STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2012
v	No. 298864 Wayne Circuit Court
JOHN SAMUEL BURTON, Defendant-Appellant.	LC No. 09-028803-FC

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, assault with intent to commit armed robbery, MCL 750.89, two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment without the possibility of parole for the murder convictions, 40 to 60 years' imprisonment for the armed robbery convictions, 20 to 40 years' imprisonment for the conviction of assault with intent to commit armed robbery, 40 to 60 years' imprisonment for the remaining assault convictions, 5 to 15 years' imprisonment for the felon-in-possession conviction, and 2 years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

The record reflects that the murders, robberies, assaults, and firearm violations all occurred within a single criminal episode, taking place in Detroit in 2002 and arising out of tensions between rival gangs of drug dealers. For purposes of the issues raised on appeal, it is unnecessary for us to discuss the details of the criminal transaction.

On appeal, defendant argues that trial counsel was ineffective for failing to object to the admission of jailhouse telephone recordings on authentication grounds, or, alternatively, that the trial court erred in admitting them into evidence. The recordings were of various phone calls made from a Pennsylvania prison between April 2007 and April 2008. The phone conversations were between a male prisoner and a female, and the prosecution asserted that defendant, who had been arrested in Pennsylvania several years after the crimes at issue here were committed, was the male heard on the recordings. Prior to trial, the trial court ruled that the recordings were admissible, rejecting defendant's argument that they were irrelevant and that any assumed

probative value was substantially outweighed by the danger of unfair prejudice. At the pretrial hearing, defendant did not deny being heard on the recordings and defense counsel essentially acknowledged that the recordings indeed captured defendant's phone conversations.[1] At trial, defendant was represented by new counsel who was of the belief that the recordings had been authenticated at the pretrial hearing; therefore, counsel did not object on authentication grounds, or any grounds, when the prosecutor successfully had the recordings admitted into evidence. This Court granted defendant's motion for remand, allowing defendant to pursue a motion for new trial on the issues of authentication of the recordings and ineffective assistance of counsel. *People v Burton*, unpublished order of the Court of Appeals, entered June 20, 2011 (Docket No. 298864). On remand, the trial court ruled that, had the issue of authentication arisen at trial, the court would have overruled any objection to admission of the recordings, given that all of the surrounding circumstances pointed to defendant as being the male heard in the phone calls. Defendant challenges that ruling on appeal, separately, and in the context of an ineffective assistance claim.

"The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law[,]" which we review, respectively, for clear error and de novo. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, such as whether a rule of evidence or statute precludes admi[ssion] of the evidence." *Id.* These preliminary questions of law are reviewed de novo, and when such questions "'are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law.'" *Id.* (citation omitted).

In *People v Aspy*, 292 Mich App 36, 45-46; 808 NW2d 569 (2011), this Court set forth the principles governing a claim of ineffective assistance of counsel, stating:

> 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 proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 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).

"Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

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[1] Counsel stated, "Your Honor, the Court [sh]ould realize that this is a conversation that Mr. Burton is having with a female caller, that they're talking about different things that they were involved in[,] [i]ncluding a relationship."

MRE 901 addresses the requirement of authentication or identification and provides in relevant part:

> (a) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
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> (1) Testimony that a matter is what it is claimed to be.
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> * * *
>
> (4) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
>
> (5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> (6) Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
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> * * *
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> (9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

"If a tape, or any other proposed exhibit that is subject to the MRE 901 requirement of authentication, is shown to be 'what its proponent claims,' then it has been authenticated sufficiently." *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991), quoting MRE 901(a). The *Berkey* Court further expressed:

> It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly. [*Berkey*, 437 Mich at 52.]

Here, there was sufficient record evidence to support a conclusion that the recordings were what the proponent prosecutor claimed them to be, i.e., recordings of defendant's telephone conversations while an inmate in Pennsylvania. Stated otherwise, there was sufficient evidence

to authenticate the recordings, and any weakness or doubt regarding whether it was actually defendant conversing on the phone was a matter for the jury to weigh. We find it appropriate to begin with a discussion of the record that supports this holding.

Officer Daniel Nowak, a Pittsburgh police officer, testified that he encountered defendant on July 11, 2006, in Allegheny County, Pa., when responding to a domestic violence complaint. Nowak stated that defendant identified himself as "John Carlos Miller." A police photograph was taken of defendant at that time, trial exhibit 130, and it was admitted into evidence after Nowak testified that it depicted defendant. Nowak further testified that he next encountered defendant on September 9, 2006, when he pulled defendant over for a traffic stop. On this occasion, defendant identified himself as "Michael Thomas." Nowak, recalling his previous interaction with defendant in July 2006, confronted defendant about the name discrepancy and arrested him for providing false information to a police officer after defendant conceded that he had lied about his identity. Nowak identified defendant in the courtroom as the person he twice encountered in Pennsylvania.

In a pretrial hearing, the same one in which the trial court ruled that the recordings were admissible, the court also denied defendant's motion seeking dismissal on speedy trial grounds, and the parties and the court extensively discussed past extradition matters. As gleaned from that discussion, and as indicated in a Pennsylvania court document contained in the lower court record, defendant, under his real name of John Burton, signed a waiver of extradition on September 13, 2006, which was a few days after Officer Nowak had arrested him. It also appears from the discussion of the speedy trial matter that weapons charges were also pending against defendant in Allegheny County at the time. The extradition matter had pertained to the pending felony charges against defendant in Michigan. While defendant waived extradition in September 2006, a Pennsylvania judge stayed it "pending disposition of local charges." Pennsylvania authorities finally made defendant available for extradition sometime in 2008, at which point defendant fought extradition, eventually losing the battle. It was during defendant's imprisonment in Pennsylvania that the phone conversations took place, as testified to by Detective Thomas Leicht, an Allegheny County detective assigned to the Pennsylvania Bureau of Prisons.

During Detective Leicht's testimony, the prosecution was allowed to admit into evidence two photographs, trial exhibits 131 and 132, and the recorded telephone conversations, exhibit 133. An audiotape of the phone calls was played for the jury. The first photograph was a 1998 police mugshot of defendant relative to a Pennsylvania arrest, which predated the crimes committed in Detroit. Leicht testified that defendant identified himself as "John Miller" when arrested by Pennsylvania police in 1998. Leicht further testified that fingerprints established that the 1998 police photograph supposedly of "John Miller" was in truth a photograph of defendant John Burton. Although not entirely clear from the record, the second photograph was apparently a police photograph, or mugshot, of defendant following his arrest in Pennsylvania in September 2006. According to Leicht, the information contained alongside the 2006 mugshot reflected that the arrestee gave the name John Burton. Leicht stated that fingerprints established that the arrestee was indeed John Burton, as was the case with the 1998 mugshot, even though there were differences in the physical descriptions and information accompanying the 1998 and 2006 mugshots, e.g., differences in height, weight, birthdates, and social security numbers. Detective Leicht explained that the identifying characteristics and information *were supplied by defendant*.

Leicht opined that the person in the two police photographs was the same person sitting in the courtroom, defendant John Burton. With respect to the recordings, Leicht testified that they concerned phone conversations that occurred between April 2007 and April 2008 and that when he receives a subpoena for a prisoner's phone records, he pulls the "pin number [PIN] for that individual." Although not stated directly by Leicht, it is implicit in his testimony, and no one argues to the contrary, that the recordings were of phone conversations by a male using the PIN assigned to defendant John Burton. Recall that Pennsylvania authorities were fully aware back in September 2006 that their prisoner was John Burton. The transcripts of the recordings show that the female speaker referred to the male as "Carlos" multiple times, but she never referred to him as John, John Burton, or John Miller.

