STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2012
v	No. 300067 Kalamazoo Circuit Court
JULIUS DEMARIO ROLLAND, Defendant-Appellant.	LC No. 2009-001989-FC

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant Julius Demario Rolland appeals his jury conviction of armed robbery,[1] first-degree home invasion,[2] assault with intent to do great bodily harm less than murder,[3] possession of a firearm by a felon (felon in possession),[4] and four counts of possession of a firearm during the commission of a felony (felony firearm).[5] The trial court sentenced Rolland as an habitual offender, fourth offense,[6] to serve 285 months to 40 years in prison for armed robbery conviction, 160 months to 30 years in prison for his first-degree home invasion conviction, 91 months to 30 years in prison for his assault with intent to do great bodily harm less than murder conviction, 38 months to 20 years in prison for his felon in possession, and two years in prison for each of his felony-firearm convictions. The sentences for armed robbery, first-degree home invasion, assault with intent to do great bodily harm less than murder, and felon in possession are to be served consecutively to the concurrent two-year sentences for the four felony-firearm convictions. We affirm.

[1] MCL 750.529.

[2] MCL 750.110a(2).

[3] MCL 750.84.

[4] MCL 750.224f.

[5] MCL 750.227b.

[6] MCL 769.12.

I. FACTS

At about 9:00 p.m. on September 17, 2009, Kenneth Malory, his wife, three or four children, and Thomas Hawkins were at Malory's home in Kalamazoo. Hawkins and Malory were sitting close to the front door. Hawkins thought that he heard the screen door open, and Malory's dogs indicated that someone was at the door. Two men with handguns then entered. One man pointed his gun at Malory and either said, "[g]imme the blow" or "gimme the bows," and demanded money. Malory testified that "blow" is slang for heroin. The man who was pointing the gun at Malory was wearing a hooded sweatshirt with the hood over his head and a mask that covered his face up to the bridge of his nose. Malory stood up, lifted his hands to allow the men access to his pockets, and the second man took between $200 and $300 from Malory's pocket.

At some point, Malory reached for the gun. Malory then had a "tussle" with the man pointing the gun at him. They moved to the front porch, Malory pushed the man away, and then the man shot Malory in the arm. Hawkins testified that the shooter had a revolver that was "kind of long . . . ."

Malory talked with police officers before going to the hospital. At that time, he indicated that he did not recognize either of the individuals. Hawkins testified that, at the time of the incident, he thought that the shooter looked like Rolland, and suspected it *was* Rolland, but he was not certain. Hawkins knew Rolland, but he had only seen Rolland once since 2006. Malory testified that when Hawkins came to see him at the hospital, Hawkins told him that he thought Rolland was the shooter. Malory explained that he "started processing it," and then began to think that the shooter was Rolland. Malory testified that he did not know Rolland personally, but he knew who he was. According to Malory, by the day after the shooting, "everybody's saying it's Ju Ju." (Rolland was known as "Ju Ju.") Several days after the incident, Hawkins identified Rolland in a photographic lineup as the shooter. And at trial, Malory testified that he was confident that Rolland was the shooter. However, Hawkins also testified at trial that he was not "100 percent" sure Rolland was the shooter. Hawkins testified that he was now not sure who the shooter was and that although Rolland fit the description of the shooter, the shooter's skin was darker than Rolland's skin.

Kalamazoo Township Police Department Detective Michael Szekely had contact with Hawkins about four weeks before trial and then about ten more times before trial. Hawkins expressed concerns to Detective Szekely about being coerced or intimidated about his potential testimony. Hawkins told Detective Szekely that he was approached to be paid not to come to court. According to Detective Szekely, on the day before trial, Hawkins expressed fear about testifying and concern for his family. However, during trial, Hawkins denied telling Detective Szekely that he was fearful of testifying or that Rolland's relatives tried to intimidate him. Hawkins clarified that he had indicated to Detective Szekely, "it's not in my best interest to do things [testify]." Hawkins explained that the reason he did not want to testify was because he had been to prison and he did not want to be responsible for Rolland going to prison when he was not sure that Rolland was the shooter.

Devon Howard, Rolland's jail cellmate, testified pursuant to a plea agreement. Howard testified that Rolland told him about the incident and that Rolland indicated he "hit a lick" (a

euphemism for robbery) at Malory's house. Howard testified that Rolland told him he "pushed his way through the front door" and that he had a gun. Rolland told Howard that he and his accomplice were looking for money and "bows," a euphemism for pounds of weed. Rolland told Howard that there was a "tussle" over the gun, the gun went off, and Malory got shot.

At trial, Rolland testified on his own behalf and denied ever going to Malory's home or even knowing the people who lived in that home. According to Rolland, on the night of the incident he was playing cards at the home of Sherry Rolland, his aunt. Sherry Rolland, her son, and her fiancé all testified that Rolland was at her home at the time of the incident.

Initially, Rolland pleaded guilty to armed robbery on the condition that the remaining counts and the habitual offender supplementation would be dismissed. There was also a sentence agreement that departed downward to a term of 120 months to 25 years. However, Rolland later moved to withdraw the plea, arguing that that he did not commit the crime, he could not develop a defense because evidence was withheld from him until the day of trial, his witnesses said they never got subpoenas, and his attorney was not representing him. Rolland further indicated that he did not understand the plea agreement to be for ten years. The trial court allowed Rolland to withdraw the guilty plea, finding that, while the withdrawal of the guilty plea was not in the interest of justice, the agreed sentence was "grossly inadequate for the armed robbery that was committed here."

As stated, the jury found Rolland guilty as charged on all eight counts, and Rolland now appeals.

II. CHARACTER EVIDENCE

A. STANDARD OF REVIEW

Rolland argues that the trial court violated MRE 404(b) by admitting testimony that he was seen with a handgun before the incident underlying this case. This Court reviews for abuse of discretion the admissibility of evidence.[7]

B. LEGAL STANDARDS

Evidence of prior bad acts is inadmissible to prove conduct in conformity.[8] "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense."[9] Possession of a similar weapon can also be relevant to identity.[10] Moreover, that a defendant's possession of the weapon constitutes a crime does not does not alone bring the

[7] *People v Jambor*, 273 Mich App 477, 481; 729 NW2d 569 (2007).

[8] MRE 404(b); *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993).

[9] *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989).

[10] *Id.* at 582-583.

evidence within the scope of MRE 404 preclusion.[11] Additionally, relevant evidence may be excluded if its probative value is "substantially outweighed" by the danger of unfair prejudice.[12]

C. RELEVANT UNDERLYING TESTIMONY

Rhonda Larry testified at trial that she knew Rolland through her ex-boyfriend, Donald Brooks, Jr. Larry testified that, in December 2009, she had contact with Detective Szekely and Detective Michael Hecht. She told the detectives that she had seen Rolland with a gun sometime in the summer or fall of 2009. Larry explained that she went with Brooks to a house, but she waited in the truck, which was parked in the street. From the truck, Larry could see a brown car in the driveway. Larry saw Rolland get a gun from the trunk of the car. Rolland held the gun in his hand and showed it to the people who were there: Rolland's brother, Rolland's cousin, and Brooks. Larry's description of the gun was consistent with a revolver, with a long barrel. Larry further testified that she did not want to be a witness at trial and would not have been there if she had not been subpoenaed. She explained that when she was previously at a court hearing where she did not testify (possibly the preliminary examination), Rolland's family was outside waiting for her.

Ashley Moss was friends with Larry and met Rolland through Brooks. Moss explained that in the summer of 2009, she was at a house for a gathering. Larry was not present, but Moss recalled that Brooks, Rolland, and Rolland's brother were there. She saw Rolland get a gun out of the trunk of a car. Rolland had been drinking and was waving the gun around. Moss said she was not familiar with guns, but her description of the gun was consistent with a revolver.

Before trial began, citing MRE 404(b), defense counsel objected to Larry and Moss testifying about seeing Rolland with a firearm. Defense counsel argued the testimony was not probative of any issue in the case.

