STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2008
v	No. 271478 Oakland Circuit Court
RASHAUN MICHAEL JOHNSON-PEEL, Defendant-Appellant.	LC No. 2005-204119-FC

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

A jury convicted defendant Rashaun Johnson-Peel of assault with intent to commit murder,[1] armed robbery,[2] and two counts of possession of a firearm during the commission of a felony.[3] The trial court sentenced Johnson-Peel to concurrent prison terms of 18 to 30 years for the assault and robbery convictions, to be served consecutive to concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

I. Basic Facts And Procedural History

On June 20, 2005, the owner of a party store in Southfield was shot during a robbery. The victim testified that a young man ran out of the store with a bag of stolen DVDs and candy. The victim confronted the young man in the parking lot and escorted him back into the store. As the victim prepared to phone the police, he was shot in the head and the gunshot severely limited his vision. The principal issue at trial was Johnson-Peel's identity as the perpetrator. The victim could not identify the perpetrator, but thought he was an occasional customer. A few days after the shooting, the victim told the police that the perpetrator might be William Dominic Bell, the son of one of his more frequent customers. But about two months later, the victim remembered the perpetrator being referred to as "Shaun" when he came to the store in the past.

[1] MCL 750.83.

[2] MCL 750.529.

[3] MCL 750.229b.

While investigating Bell, Southfield police officers received information that led them to refocus their investigation on Johnson-Peel. After the police arrested Johnson-Peel, he told a jail inmate, Germaine Jackson, that he had been charged with attempted murder and that he shot a foreign person in the face with a .22 caliber gun. Johnson-Peel told another jail inmate, Kirk Korecki, that he was not worried about being charged with assault with intent to commit murder because, even though he shot the gentleman, the gun would never be found. At trial, Johnson-Peel presented an alibi defense and claimed that the prosecution witnesses who linked him to the shooting were not credible.

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Johnson-Peel argues that he was denied the effective assistance of counsel and seeks either a new trial or remand for a *Ginther*[4] hearing. Because Johnson-Peel did not file a motion to remand in accordance with MCR 7.211(C)(1), and has not otherwise demonstrated any additional facts to be developed on remand with an appropriate offer of proof, we deny his request for a remand.[5] Our review of this issue is limited to mistakes apparent from the record.[6]

B. Legal Standards

"To establish ineffective assistance of counsel, [a] defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms."[7] A defendant must overcome a strong presumption that counsel's performance was sound trial strategy.[8] Further, a defendant must establish prejudice, that is, a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.[9]

C. Polling The Jury

Johnson-Peel first claims that counsel was ineffective because he failed to request that the jury be polled to determine if the verdict was unanimous. Johnson-Peel's failure to establish prejudice is dispositive of this claim. There is no requirement that the jury be polled in open court.[10] Absent proof to the contrary, it can be presumed that the jury followed the trial court's instruction that the verdict must be unanimous.[11] We find nothing about the foreperson's request

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[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[5] *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

[6] *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

[7] *Id*. at 714.

[8] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[9] *Id*.

[10] MCR 6.420(D).

[11] See *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000).

to have another juror read the verdict form that supports an inference that the jury did not reach a unanimous verdict. Because there is no evidence that the jury did not follow the trial court's instruction, Johnson-Peel's ineffective assistance of counsel claim on this ground cannot succeed.

D. Exclusion Of Testimony

Johnson-Peel next claims that counsel was ineffective because he failed to move to exclude the testimony of the two jail inmates who testified against him. Because Johnson-Peel has failed to cite authority in support of his argument that the testimony was inadmissible, he has not met his burden of showing that counsel's performance was deficient. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim."[12]

To the extent that Johnson-Peel suggests that counsel should have moved to exclude the testimony under MRE 403, on the ground that its probative value was substantially outweighed by the danger of unfair prejudice, we find no support for this claim. The apparent basis for Johnson-Peel's argument is that the full "kite" used by Jackson and the back of the "kite" used by Korecki to initiate communications with law enforcement officers at the jail could not be located. This did not affect Johnson-Peel's right of cross-examination, which provided him with a reasonable opportunity to test the truth of the witnesses' testimony and to show any facts on which an inference of bias, prejudice, or lack of credibility may be drawn.[13] The missing "kite" evidence affected only the weight of the witnesses' testimony, not its admissibility.[14]

Moreover, to the extent that Johnson-Peel argues that defense counsel was deficient for failing to offer as impeachment evidence the recorded interviews of Korecki and Jackson that were conducted after they submitted their respective "kites," rather than rely on his cross-examination of these witnesses regarding the content of the interviews, we similarly find that the record does not support his claim. Decisions regarding what evidence or witnesses to present are presumed to be matters of trial strategy.[15] The failure to present evidence only constitutes ineffective assistance of counsel if it deprives a defendant of a substantial defense.[16] "A substantial defense is one that might have made a difference in the outcome of the trial."[17]

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[12] *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

[13] *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993); *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985).

[14] Cf. *People v Jennings*, 118 Mich App 318, 324; 324 NW2d 625 (1982) (alleged deficiency in procedure used by police to collect and preserve evidence affected the weight of evidence, not the admissibility); see also MRE 104(e) (party may introduce evidence relevant to weight or credibility of admitted evidence).

[15] *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

[16] *Id*.

[17] *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defense counsel indicated in his opening statement that he would be introducing evidence of the recorded interviews in some fashion. He also told the jury that he was recently given two tapes and asked the jury to "look to those tapes." He also stated, "My client will testify that immediately upon being retained in this case I went one time to Oakland County Jail and strongly advised him against speaking to anyone about this case except for me under any circumstances." Johnson-Peel later testified that he was advised not to discuss the case with anyone in jail. He also denied telling Korecki or Jackson that he shot the victim.

Although there is no indication in the record that defense counsel offered the tapes of the interviews of Korecki and Jackson into evidence, it is clear that defense counsel used information from those interviews when cross-examining each witness. He again alerted the jury to the existence of the tapes in his closing argument when commenting, with respect to Jackson, "[h]e couldn't remember he was smoking. I saw the tape. Don't say what I say is not evidence. He asked for an ashtray for his cigarette and the Detective says here's a cigarette for the road. He smoked all the way through the whole thing. If you were not smoking—I'm telling you, the guy was lying . . . . "

We find no basis for concluding that defense counsel's use of the information in the recorded interviews constituted unsound trial strategy. Further, there is nothing to indicate that Johnson-Peel was denied a substantial defense by the jury's failure to hear the full text of recorded interviews. Moreover, we are not persuaded that defense counsel's failure to explain to the jury why the tapes were not played at trial demonstrates either the requisite deficient performance or prejudice necessary to establish a claim of ineffective assistance of counsel.

E. Jury Instructions

Next, Johnson-Peel argues that defense counsel was ineffective by not requesting three standard jury instructions, CJI2d 5.12 (prosecutor's failure to produce witness whose appearance was the responsibility of the prosecution), CJI2d 5.1 (witness impeachment by prior conviction), and CJI2d 5.8(1) (character of witness for truthfulness). We disagree. The use of the standard criminal jury instructions is not required.[18] They should be examined carefully to ascertain their accuracy and appropriateness to the case at hand.[19]

Johnson-Peel has not established that CJ2d 5.12 was appropriate in light of the prosecutor's filing of an amended witness list on January 10, 2006, which did not include Bell, and in light of the trial court's decision to grant the prosecutor's motion to strike any remaining witnesses on its witness list. "The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties."[20]

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[18] *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

[19] *Id*.

[20] MCL 767.40a(4); see also *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003).

We also reject Johnson-Peel's alternative claim that defense counsel was ineffective by not interviewing or calling Bell as a witness at trial. The existing record does not factually indicate the nature of defense counsel's pretrial investigation of Bell or the substance of Bell's potential testimony. There is no indication that Bell could have provided Johnson-Peel with a substantial defense.[21] The burden was on Johnson-Peel to establish the factual predicate for his claim.[22] Further, Johnson-Peel has not demonstrated with an appropriate offer of proof that the case should be remanded for a *Ginther* hearing on this issue.[23] Johnson-Peel's unsupported speculation that Bell would have implicated himself in the crime is insufficient to warrant a remand.

With respect to CJI2d 5.8(1), Johnson-Peel has failed to demonstrate any character evidence that would support this instruction. Defense counsel is not ineffective for failing to make a futile request for an instruction.[24]

With respect to CJI2d 5.1, we note that impeachment by prior conviction is appropriate for a crime that contains an element of dishonesty or theft.[25] The record indicates that Korecki testified that he had prior convictions involving theft or dishonesty and that the trial court did, in fact, given a cautionary instruction based on CJI2d 5.1 to assist the jury in evaluating his testimony. The trial court instructed the jury, in part, that it "may consider his past criminal convictions along with all the other evidence when you decide whether you believe his testimony here in court and how important you think it is."

Although there was no reference to Jackson in the instruction, Johnson-Peel has not established that CJI2d 5.1 was appropriate for his prior convictions. To the extent that Johnson-Peel's argument is predicated on Jackson's motive for providing information to law enforcement officers, the trial court's general instructions regarding witness credibility were sufficient to protect Johnson-Peel's rights. The trial court instructed the jury on several factors that it could consider to determine a witness's credibility, such as whether the witness has any special reason to lie or whether any other influences affect the testimony. Defense counsel's failure to request additional instructions did not deprive Johnson-Peel of the effective assistance of counsel.

F. Defense Counsel's Comments

Next, Johnson-Peel argues that defense counsel was ineffective by commenting during his cross-examination of Henry Francis that "I don't know if we need to get this man a lawyer . . . ." Although it might have been more appropriate to make the comment outside the presence of the jury, it is clear from the record that it was directed at evidence that Francis committed

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[21] *Dixon*, *supra* at 398.

[22] *Carbin*, *supra* at 601.

[23] MCR 7.211(C)(1)(a); *Williams*, *supra* at 200.

[24] Cf. *Rodgers*, *supra* at 715 (counsel need not make futile objections).

[25] MRE 609; *Rodgers*, *supra* at 715.

perjury by giving testimony at trial that contradicted his unfavorable testimony against Johnson-Peel at the preliminary examination. Defense counsel elicited testimony from Francis that he had lied at the preliminary examination because he felt pressured and scared. Defense counsel asserted in closing argument that Francis was truthful at trial.

We agree with the prosecution's argument that defense counsel may have made a strategic decision to point out to the jury that Francis faced possible criminal consequences for changing his story at trial. But regardless of whether defense counsel's performance fell below an objective standard of reasonableness, Johnson-Peel has not shown any reasonable probability that the outcome of the trial would have been different if defense counsel had not made the comment. Therefore, his claim of ineffective assistance on this ground fails.[26]

Similarly, Johnson-Peel's claim of ineffective assistance of counsel predicated on defense counsel's response to the trial court's admonishment that his closing argument be based on the evidence fails because the necessary prejudice has not been shown.[27] Johnson-Peel has not established any deficiencies by defense counsel that warrant a new trial.

III. Prosecutorial Misconduct

A. Standard Of Review

Johnson-Peel argues that the prosecutor engaged in misconduct by commenting in his closing argument that Johnson-Peel is Bell's cousin when explaining how the police investigation changed its focus from Bell to Johnson-Peel. Johnson-Peel argues that there was no evidence that he had a familial relationship with Bell. Because defense counsel did not object to the prosecutor's remarks, but only chose to dispute the prosecutor's claim that there was a familial relationship between Bell and Johnson-Peel in his responsive closing argument, this issue is unpreserved. Therefore, we consider Johnson-Peel's claim under the plain error doctrine in *People v Carines*.[28] The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.[29]

B. Applying The *Carines* Standards

Johnson-Peel cannot satisfy the threshold requirement of plain error under *Carines*. Detective James Dziedzic's testified that Bell is Johnson-Peel's cousin. Therefore, the

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[26] *Carbin, supra* at 600.

[27] *Id*.

[28] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). See also *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[29] *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

prosecutor was free to argue the evidence at trial.[30] Additionally, because the prosecutor's statement was not improper, defense counsel was not ineffective for failing to object.[31]

IV. The Great Weight Of The Evidence

A. Standard Of Review

Johnson-Peel argues that the jury's verdict was against the great weight of the evidence and, therefore, that the trial court erred in denying his motion for a new trial. We review a trial court's decision on a motion for a new trial for an abuse of discretion.[32] "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes."[33]

B. Legal Standards

A motion for a new trial on this ground differs from a challenge to the sufficiency of the evidence. When considering whether there is sufficient evidence to sustain a conviction, a court views the evidence in a light most favorable to the prosecution and determines whether "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[34] The credibility of the evidence is for the jury to decide.[35]

Conversely, where a defendant seeks a new trial on the ground that the verdict is against the great weight of the evidence, the appropriate inquiry is whether the evidence preponderates heavily against the verdict and a miscarriage of justice would result if a new trial is not granted.[36] A trial court does not sit as a thirteenth juror when deciding a motion for new trial.[37] The trial court must defer to the jury's determination absent exceptional circumstances, such as testimony that contradicts indisputable physical facts or laws, is patently incredible or defies physical realties, is material and so inherently implausible that a reasonable juror could not believe it, or was seriously impeached in a case marked by uncertainty and discrepancies.[38]

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[30] *Schutte, supra* at 721.

[31] *Carbin, supra* at 600; *Rodgers, supra* at 714.

[32] *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

[33] *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006), quoting *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

[34] *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

[35] *Id.* at 514-515.

[36] *Lemmon, supra* at 642.

[37] *Id*.

[38] *Id.* at 643-644; see also *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003).

C. Applying The Standards

We conclude that Johnson-Peel has not established that the trial court abused its discretion in denying his motion for new trial. The trial court found, and we agree, that the credibility of the testimony of the two jail inmates was for the jury to decide. The testimony was not devoid of all probative value or was such that the jury could not have believed it.[39]

V. Sentencing

A. Standard Of Review

Relying on *Blakely v Washington*,[40] Johnson-Peel argues that resentencing is necessary because the trial court scored two offense variables based on facts that he did not admit and were not proven beyond a reasonable doubt at the jury trial. Because Johnson-Peel did not object to the scoring of either offense variable on this ground at sentencing, our review is limited to plain error affecting Johnson-Peel's substantial rights.[41]

B. *Blakely*

The Michigan Supreme Court reaffirmed in *People v Harper*[42] that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Therefore, the trial court's reliance on facts that Johnson-Peel did not admit or that the jury did not find, if any, was not plain error.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering

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[39] *Lemmon*, *supra* at 643-644.

[40] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[41] See *People v McCuller*, 479 Mich 672, 695; 739 NW2d 563 (2007); *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

[42] *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007).