the *Dunbar* opinion. Thus, *Dunbar* remains controlling law. The prosecution acknowledges the *Dunbar* rule and concedes that attorney fees were improperly assessed. We therefore vacate the attorney fee assessment and remand to the trial court for reconsideration of the issue concerning attorney fees under the principles espoused in *Dunbar*.[2] We also note that, as mentioned in the prosecutor's brief, there appears to be a typographical error in the amended judgment of sentence with respect to the lower court case number from the CSC conviction (section 8 of the judgment concerning the consecutive sentence). On remand, the judgment is to be corrected if indeed in error.

Defendant's final assertion is that his counsel was ineffective for failing to object to the police officer's testimony and for failing to object to the alleged sentencing errors. As defendant has incurred no prejudice and any sentencing mistakes will be corrected, the argument is rejected. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio

[2] As noted in *Dunbar*, *supra* at 255 n 14, "[j]ust as an evidentiary hearing is not required at the trial level, one is not required on remand. The court may obtain updated financial information from the probation department."