STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2010
v DAVID BLAKE HUDSON, Defendant-Appellant.	No. 290148 Wayne Circuit Court LC No. 08-010074

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DAVID BLAKE HUDSON, Defendant-Appellant.	No. 290215 Wayne Circuit Court LC No. 08-013877-FC

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

These two criminal cases have been consolidated for decision. In Docket No. 290148, defendant appeals as of right from his jury convictions for armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 262 to 480 months for the armed robbery and carjacking convictions, and to a consecutive two-year term for the felony-firearm conviction. In Docket No. 290215, defendant appeals as of right from his jury convictions for armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 262 to 480 months for the armed robbery conviction and 36 months to 7-1/2 years for the felon in possession conviction, and to a consecutive two-year term for the felony firearm conviction. We affirm.

Defendant was tried in a single jury trial for two separate armed robberies. The first robbery occurred on April 9, 2008, when the testimony established that Richard Collins was

robbed at gunpoint at about 9:30 p.m. at a party store, but he did not promptly report the incident to police.

The second robbery occurred on April 10, 2008, at approximately 4:00 p.m., when Robin Palmer and her young daughter were robbed at a dry cleaners within a mile of the Collins robbery. At gunpoint, the robber took her purse, coat, and the keys to her Cadillac Deville. The robber drove off in her car, and Palmer went to the police station to report the robbery. While she was making the report, she was advised that her car had been recovered about a block from the cleaners. While waiting for the tow truck to remove her car, she twice saw defendant drive by the location in a burgundy colored Taurus or Sable and advised the police that he was the man who had robbed her.

At about the same time, Collins was at home when he also saw a burgundy Sable repeatedly circling the block. Collins saw the police down the street and went to see what was happening. The police were just recovering Palmer's vehicle. During that time, Collins saw defendant stop, get out of the car, and walk toward him. Defendant then appeared to recognize Collins, and returned to his car and drove off. Collins noted the license plate, "VP Firm," and approached the police to tell them about the robbery that had occurred the night before.

That same night, both Palmer and Collins went to the police station to view photographs of possible suspects. Neither identified a suspect, and defendant's photograph was not in the array. Detroit Police Officer Michael McGinnis ran the license plate number "VP FIRM" through the LEIN computer but did not locate a record of that plate number.

On April 19, 2008, Detroit Police Officer Barron Townsend and his partner, Rhonda Sherman, received a run to Henry Ford Hospital regarding a shooting victim who had driven himself to the hospital. Defendant, the shooting victim, had sustained gunshot wounds to his left arm. Defendant drove to the hospital in his car – a Mercury Sable with the license plate "VP FIRM." The vehicle was impounded because it was involved in a shooting, and defendant was arrested at the hospital for something unrelated to the present armed robberies.

A live line-up regarding the Collins and Palmer robberies was scheduled, but defendant refused to participate. On May 13, 2008, both Collins and Palmer separately viewed a photographic array in the presence of McGinnis and defense counsel, and each one immediately picked out defendant's photograph. Palmer indicated that she was 100 percent confident in her selection, and Collins indicated that he was "very confident" in his selection.

The defense presented an alibi defense. William Wells testified that he is a counselor and minister and that he knew defendant through the "Snap-Back Program," a program for people on probation and parole. He testified that he met with defendant at a home he owns at 15640 Springer in Eastpointe on April 10, 2008, from 3:28 p.m. through 4:47 p.m. He first began meeting with defendant in March 2008. Wells brought a written record from his meeting with defendant on April 10, but did not bring any records from any other purported weekly meetings. On cross-examination, Wells was asked about aliases he has used in the past, including Charles Banks, Daniel Oakley, William Terrance Banbury, and David Elliot Barnett. Wells admitted that he had been convicted of 3rd degree retail fraud in May 2000. He also admitted that he never informed police that defendant was with him at the time of the Palmer robbery.

Denise Pratt testified that defendant is her "significant other." She remembered the date of April 9, 2008, because that was the night of the Gucci Man concert that defendant wanted to attend, and defendant was stressed about the concert because he could not go. Defendant cooked dinner at 7:00 p.m. and never left the house. On April 10, 2008, she took defendant to see his parole officer sometime between 9:30 a.m. and 10:00 a.m. She later dropped him off at the Snap-Back Program at approximately 3:30 p.m. in Eastpointe, and then picked him up there at 4:45 p.m. Pratt testified that she and defendant were living together in April 2008 at 4610 Stockton in Detroit, and that defendant had moved in with her in March 2008.

Deandre Gracyse, Pratt's 15-year-old son, testified that defendant is his mother's boyfriend. He remembered the date of April 9, 2008, because that was the date of the Gucci Man concert and defendant was stressed all day because he wanted to attend the concert. Gracyse indicated that he saw defendant at home at 4:30 p.m. and later, and that defendant never left the house. Gracyse further testified that defendant had been living with his mother since October 2007.

Defendant testified that he was living at 4610 Stockton in April 2008. On April 9, 2008, he got out of work at 4:00 p.m. and drove home with Denise Pratt. He cooked dinner at 7:00 p.m., and they "hung out" all night. He recalled the night because it was the night of the Gucci Man concert. On April 10, 2008, he met with his parole officer in the morning, and Pratt later drove him to the Snap-Back Program in Eastpointe. She dropped him off at 3:30 p.m., and he was there until 4:45 p.m.

Defendant testified that he previously had contact with Richard Collins on a Monday in late March 2008. Defendant indicated that Collins did not like defendant because they had a small altercation over the playing of loud music in a car. Defendant denied robbing either Collins or Palmer.

On cross-examination, defendant admitted that he told the police at the hospital on April 19, 2008, that he lived at 19321 Houghton in Detroit. He also admitted telling this information to his parole officer. He admitted that he owns the burgundy Mercury Sable. He testified that Collins was lying when he testified that he had never before met defendant. Defendant denied telling the police that his grandmother lived on Appoline, and did not recall telling the police that Palmer was his "ex" and that she accused him of robbery because she is bitter.

On rebuttal, defendant's parole officer, Denise Jones, testified that she met with defendant for 5 – 7 minutes beginning at 10:21 a.m. on April 10, 2008. On that date, defendant indicated that he was living at 19321 Houghton in Detroit with his girlfriend, Salika Pemberton, and her mother. Jones called Pemberton and verified that information. Jones had never heard of William Wells, Charles Banks, Daniel Oakley, Dwayne Ferguson, William Banbury, or David Barnett, and had never heard of the Snap-Back Program. She never referred defendant to that program. When she met with defendant on April 10, he never mentioned Wells or counseling. It was not until June 2008 that defendant ever mentioned the Stockton address.

Officer Michael McGinnis testified that when he took defendant from the jail to be arraigned on one of the robbery charges, defendant stated that he used to date Robin Palmer. McGinnis ran the address of 15640 Springer in Eastpointe through the computer on April 10,

2008, and there was no record of Wells or any of his aliases ever owning that house for at least ten years prior.

Richard Collins testified that he never had any contact with defendant in March 2008. He produced work documents indicating that he left for California on March 7, 2008, and that he did not return to Michigan until April 1, 2008.

Defendant first argues that he was denied the effective assistance of counsel at trial. An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id.*

"Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.;* see also *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant first argues that he was denied the effective assistance of counsel at trial because defense counsel failed to move to suppress the identification testimony of the complainants following a photographic array on May 13, 2008. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant's ineffective assistance of counsel argument is premised on the allegation that the pretrial identification procedure was unfairly suggestive because both of the victims were present at the police station on the day of the photo array. Defendant appears to be asserting that Collins and Palmer were in the same room at the time each of them identified defendant's photograph and could have influenced each other's decision. However, the evidence presented at trial does not support the assertion. The record establishes that Collins and Palmer were not together at the time of the identifications. Palmer testified that the only people in the room with her at the time of her identification were Officer McGinnis and a lawyer. Collins testified that the only people in the room with him at the time of his identification were Officer McGinnis and a lawyer. Officer McGinnis testified that he had the victims view the photographic array separately, and that the only people in the room during the identifications were the individual victim, the officer, and a lawyer. The record simply does not reveal that the identification procedure was impermissibly suggestive. Defense counsel was not ineffective for failing to move to suppress the identifications.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's impeachment of Wells with evidence of a prior misdemeanor conviction for third-degree retail fraud. The record reveals that the prosecutor asked the court for permission to impeach Wells with this conviction, and that the trial court found that the conviction was admissible for impeachment purposes under MRE 609 because the offense of third-degree retail

fraud involves an element of theft or dishonesty. Defense counsel indicated her agreement with the trial court's reasoning. When Wells took the stand, the prosecutor asked him if he had ever been convicted of a crime involving theft or dishonesty within the last ten years. Wells confirmed that he had, and confirmed that the conviction was for the misdemeanor offense of third-degree retail fraud.

MRE 609 generally permits introduction of prior convictions in order to impeach a witness's credibility where the "crime contained an element of dishonesty or false statement," or "the crime contained an element of theft" and met certain other requirements. MRE 609(a); *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). The prosecutor concedes on appeal that Wells' prior retrial fraud conviction did not meet the requirements of MRE 609 and should not have been admitted as impeachment evidence because the factual circumstances of Well's prior retail fraud conviction were not placed on the record. See *People v Parcha*, 227 Mich App 236, 246-247 (1997). The prosecutor maintains, however, that defense counsel's failure to object to the impeachment evidence did not affect the outcome of the trial. We agree.

Wells' credibility was impeached with evidence that he had several aliases, that he failed to come forward with information that defendant had an alibi for the time when the Palmer robbery occurred, and that he did not own the house where the Snap-Back meetings occurred as he had testified. Additionally, defendant's parole officer testified that she had never heard of the Snap-back program, that she had never referred defendant to the program, and that defendant had never mentioned the program. In light of this evidence, as well as the fact that the jury did not find the testimony of any of the alibi witnesses to be credible, there is no reasonable probability that the result of the proceedings would have been different had defense counsel objected to this one instance of impeachment evidence.

Lastly, defendant maintains that the trial court erred by allowing the prosecutor to impeach defendant with evidence of a prior conviction for unarmed robbery. This Court reviews for an abuse of discretion a trial court's determination whether a prior conviction involving a theft component may be used to impeach a defendant. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005).

Before trial, defendant moved in limine to exclude any evidence of his 2004 conviction for armed robbery. The trial court denied the motion, finding that credibility of the witnesses would be a main issue at trial, that the prior conviction would be probative of defendant's credibility, and that any potential prejudice that would arise from the similarity of the crimes could be mitigated by a limiting instruction.

Defendant argues that the trial court erred when it admitted, as impeachment evidence, his prior unarmed robbery conviction. However, defendant has waived this claim because the record shows that defendant testified about his prior conviction during his direct examination rather than on cross-examination. *Ohler v United States*, 529 US 753, 760; 120 S Ct 1851; 146 L Ed 2d 826 (2000) ("a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error."); see also *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001). Similar to the instant case, the trial court in *Ohler* determined that if the defendant chose to testify, her previous conviction would be admissible for impeachment purposes. *Ohler*, 529 US at 755. Therefore,

defendant has waived appellate review of this issue.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly