STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 3, 2009
v	No. 283156 Wayne Circuit Court
JOSHUA MARLON FOX, Defendant-Appellant.	LC No. 07-014307-FH

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of being a felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, possession of a firearm during the commission of a felony, second offense, MCL 750.227b, and resisting/obstructing a police officer, MCL 750.81d. Defendant was sentenced to one to five years' imprisonment for the felon in possession of a firearm conviction, one to five years' imprisonment for the carrying a concealed weapon conviction, five years' imprisonment for the felony-firearm conviction, and one to two years' imprisonment for the resisting/obstructing a police officer conviction. We affirm.

I. Ineffective Assistance of Counsel

Defendant says he was denied effective assistance of counsel. The determination 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.*

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the

proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, *supra* at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

First, defendant argues that trial counsel was ineffective by not conducting a thorough investigation. "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, in order to be ineffective assistance, counsel's failure to investigate must result in prejudice to defendant. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant's main contention is that counsel never went to the bar to uncover some other favorable eyewitnesses to the events of the early morning hours of September 1, 2007. However, defendant offers no evidence of what counsel would have discovered and, consequently, how this would have resulted in a "reasonable probability" of a different outcome at his trial. The after-hours loitering at the bar consisted primarily of defendant's friends and family. It is inconceivable that going to the bar itself would have somehow been more productive at getting names of witnesses than by merely talking with defendant. Thus, defendant was not denied the effective assistance of counsel because any failure to investigate did not prejudice defendant.

Second, defendant argues that counsel was ineffective in failing to ask Avery Lee an obvious question that would have exonerated defendant. Specifically, trial counsel knew that Lee had admitted earlier to owning and carrying the gun the night of defendant's arrest, but never asked Lee about this on direct examination. Although defendant speculates that Lee would have admitted to owning and possessing the gun at the time of defendant's arrest on September 1, 2007, that outcome is far from certain. Lee never testified at the *Ginther*[1] hearing, and thus statements of what Lee would have testified to are hearsay statements.[2] Trial counsel and Chad Fox both testified at the hearing that they each were told by Lee that he, not defendant, had the gun that night. Trial counsel also stated at the *Ginther* hearing that he strategically chose to not ask this question because he did not think that the jury would believe Lee and thought the inconsistencies in the officers' testimony should be enough to produce reasonable doubt. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). That a strategy did not work does not render it ineffective assistance of counsel. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). The trial attorney's strategy to not elicit testimony that he honestly and reasonably believed would not be believed by the jury, and thereby could work against his client, is reasonable strategy. It would be difficult for a jury to accept that someone could be carrying a gun, see police officers approaching, and decide to throw the gun to the ground, while in plain sight to everyone around, in order to ostensibly not get in trouble. What further makes such a scenario difficult for a jury to believe is considering what Lee actually *did* testify to at trial:

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

[2] In fact, Lee avoided the hearing and all attempts by defendant to contact him, which indicates that Lee, in reality, would *not* have admitted to owning the gun.

Q. When the police arrived on the scene, you hadn't done anything wrong; is that correct?

A. Yes, sir.

* * *

Q. You hadn't done anything wrong, right?

A. Yes, sir.

Q. So you didn't have anything to fear from the police; is that correct?

A. That's correct.

Q. Okay. You were simply just getting into your car, right? Turned around to get into your car?

A. That's correct.

Lee made it unambiguous, while under oath, that he was doing absolutely nothing wrong when the police arrived and had nothing to fear from the police. Defendant argues now that it would have been helpful to his cause to then have Lee essentially recant his statements and admit to being scared of the police and ditching the gun he was carrying illegally at the time by throwing it in an open parking lot. Clearly, trial counsel's strategy was reasonable.

Third, defendant argues that he was deprived effective assistance when trial counsel did not call defendant's brother, Chad Fox, to testify at trial. Chad did not testify at trial but testified at the *Ginther* hearing that Lee admitted to having the gun that night. This testimony is hearsay since it is Lee's out-of-court statement being offered to prove the truth of the matter asserted. MRE 801. At the hearing, defendant argued that the statement was an exception to hearsay under MRE 804(b)(3), a statement against interest. However, MRE 804(b)(3) is applicable only when the declarant is unavailable. *People v Taylor*, 482 Mich 368, 378; 759 NW2d 361 (2008). Lee was clearly available at the time of the trial and he testified at trial. Therefore, Chad's testimony regarding Lee's "confession" would have been inadmissible. Accordingly, trial counsel did not commit any error by failing to call him as a witness, and defendant was not denied the effective assistance of counsel.

II. Prosecutorial Misconduct

Defendant also says that he was denied a fair trial when the prosecutor made improper comments during voir dire and rebuttal. Claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). A prosecutor's remarks are evaluated in the context of the evidence presented and in light of defense arguments. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Defendant never objected to the comments at trial, thus not preserving the issue on appeal. Unpreserved claims are reviewed for plain error, which means defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Reversal is warranted only "if the defendant is actually

innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Thus, reversal is necessary if a timely instruction would have been inadequate to cure any defect. *Ackerman*, *supra* at 449.

Defendant takes exception to the following prosecutor's comments during voir dire:

> So when a police officer goes out there to investigate a crime and sees that [Individual A] has committed a crime and that [Individual B] . . . here hasn't committed a crime, . . . is he then to believe [Individual A] who committed the crime and just call it a day?

Defendant argues that the above statement improperly vouched for the credibility of the police because it equated being arrested with conclusive evidence of guilt. Defendant misconstrues the thrust of the prosecutor's comments. The prosecutor simply gave a hypothetical, while he explained that it would be completely unreasonable for an officer to let a suspect go just because he said he did not commit the crime, when in fact, the officer saw the suspect commit the crime. This common-sense example was in response to defense counsel's earlier suggestion that police officers, when faced with two possible defendants, would sometimes choose which person to arrest based on who had the prior record. Thus, there was no vouching and no error.

Defendant further contends that the following prosecutor's comments during rebuttal were inappropriate because they improperly vouched for the police officers' credibility:

> When Officer Guntzviller sat down over in this witness chair, he told you the truth. When Officer Janoskey sat in that witness chair, he told you the truth. When Officer Owen sat in that chair, he too told you the truth.

A prosecutor may not vouch for the credibility of witnesses by implying he has some special knowledge of the witnesses' truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Nor can a prosecutor place the prestige of his office behind the testimony of witnesses. *McGhee*, *supra* at 633. However, a prosecutor can argue that a witness is credible, especially when "the question of guilt depends on which witnesses the jury believes." *Thomas*, *supra* at 455. Here, the prosecutor did not imply he had some special knowledge that the jury was not aware of, nor did these comments place the prestige of the prosecutor's office behind the officers' testimony. Therefore, these prosecutor comments during rebuttal were not improper. Also, to the extent that the comments could be interpreted as improper, any prejudice "could have been alleviated by a curative instruction given on a timely objection." *Id.*

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra