STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2010
v	No. 292302 Macomb Circuit Court
HAROLD ARNOLD BOYD, Defendant-Appellant.	LC No. 2008-002522-FH

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

Harold Arnold Boyd appeals as of right his jury trial conviction for first-degree home invasion, MCL 750.110a(2). Boyd was sentenced, as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment. We affirm.

Boyd initially contends that he is a victim of prosecutorial vindictiveness because the prosecutor charged him with first-degree home invasion after he refused to waive a preliminary examination and plead guilty to second-degree home invasion. An allegation of prosecutorial vindictiveness presents a due process issue, *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996), which this Court reviews de novo, *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000). Unpreserved constitutional issues are reviewed for plain error that affected a defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Problems arose between Boyd and his first court-appointed attorney, David M. Sinutko, when Boyd refused to accept an offer from the prosecutor that involved his waiving of the preliminary examination and entering a guilty plea to second-degree home invasion.[1] After the withdrawal of Sinutko, the trial court assigned Boyd a new attorney, Richard Glanda, and remanded the matter back to the district court for a preliminary examination. The district court conducted a preliminary examination and found the prosecutor met his burden of proof to proceed on a charge of first-degree home invasion. Boyd argued that when he waived the initial preliminary examination there was an understanding that he would only be charged with second-

[1] MCL 750.110a(3).

degree home invasion as a "conditional waiver." The district court judge indicated that such waivers are forbidden, and bound the matter over to the circuit court for trial on a charge of first-degree home invasion.

At the first pre-trial conference, Glanda informed the court that the prosecutor had offered Boyd a deal of 6 to 20 years' imprisonment with dismissal of the habitual fourth offender charge, which Boyd refused against counsel's advice. Boyd insisted to Glanda that he wished to proceed to trial because he was not guilty. At a subsequent pre-trial conference, the prosecutor informed Glanda that he planned to charge Boyd with the additional crime of breaking and entering into a motor vehicle in a separate case arising from an unrelated incident. The prosecutor offered to drop the breaking and entering charge if Boyd pled guilty to first-degree home invasion with the imposition of a sentence of 6 to 20 years' imprisonment. Boyd again declined the offer and requested another attorney, which the trial court denied.

Boyd contends he was the victim of prosecutorial vindictiveness because the prosecutor charged him with first-degree home invasion when he demanded a preliminary examination and refused to plead guilty to second-degree home invasion. Prosecutorial vindictiveness constitutes a violation of a defendant's constitutional right to due process. *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612 (1996). The Michigan Supreme Court defined prosecutorial vindictiveness as "'a violation of due process to punish a person for asserting a protected statutory or constitutional right.'" *Id*. at 35-36. The defendant bears the burden of establishing prosecutorial vindictiveness. *Id*. at 36.

"'Actual vindictiveness will be found only where objective evidence of an 'expressed hostility or threat' suggests that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right.'" *People v Jones*, 252 Mich App 1, 7; 650 NW2d 717 (2002) (citation and internal quotation marks omitted). Citing *Ryan* as authority, this Court explained:

> [T]he mere threat of additional charges during plea negotiations does not amount to actual vindictiveness where bringing the additional charges is within the prosecutor's charging discretion . . . . Additionally . . . this Court held that "it is well established that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is not sufficient to warrant presuming that subsequent changes in the charging decision are vindictive and therefore violative of due process." The "[d]ismissal of a lesser charge and rearrest on a newly filed greater charge due to a defendant's failure to plead guilty to the lesser charge does not, by itself, constitute prosecutorial vindictiveness and denial of due process of law." Accordingly, the defendant must affirmatively prove actual vindictiveness in order to establish that there was a denial of due process. [*Jones*, 252 Mich App at 8 (internal citations omitted).]

Boyd has failed to affirmatively demonstrate any actual vindictiveness by the prosecutor, as sufficient evidence supported a charge of first-degree home invasion. *Ryan*, 451 Mich at 36. Nor do any other facts establish a prima facie case of prosecutorial vindictiveness. Boyd was offered a plea deal, which he declined. As a result, the matter was remanded back to the district court for a preliminary examination. Merely because Boyd "refused to plead guilty and chose to

have the prosecution prove its case is insufficient to warrant the presumption that the prosecution acted vindictively in violation of [Boyd's] due process rights." *Jones*, 252 Mich App at 10.