Defendant argues that a prisoner's PIN can be used by prisoners other than the prisoner assigned to the PIN, that no one identified the male voice on the recordings as defendant's voice, that the reference to "Carlos" in the recordings is too tenuous to show a connection to defendant, and that the record leaves doubt, given the conflicting descriptions and information as to the 1998 and 2006 mugshots, that John Carlos Miller and defendant John Burton are one in the same.

While the prosecution failed to find a witness who could identify defendant's voice on the recordings, defendant was imprisoned in Pennsylvania when the calls were made, the prison PIN used by the caller was assigned to defendant, defendant had used the name "Carlos" as an alias in the past, the name "Carlos" is referenced by the female speaker in the phone conversations multiple times, the photographs and police testimony connected defendant to the phantom "John Miller" and "John Carlos Miller," and the fingerprint testimony linking defendant to the aliases was not contradicted. Moreover, the male heard on the recordings spoke of the need to obtain $35,000 to acquire false identification, which was necessary if he wanted a future that did not entail constant running to avoid imprisonment, spoke of the FBI searching for him, spoke of being "on the run for bodies," and spoke of not returning to the "D" because he had too "many enemies" there. Taking into consideration these statements and all of the other evidence referenced above, it was not error for the trial court to conclude that the record was sufficient to authenticate the recordings, with defendant being identified as the male speaker in the telephone calls. Although it is perhaps within the realm of possibility that an inmate other than defendant was using the PIN and making the phone calls, it seems unlikely under the circumstances and, regardless, given satisfaction of the threshold for admission, any doubts were a matter for the jury to ponder, not the trial court, nor this Court.

Accordingly, defense counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms and his failure to object to the admission of the recordings was not outcome-determinative because any objection to the recordings would have been futile. The trial court, as the court itself noted on remand, would have admitted the recordings, and properly so, had defense counsel objected. Therefore, any objection to the authenticity of the recordings would have lacked merit, and defense counsel was therefore not obligated to raise the issue. *Ericksen*, 288 Mich App at 201.

Next, in a Standard 4 brief, defendant argues that the trial court erred in allowing the prosecution to introduce knowingly false evidence in the form of the 1998 Pennsylvania mugshot. Defendant maintains that the mugshot was not him and that the trial court, in a side-

bar conference that took place immediately after the court overruled an objection to the admission of the photograph, expressly acknowledged that it was not a mugshot of defendant. Defendant also argues, in the alternative, that the trial court simply erred in admitting the photograph irrespective of any perjury or misconduct.

Although the record reveals that there was a side-bar discussion regarding photographs, the record does not contain the comments allegedly made by the trial court, nor does defendant cite any transcript pages on the issue, and the court indicated directly after the conference that the photographs were admissible. Moreover, there was uncontradicted testimony that the fingerprints associated with the photographs, including the 1998 mugshot, were defendant's fingerprints. Additionally, Detective Leicht testified that "they look like it to me" when asked if the photographs pictured defendant.[2] There is also the fact that defendant used the alias of John Carlos Miller in 2006, as indicated in the testimony of Officer Nowak, making it unlikely under the circumstances that the person arrested in 1998 using the name "John Miller" was someone other than defendant. "It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Here, however, there is absolutely no evidence whatsoever that perjured testimony was elicited or that false evidence was presented. Furthermore, given the other strong evidence of identification, there is no reasonable likelihood that the evidence, even if presumed to be false and perjured, would have affected the judgment of the jury. *Id.*

Finally, the trial court did not err or abuse its discretion in admitting the 1998 mugshot as it was relevant to the issue of defendant's use of aliases and on the matter regarding the PIN and associated telephone recordings, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 401-403.

Affirmed.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck

[2] We also note that defense counsel objected to admission of the photographs, including the 1998 mugshot, on the basis that admission would violate a discovery order and not that the photographs did not depict defendant. In fact, after the side-bar conference, defendant proclaimed that he had no objection when the photographs were actually admitted through Leicht.