The prosecutor responded that the original defense counsel "was provided with the specific statements of" Larry and Moss. The prosecutor represented that the original defense counsel was aware that the two witnesses described a handgun similar to the one that the victim was expected to describe. The prosecutor argued the evidence was probative because it "indicates that there is an opportunity as it relates to one of the elements of the offense here, which is the armed robbery—the possession of a weapon in this case—and is probative because it is described more closely with what the victims will describe was the weapon in this case, which was a long-barreled revolver, not some sort of semiautomatic weapon." The prosecutor represented that he spoke with the original defense counsel about Larry's testimony and that the original defense counsel did not object to the evidence. After the plea agreement was withdrawn, Moss's statement was provided to the original defense counsel, and he did not object.

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[11] *Id*. at 583.

[12] MRE 403; *VanderVliet*, 444 Mich at 74.

There was no MRE 404(b) notice in the court file. The trial court stated, "I do recall the—the events as the prosecutor does with [the original defense counsel], his position being the same as described on the record; and so I think that this matter is previously settled." The trial court noted that attorneys can bind their clients and that even if the trial court addressed the issue that day as if there was an MRE 404(b) notice and an objection timely filed, it would find the evidence admissible and that the evidence was more probative than prejudicial.

D. ANALYSIS

The trial court did not abuse its discretion because the statements that Rolland was seen with a gun before the underlying offense were relevant and not offered to show conduct in conformity.

Moss and Larry testified that they saw Rolland with a gun similar to the one Hawkins described the shooter had on the night of the incident. This was relevant to the crime of armed robbery and to identity. Therefore, admission of the testimony did not violate MRE 404(b) because the statement was relevant and not offered only to show conduct in conformity.

Further, we conclude that the danger of unfair prejudice did not substantially outweigh the probative value of the testimony about the weapon. Because the challenged testimony was admitted for the proper purpose of establishing identity, was relevant, and had probative value that was not substantially outweighed by the danger of unfair prejudice, it was admissible under MRE 404(b).[13] Even if there was an abuse of discretion, Rolland has not shown that "it is more probable than not that a different outcome would have resulted without the error."[14] Evidence against Rolland included Malory's identification, Hawkins' initial identification, and Rolland's cellmate's testimony that Rolland told him about the incident. Thus, Rolland has not shown that the trial court abused its discretion when it admitted the challenged testimony.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Rolland argues that his trial counsel was ineffective because he elicited inadmissible and highly prejudicial testimony about his withdrawn guilty plea. A properly preserved claim of ineffective assistance of counsel is a mixed question of law and fact.[15] "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[16] This Court reviews the trial court's

[13] *People v Aguwa*, 245 Mich App 1, 7; 626 NW2d 176 (2001).

[14] *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

[15] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[16] *Id*.

findings of fact for clear error.[17] This Court reviews de novo claims of ineffective assistance of counsel.[18]

B. LEGAL STANDARDS

To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial."[19] There is a strong presumption that trial counsel's action was sound trial strategy.[20] With regard to trial strategy, "this Court neither substitutes its judgment for that of counsel regarding trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight."[21] To show prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[22] A trial court's findings regarding the strategy a trial counsel uses are findings of fact that this Court reviews for clear error.[23]

The Michigan Rules of Evidence bar evidence of a withdrawn guilty plea and any statement made when a plea was taken.[24]

C. UNDERLYING PROCEDURAL FACTS

After the trial court allowed Rolland to withdraw his guilty plea, Rolland's original attorney was allowed to withdraw. When Rolland testified at trial, his new trial counsel elicited testimony about the guilty plea and its withdrawal. Rolland testified that he entered a guilty plea while he was represented by his previous attorney. Rolland stated that he felt that his previous attorney did not properly represent him, he felt railroaded, and he wanted his attorney to do certain things, but the attorney refused. Rolland explained that he and his previous attorney argued and did not have a good relationship. Rolland explained that there was a plea offer that was below the sentencing guidelines and that he initially accepted the plea. However, he withdrew the plea because "I just knew I couldn't live with myself going to prison for some stuff I know I didn't do, you know."

On cross-examination, the prosecutor pointed out that Rolland had three felonies and that he was represented by lawyers for each of those felonies. On redirect examination, Rolland

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[17] MCR 2.613(C); *LeBlanc*, 465 Mich at 579.

[18] *LeBlanc*, 465 Mich at 579.

[19] *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

[20] *Id*.

[21] *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

[22] *Toma*, 462 Mich at 302-303 (quotation and citation omitted).

[23] *LeBlanc*, 465 Mich at 582.

[24] MRE 410 (1), (3); MCR 6.302.

testified that, in those other cases, he had an opportunity to discuss them with his attorney. But in this case, according to Rolland, his previous attorney was arguing with him more than discussing the case. Rolland testified that the plea agreement that was offered was below the sentencing guidelines. He took the plea because he was scared; he was young; he was getting bullied about the amount of time he could get; and he thought that if he took the plea agreement, he could get out and see his son. Rolland testified that he was not denying that he committed the other crimes; he did them and pleaded guilty. However, he claimed that, in this case, he pleaded guilty and did not do the crime.

In closing arguments, defense counsel argued:

> We went through a whole bunch of stuff about the plea agreement. We went through a whole bunch of stuff about his prior record. And the key on the prior record—That might be key.—he [sic] pled to every one of those prior cases. Pled right to them. He even pled to this one and said, you know what, I didn't do this and asked the judge to withdraw his plea, and the judge allowed him to. That's key.
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> He didn't do this. And he—And he had to tell you, he wants to tell you, and he told you, I didn't do this crime.

After the jury convicted Rolland, Rolland's appellant counsel moved for a *Ginther*[25] hearing, arguing that Rolland's trial counsel was ineffective for eliciting testimony about the guilty plea. At the *Ginther* hearing, defendant's trial counsel, Matthew L. Glaser, testified. He stated that his understanding from Rolland was that Rolland had "had a fairly lengthy discussion on the record [during the motion to withdraw the plea] about his innocence" and that Rolland had placed "a great deal of discussion on the record in reference to him being at his aunt's house playing cards." However, Glaser did not have the transcripts related to the plea and withdrawal.

With regard to his statements that Rolland would have to explain to the jury his plea, Glaser stated that he was concerned the prosecutor would find a way to bring in a previous statement and that Rolland would have to be rehabilitated. According to Glaser, Rolland told him that "he [Rolland] made this series of statements in the motion to withdraw the plea." Glaser's understanding was that "there was a great deal of statements made by my client to the guards, to the prosecutor, to several people, even on the record, at that time when they were withdrawing the plea. And my client verified that." Glaser explained, "I knew that we were going to have to explain at some point to a jury why he was in a courtroom—making statements in a courtroom to a judge." Glaser wanted to have Rolland explain the plea rather than have to rehabilitate Rolland. Glaser explained to Rolland that it was a technique that he called "drawing the teeth" to bring up the plea first.

Appellate defense counsel asked Glaser, "[i]f Mr. Rolland had not testified, what was your understanding of the admissibility of his prior plea?" Glaser answered:

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

> That the plea itself would not come in. . . . I don't think the plea itself would come in; but, if you're talking the other statements, I'm not so sure they could not have come in in their case in chief. But, since they didn't come in, I didn't think [the prosecutor] was going to use them; but I believe if he—Just having dealt with [the prosecutor] before, whether it's an inconsistent statement or a misstatement of fact—We've had those discussions numerous times.—I believe that he could have used the statements, at the very least, in his motion to withdraw the plea to impeach him.

Glaser explained that he thought discussing the withdrawn plea supported Rolland's credibility: "I've heard him explain why he entered a plea, why he withdrew the plea. I felt that gave a lot to his credibility." Glaser believed that Rolland came across as very credible and that was why the jury deliberated for five days. Glaser's intention was to show that Rolland had a pattern that when he was guilty, he pleaded guilty, but, even with a good sentence agreement, he would not plead when he was innocent. Glaser also intended to use to method of "drawing the teeth" and trying to avoid damage the prosecutor may have done.

The trial court did not find trial counsel's performance to be objectively unreasonable and it did not find that there was ineffective assistance of counsel. The trial court noted that Glaser's testimony showed that he made assessments and evaluations of credibility throughout trial; Glaser understood different issues and the statements made during the plea proceeding and statements made during the motion to withdraw the plea; Glaser testified that there were potential statements made by Rolland to guards or deputies; and Glaser testified that he made a decision to "draw the teeth" and use the information to bolster Rolland's testimony. The trial court concluded that it was rational for Glaser to use a strategy to prevent his client from hurting his own case by being "tripped up" by not understanding questions. The trial court pointed out that a perfectly legal question could cause a defendant to do that. The trial court noted that Glaser argued in closing how everything fit together and that he used a sound strategy even if it was ultimately unsuccessful. The trial court further found that even if Glaser's conduct was not reasonable, there was not a showing of outcome-determinative prejudice.

D. ANALYSIS

The trial court did not err in finding that Rolland received effective assistance of counsel. During the *Ginther* hearing, defense counsel explained his strategy in eliciting testimony about the guilty plea. The trial court found that his performance was not objectively unreasonable and that his testimony showed that he assessed Rolland's credibility, understood the issues concerning statements made at the motion to withdraw the guilty plea, and made the decision to bolster Rolland's credibility by explaining issues related to the plea instead of potentially having to rehabilitate Rolland as related to statements made in withdrawing the plea. The trial court emphasized that it was reasonable for defense counsel to have concerns that the prosecutor could have "tripped up" Rolland with a perfectly proper question.

As stated, the Michigan Rules of Evidence bar evidence of a withdrawn guilty plea and any statement made when a plea was taken.[26] However, MRE 410 does not bar statements made at a proceeding to withdraw a guilty plea. And defense counsel's testimony at the *Ginther* hearing established that he understood the plea was not admissible, but he also understood the prosecutor may properly use the statements from the motion to withdraw the plea. For example, the statements could be used for impeachment purposes pursuant to MRE 613 without violating MRE 410. There is no clear error in the trial court's findings in this case. Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight."[27] Rolland has not shown defense counsel's conduct fell below an objective standard of reasonableness.[28]

Rolland also argues that defense counsel was ineffective because he failed to conduct a reasonable investigation by not obtaining the transcripts for the plea proceeding or the motion to withdraw the plea. "Failure to make a reasonable investigation can constitute ineffective assistance of counsel."[29] However, failure to investigate must result in prejudice to the defendant.[30] Rolland's counsel had discussions with Rolland and relied on Rolland's memory. Rolland was going to testify using his memory, so counsel's dependence on that memory was not unreasonable. Moreover, although counsel did not have the transcripts, he had specific reasons for eliciting the testimony about the withdrawn plea, specifically bolstering Rolland's credibility and avoiding rehabilitation. This Court does not second guess counsel's trial strategy.[31]

Additionally, Rolland cannot establish that, but for counsel's performance, the result of the trial would have been different.[32] At trial, Malory identified Rolland as the shooter. Hawkins also initially identified Rolland as the shooter. While his identification became less certain by trial, there was evidence that Hawkins was intimidated and offered money concerning his testimony. And Moss and Larry testified that they saw Rolland with a handgun similar to the one used during the incident. The testimony of the withdrawn guilty plea did not weigh against Rolland where it was integral to defense strategy and showed a pattern that Rolland pleaded guilty to offenses when he was guilty. Rolland has not shown that the outcome of the trial would have been different without this evidence, and he has not established that he was denied effective assistance of counsel.

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[26] MRE 410 (1), (3); MCR 6.302.

[27] *Matuszak*, 263 Mich App at 58.

[28] *Toma*, 462 Mich at 302.

[29] *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

[30] *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

[31] *Matuszak*, 263 Mich App at 58.

[32] *Toma*, 462 Mich at 302-303.

Additionally, because we conclude that Rolland was not denied effective assistance of counsel, we also conclude that the trial court did not abuse its discretion when it denied his motion for a new trial on this ground.[33]

We affirm.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

[33] *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998).