Having rejected Boyd's contention of prosecutorial vindictiveness, we also reject his assertion that defense counsel was ineffective for failing to object to the amended charge. Because Boyd has not carried his burden of establishing prosecutorial vindictiveness, his concomitant contention that his counsel ineffectively failed to object to the prosecutor's actions lacks merit. Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Boyd further asserts that the trial court violated his due process rights by empanelling a jury whose members were referred to only by their assigned numbers, and by failing to give a proper cautionary instruction. "The court's decision to refer to jurors by number rather than name is a decision concerning the conduct of voir dire, which we will review for abuse of discretion." *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). Unpreserved contentions of error are reviewed by this Court for plain error that affects a defendant's substantial rights. *Thomas*, 260 Mich App at 453-454.

An "anonymous jury" has been defined as "one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public." *Williams*, 241 Mich App at 522. Anonymous juries are typically used in situations where it is necessary to protect the jurors. *Id*. "[T]o successfully challenge the use of an 'anonymous jury'" it must be shown that "the parties have had information withheld . . . preventing meaningful voir dire, or that the presumption of innocence has been compromised." *Id*.

Contrary to Boyd's contention, this was not an anonymous jury. "This Court underscored the key factor of an 'anonymous jury,' which is that 'certain biographical information about potential jurors is withheld' from the parties. Thus, this Court opted for a strict definition of 'anonymous jury,' where something more than just the jurors' names is withheld from the parties." *People v Hanks*, 276 Mich App 91, 93; 740 NW2d 530 (2007), citing *Williams*, 241 Mich App at 523. An anonymous jury is found to exist when a party is prevented from conducting meaningful voir dire and precluded from having biological information regarding the venire, not simply the names of the potential jurors. *Id*. at 94. As Boyd's counsel conducted extensive voir dire, during which he questioned many possible jurors about their personal histories and occupations, the jury cannot be construed as anonymous. *Williams*, 241 Mich App at 523-524. Boyd has also failed to demonstrate that the mere reference to the jurors by number rather than name impacted the presumption of Boyd's innocence. While addressing the jury pool, the trial court said, "We will refer to you as juror number only or seat number only. And that is a recent rule that has been promulgated by the supreme court [sic] because there have been cases where jurors very much object to having their names read off, and that's certainly understandable." Such a statement had no bearing on Boyd's entitlement to be presumed innocent.

Because the failure to identify jurors by name did not constitute the impaneling of an anonymous jury, the trial court did not violate Boyd's due process rights by failing to give a cautionary jury instruction. A trial court is only required to instruct the jury on "the applicable law . . . and fully and fairly present the case to the jury in an understandable manner." *People v*

Moore, 189 Mich App 315, 319; 472 NW2d 1 (1991). During voir dire, the trial court provided the following instruction:

> A person accused of a crime is presumed to be innocent. That means you must start with the presumption that the Defendant is innocent. This presumption continues throughout the trial and entitles the Defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Although the instruction did not specifically reference their anonymity, it sufficiently addressed the jury's responsibility to presume Boyd innocent until proven guilty, obviating any need for an additional instruction.

Citing irrelevant case law from other states, Boyd further asserts that MCR 7.215(J)[2] necessitates reconsideration of this Court's recent decision in *Hanks*. Boyd's failure to explain or support his contention constitutes an abandonment of the issue, which we need not address. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted).

Finally, Boyd asserts that trial counsel was constitutionally ineffective by failing to object to opinion testimony provided by an investigating police officer and the detective in charge of the case. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law . . . . This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law." *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). Because an evidentiary hearing was not held, Boyd's claim of ineffective assistance of counsel is limited to "errors apparent on the record." *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

To establish ineffective assistance of counsel, it must be demonstrated 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 Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden . . . . the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Dendel*, 481 Mich at 124-125.

In accordance with MRE 701, "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." This Court has determined that police

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[2] MCR 7.215(J)(1) provides; "[a] panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule."

officers may use facts to draw conclusions that any lay person could reach in similar circumstances. *People v Oliver*, 170 Mich App 38, 50-51; 427 NW2d 898 (1988), modified by 433 Mich 862 (1989). Officer Rood testified that Boyd "seemed nervous," which he interpreted as a sign of deception. Detective Kozikowski stated he had no reason to question the victim's credibility. Such perceptions were based on the officers' personal observations and comprised conclusions that any lay person could draw. *Id.* Because objection to this testimony would have been futile, counsel was not ineffective. *Thomas*, 260 Mich App at 457.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly