STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2008
v	No. 274771 Livingston Circuit Court
ANDREW TYRONE BELL, Defendant-Appellant.	LC No. 04-014540-FC

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 216 months to 30 years for the armed robbery, and three to ten years for felon in possession of a firearm, to be served consecutive to a two-year prison term for felony-firearm. We affirm defendant's convictions, but remand for resentencing.

This case arose when defendant allegedly robbed, at gunpoint, the Hell Country Store in Livingston County. Defendant was arrested for the robbery after the police found that he had recently purchased a van that matched the description and license plate of the van driven away from the robbery.

Defendant first argues that he was denied the effective assistance of counsel by his trial counsel's failure to effectively object to the prosecutor's inquiry into defendant's post-arrest silence. We disagree. Where there is no request for an evidentiary hearing or a motion for a new trial, appellate review of defendant's claim of ineffective assistance of counsel is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that; (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *People v Pickens*, 446 Mich 298, 309, 312-314; 521 NW2d 797 (1994). An appellate court will not second-guess matters of trial strategy or use the benefit of hindsight

when assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Here, defendant testified on direct examination that he initially told the police that he would "answer any question in the presence of a lawyer." On cross-examination, the prosecutor asked if, when defendant did obtain the services of an attorney, he called the police back. This question was appropriate follow up to questions posed on direct examination and the line of questioning did not concern or address defendant's right to remain silent. Rather, it was cross-examination of defendant about his claims of willingness to cooperate with the police after his arrest. Moreover, defendant opened the door to this line of questioning by creating an impression that he was willing to answer any questions the police had as soon as he had an attorney. When defendant testified that he obtained an attorney five days after his initial contact with police, the prosecution was free to pursue whether the promised cooperation did, in fact, occur. See, e.g., People *v Vanover*, 200 Mich App 498, 501-504; 505 NW2d 21 (1993). Thus, any objection by defense counsel to this line of questioning based on a defendant's right to remain silent would have been futile ("There is no obligation for a defense attorney to object where such objection would be futile." *Odom*, *supra* at 416) and defendant was not denied the effective assistance of counsel by any failure to object on that basis.

Defendant next argues that the trial court abused its discretion by admitting evidence that defendant was on parole at the time of the charged offense. We disagree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). However, a trial court's error of this sort "is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

In this matter, if, in fact, the admission of evidence of defendant's parolee status was in error, the error was harmless. This is necessarily so, as defendant stipulated during trial that he was a convicted felon. On direct examination, defendant also testified that he met a co-worker in prison. The jury, then, would likely not have been particularly surprised to discover that defendant was on parole at the time the instant crime was committed and there is no basis on which to suppose that the parole evidence was more significant or prejudicial than the stipulated-to evidence of defendant's status as a convicted felon. Any error in admission of the challenged evidence not being outcome determinative, reversal is not required. See *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

Defendant next argues that the prosecutor engaged in misconduct by attempting to argue that defendant should be found guilty based on a propensity to commit bad acts as evidenced by prior convictions. We again find any error in this regard harmless.

Generally, claims of prosecutorial misconduct are reviewed to determine whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995). Here, however, defendant did not object to the prosecutor's conduct. Therefore, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness,

integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Bahoda, supra* at 266-267.

Assuming the prosecutor engaged in misconduct by making an improper propensity argument, the error was harmless given the overwhelming evidence against defendant, including a positive identification of defendant by the victim, the identification of defendant's van and license plate, and the clothing and gun found in his home. *Smith*, *supra* at 680. Further, any error in this regard would have been cured by the trial court's instruction to the jury that statements and arguments of counsel are not evidence. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Defendant next claims that his sentencing guidelines score was improperly calculated because offense variable (OV) 13 was improperly scored at 25 points. We agree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

OV 13 is scored where there is a "continuing pattern of criminal behavior." MCL 777.43(1). OV 13 is scored 25 points where the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). "Because MCL 777.43(2)(a) states that the sentencing offense 'shall' be included in the five-year period, the sentencing offense *must* be included in the five-year period. Therefore, MCL 777.43(2)(a) does preclude consideration of a five-year period that does not include the sentencing offense." *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006).

Here, defendant claims, and the prosecution concedes, that OV 13 was scored incorrectly because the score was based on crimes from 1998 and earlier, using a five-year period that did not include the instant offense (2004), as is required by the statute.[1] We agree that the scoring of 25 points for OV 13 in this case is plain error based on the above. Lowering defendant's OV total by 25, his total OV level would be 30, which lowers defendant from a guidelines range of 135 to 450 (with habitual-offender fourth) down to a range of 126 to 420 months. MCL 777.62; MCL 777.21(3)(c). While this range still includes the 216-month sentence he was actually given, the change in the guidelines score necessitates remand for resentencing. *Francisco*, *supra*

[1] The trial court relied on an earlier case, *People v McDaniel*, 256 Mich App 165, 172-173; 662 NW2d 101 (2003) which was binding precedent in the trial court at the relevant time and which allowed *any* five-year period to be used.

at 90-92. This does not necessarily mean, however, that OV 13 must be scored at zero on remand. If, in connection with resentencing, the prosecution offers evidence of two or more crimes against a person which occurred within the requisite five-year period, the trial court may revisit the proper scoring of OV 13. See *People v Miles*, 454 Mich 90, 98-99; 559 NW2d 299 (1997) (sentencing must be based on accurate information and resentencing is required even where the corrected information results in a longer sentence for defendant).

Finally, defendant claims that the sentencing court erred by ordering defendant to reimburse the county for the expense of his court-appointed attorney without determining whether such reimbursement could be made without substantial hardship to defendant. We agree.

Where, as here, a defendant has failed to object to a court order requiring reimbursement of the costs of a court-appointed attorney below, this Court reviews "only for plain error affecting defendant's substantial rights." *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

"[A] defendant may be required to reimburse the county for the cost of his court-appointed attorney." *Dunbar*, *supra* at 251. While a court is not required to make specific findings regarding a defendant's ability to pay, "the court does need to provide some indication of consideration" of defendant's foreseeable ability to pay. *Id*. at 254-255. Also, even where appropriate consideration is given, the terms of repayment should not be part of the judgment of sentence, but should instead be in a separate order. *Id*. at 255-256. This is because "[d]efendant's obligation to reimburse the county for legal fees and costs is completely independent of his sentence." *Id*. at 256 n 15.

It is undisputed that there was no consideration of defendant's foreseeable ability to pay by the trial court in the record. Thus, the trial court plainly erred when it ordered repayment of attorney fees without such consideration. *Dunbar*, *supra* at 254-255. That portion of the repayment order requiring defendant to reimburse the county for his attorney fees must be vacated and remanded for consideration of defendant's foreseeable ability to pay. The portion of defendant's judgment of sentence ordering repayment should likewise be vacated because that repayment cannot be ordered as part of defendant's sentence.[2] *Id.* at 256 n 15.

Defendant's convictions are affirmed, but this case is remanded for resentencing and reconsideration of the attorney fee reimbursement matter. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

[2] MCL 769.1k(1)(b)(iii) authorizes an order to pay attorney fees as part of a sentence, but this became effective January 1, 2006, so it was not in effect at the time of defendant's sentencing.