STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 2, 2009
v KEVIN LEE POWELL, Defendant-Appellant.	No. 280327 Wayne Circuit Court LC No. 07-008497-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v BILLY DARELL ARNOLD, Defendant-Appellant.	No. 280805 Wayne Circuit Court LC No. 07-008497-02

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

In Docket No. 280327, defendant, Kevin Lee Powell, appeals as of right his convictions, following a jury trial, for assault with intent to commit great bodily harm less than murder, MCL 750.84, and discharge of a firearm from a motor vehicle, MCL 750.234a. Powell was sentenced to four to ten years' imprisonment for the assault, and two to four years' imprisonment for the discharge of a firearm crime. We affirm, but remand for the ministerial task of correcting the judgment of sentence to reflect Powell's entitlement to 99 days of jail credit.

In Docket No. 280805, defendant, Billy Darell Arnold, appeals as of right his convictions, following a jury trial, for assault with intent to commit great bodily harm less than murder, MCL 750.84, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, discharge of a firearm from a motor vehicle, MCL 750.234a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Arnold was sentenced, as a second habitual offender, MCL 769.10, to 47 months to 15 years' imprisonment for the assault, two to seven and one half years' imprisonment for carrying a concealed weapon, two to seven and one half years' imprisonment for being a felon in

possession of a firearm, two to six years' imprisonment for the discharge of a firearm crime, and two years' imprisonment for the felony-firearm offense. We affirm.

These two cases were consolidated below for trial and on appeal. At trial, Tachelle Harris testified that during the afternoon of April 17, 2007, she was at a gas station in Detroit with her friends, Kyle Grey and Michael Moore. They had gone to the gas station in Grey's car because one of Grey's tires needed air. As Grey put air into his tire, Harris and Moore sat in the car. Deante Morris, an acquaintance of Harris, was walking out of the gas station, stopped by Grey's car to chat with Harris and Moore. As Grey continued to put air into his tire, a black Nissan Pathfinder truck pulled up alongside Grey's car. Powell was driving the truck, and Arnold was in the passenger seat. Harris could identify the men, because she had known them since middle school. Arnold stuck his arm out of the window of the truck, and fired seven shots with a silver handgun. Three of the bullets hit Grey's car, but no one was struck. The truck then sped away from the gas station.

Powell first argues that the trial court erred in permitting the late endorsement of a prosecution witness. We disagree. A trial court's decision to permit late endorsement of a witness is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

"Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." MCL 767.40a(3). "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 . . .." MCL 767.40a(4).

Here, the prosecutor moved on the first day of trial, but prior to the commencement of trial, to add Sade Baugh, Powell's girlfriend, to the people's witness list. The prosecutor represented that Baugh would testify that Powell sought to elicit a false alibi from her, as evidenced from a recorded phone conversation between Powell and Baugh. The trial court permitted the prosecution to add Baugh to its witness list. We are persuaded that there was good cause shown for the late endorsement.

The crux of Baugh's testimony concerned her phone conversation with Powell, which occurred only about two weeks prior to trial. Given the short time span between when the prosecutor became aware of the phone call in question, and when he moved for the late endorsement, the prosecutor did not unreasonably delay in seeking the late endorsement.

Also, Powell cannot demonstrate prejudice as a result of the late endorsement. He does not allege that he was surprised by Baugh's testimony, or that time constraints rendered him unable to prepare a suitable defense. Powell's counsel did not seek a continuance. In addition, the evidence against Powell was compelling. Harris testified that Powell was the driver of the car involved in the shooting. Harris had known Powell for years, and had a clear, unobstructed view of him during the shooting. Given the totality of the circumstances, the trial court did not err in allowing the late endorsement. See *People v Callon*, 256 Mich App 312, 326-328; 662 NW2d 501 (2003) (stating that the trial court properly allowed late endorsement where the witness was known to the defense, no continuance was requested, and no unfair prejudice resulted to the defendant).

Next, Powell argues that he was deprived of his constitutional right to counsel because his appointed counsel was ineffective. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). 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." *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[C]ounsel's performance must be measured against an objective standard of reasonableness" and without "benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Powell claims that Baugh's testimony and the recorded phone call were irrelevant, because they did not demonstrate that he attempted to elicit a false alibi. Powell argues that his counsel was ineffective for failing to object to this challenged evidence. Powell is correct in that it is not clear that he was attempting to elicit a *false* alibi during the phone conversation in question. Rather, he could have mistakenly believed that he and Baugh were together on the date and time of the shooting (a mistaken belief which Baugh opined that Powell held given that they were usually together "24-7"), and could have been trying to convince her to disclose their being together despite her reluctance to be involved in the case.

However, the evidence could also support the conclusion that Powell was attempting to elicit a false alibi. Baugh testified that she was not with Powell during the time in question, yet during the recorded phone call, Powell clearly attempted, forcefully, to convince Baugh to testify that she was with him at the time in question. The jury was entitled to hear and to assess the challenged evidence. Evidence that a defendant attempted to solicit perjured testimony may be considered evidence of guilt. *People v Lytal*, 119 Mich App 562, 575; 326 NW2d 559 (1982). Thus, Baugh's testimony and the recording – which was properly authenticated by personnel from the Sheriff's Office – were admissible. Consequently, Powell's counsel was not ineffective for failing to object to the challenged evidence. See *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995) (stating that a failure to pursue a meritless objection does not constitute ineffective assistance of counsel). Also, because the evidence was admissible, Powell's counsel was not ineffective for failing to object to the jury instruction directing the jury that it could consider the challenged evidence as evidence of guilt, or for failing to pursue a limiting instruction of some sort. *Id.*

In addition, defense trial counsel had a good reason to downplay this evidence, and hence a good reason not to ask for a specific instruction. We do not second-guess a defense counsel's trial strategy. *People v Matuzak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Next, Powell claims that a remand for the ministerial task of correcting the judgment of sentence is required. We agree. Powell's unpreserved claim of error is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

At sentencing, the trial court noted that Powell had served 99 days in jail before sentencing, and was entitled to credit for time served. Powell's presentence investigation report reflects 99 jail credit days. In an apparent clerical oversight, Powell's judgment of sentence does not provide for any jail credit. The prosecution concedes that the judgment of sentence is in error, and that Powell is entitled to a remand for the ministerial task of correcting his judgment of sentence to provide for 99 jail credit days. We agree. See MCL 769.11b (stating that a defendant who serves time in jail prior to sentencing is entitled to credit for time served); *People v Russell*, 254 Mich App 11, 22; 656 NW2d 817 (2002) (remanding for the ministerial task of correcting a mistake in the presentence report), rev'd on other grounds 471 Mich 182 (2004).

Arnold's only claim on appeal is that prosecutorial misconduct deprived him of a fair trial. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutorial comments must be read as a whole, and evaluated in light of defense arguments, and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Here, Arnold's friends, Tyrece Phillips and Charles Lee, testified as his alibi witnesses. They testified that Arnold was with them at a party during the time of the shooting. Phillips also testified that there were other individuals at the party, namely, Phillips's mother, father, sister and brother-in-law. The challenged remark occurred during the prosecutor's rebuttal closing argument, when the prosecutor questioned why Arnold did not call additional alibi witnesses, such as Phillips's mother, father, brother, or sister, since they were allegedly also at the party.

Where a defendant presents evidence of an alibi, the prosecutor may comment during closing argument on the weakness of the alibi defense, by pointing out the lack of corroboration. *People v Ovegian*, 106 Mich App 279, 281; 307 NW2d 472 (1981). Here, the prosecutor argued that Arnold's alibi was weak and uncorroborated, in that there were other individuals at the party who allegedly witnessed Arnold's presence there, yet failed to testify. Also, the prosecutor expressly remarked to the jury that it was his (the prosecutor's) burden to prove that Arnold committed the charged offenses, and the trial court so instructed the jury. Finally, even if we were to assume that the challenged remark was improper, Arnold cannot demonstrate prejudice, in light of the strong, untainted evidence against him. Harris testified that she got a clear, unobstructed view of the shooter, whom she identified as Arnold, an individual she had known for years. Given Harris's testimony, Arnold's claim cannot succeed.

We affirm both Powell's and Arnold's convictions, but remand Powell's case for the ministerial task of correcting the judgment of sentence to reflect 99 days of jail credit. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello