STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2012
v	No. 300128 Shiawassee Circuit Court
NATHAN ALBERT SAUNDERS, Defendant-Appellant.	LC No. 10-000071-FH

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Following his jury trial, defendant was convicted of safe breaking, MCL 750.531, and sentenced to 10 months in jail and three years' probation, with the possibility of the jail time "being subject to waiver" based on defendant's compliance with the three-year term of probation imposed.[1] Defendant appeals as of right. We affirm.

Defendant stole a locked safe from the home of John Everden and Ashley Everden and later broke into the safe at a different location. The safe contained $600, the Everden children's piggy bank, some jewelry, and all of the family's important documents.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first claims on appeal that he was denied the effective assistance of counsel because counsel failed to object to, and in some cases introduced, evidence of defendant's unemployment, transience, violent nature, and drug use, and also failed to object to the prosecution's mischaracterization of witness testimony. We disagree.

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

[1] The sentencing took place on July 30, 2010, but defendant was not ordered to start his jail term until August 1, 2011. The trial court stated that it would consider waiving the jail term at that time if defendant conscientiously abided by the terms of the probation.

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.* Because defendant's motion for a new trial or *Ginther*[2] hearing was denied and no evidentiary hearing was held, review is "limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

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*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that 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*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A. FAILURE TO OBJECT TO EVIDENCE OF POVERTY/UNEMPLOYMENT

Generally, poverty and unemployment are not admissible as evidence of a defendant's guilt, his tendency to be truthful, or to show motive. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980); *People v Johnson*, 393 Mich 488, 496; 227 NW2d 523 (1975). Such evidence is legally irrelevant for these purposes since its undue prejudice outweighs its limited probative value. *Henderson*, 408 Mich at 65-66 (citing *People v Green* (*Green II*), 79 Mich App 186, 188; 261 NW2d 253 (1977)); see also MRE 401; MRE 403. Routinely admitting this type of evidence works a hardship on the poor and creates a "'two-tiered standard of justice.'" *Id.* (quoting *People v Green* (*Green I*), 74 Mich App 601, 606; 254 NW2d 788 (1977), decision clarified *Green II*, 79 Mich App 186).

At trial, the prosecution repeatedly elicited testimonial evidence of defendant's unemployment, transient status, and poverty. Mary Dumond, the mother of a friend of defendant, testified she knew that defendant was not working and that he occasionally stayed at her home. On cross-examination, defense counsel questioned Mary about defendant's unemployment checks and she stated that they were sent to her house. Tiffany Thomas, defendant's ex-girlfriend, testified regarding defendant's ongoing unemployment during August to October 2008. When asked on cross-examination whether she knew if defendant was drawing unemployment, she stated that she did not. Adam Wisely, who was present with defendant at the Everdens' home when the safe was stolen, testified that defendant kept clothes at the home of a mutual friend and would stay there when he needed to. Charles Kregger, a friend of defendant,

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973) (holding that a defendant claiming ineffective assistance of counsel must move for an evidentiary hearing in order to create a record on the issue).

testified that defendant came to his house one morning around the time the safe was stolen, needing to get cleaned up there because he had no other place to go. He said defendant would regularly stay at his home for several days at a time during the period Kregger was engaged to defendant's aunt. Defendant testified on direct examination that he was unemployed and collected unemployment checks during the time he was in a relationship with Thomas. He also testified that, around the time the safe was stolen, he had his clothes at the Dumond residence and had been staying at various places. The prosecution elicited defendant's testimony that he did not have a driver's license or a car and that he had been laid off for two-and-a-half years at the time of trial.

Defense counsel did not object to any of the foregoing testimony and, in fact, introduced some of it on his own initiative. Defendant claims this created the overall impression at trial that he was unemployed and destitute, and therefore likely to commit a crime of theft. This is precisely the type of "two-tiered standard" that is meant to be avoided by not permitting evidence of poverty or unemployment to show motive. *Henderson*, 408 Mich at 65. However, it appears here that defense counsel's decisions were within the realm of sound trial strategy. Defense counsel's questioning regarding defendant's unemployment checks arguably was done to illustrate that Thomas had taken defendant multiple times to cash his checks and had been in his presence several times when he had called to inquire on the status of the checks. Thomas had previously testified she was unaware defendant was drawing unemployment. Since the essence of Thomas's testimony was that defendant had confessed to her that he had stolen the safe, she was a key witness for the prosecution. Any testimony that worked to discredit and impeach her testimony was in defendant's best interest. And because defense counsel wanted to use this tactic, it was illogical for him to object to introduction of defendant's unemployment status by the prosecution. This course of action was within the territory of sound trial strategy, and we will not substitute our judgment for that of counsel on such matters. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

B. FAILURE TO OBJECT TO EVIDENCE OF OTHER BAD ACTS

Evidence of other crimes, wrongs, or acts is not admissible to show the character of a person in order to show behavior in conformity therewith. MRE 404(b)(1). In other words, "[w]here the relevance of the proposed evidence is to show the defendant's . . . propensity to commit crime, the evidence must be excluded." *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004). Thus, for evidence that implicates MRE 404(b) to be admissible, the evidence must be offered for a proper purpose. *Id.* at 509. A proper purpose is one other than establishing a defendant's character to show his propensity to commit the charged offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005).

Here, the evidence of defendant's prior drug abuse and bad acts in relation to such abuse was not offered to show that defendant had a propensity to steal. Instead, it was offered to show motive, which is an acceptable use of prior acts evidence. MRE 404(b)(1); see also *People v Rice*, 235 Mich App 429, 438; 597 NW2d 843 (1999) (evidence of a defendant's drug use was properly admitted to show motive for murder). Thomas testified that defendant had a drug problem and that he would pay for drugs by borrowing money from Thomas or "how ever [sic] else he could get a hold of it." She pointed to another reason for their breakup as being her unwillingness to continue dealing with defendant's drug problem. Thomas also testified she

thought defendant spent the money from the safe on drugs. The prosecution here was justified in eliciting this testimony because it supported its theory of motive. Consequently, since it was for a proper purpose and admissible, defense counsel's objection would have been futile. And trial counsel is not ineffective for failing to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Therefore, defense counsel's failure to object to this testimony did not constitute ineffective assistance of counsel.

C. FAILURE TO OBJECT TO EVIDENCE OF DEFENDANT'S CHARACTER

Evidence of a defendant's character, such as a violent nature, is not admissible to prove action in conformity therewith, except as it is relevant to determining who the aggressor was in violent acts, with respect to determining the guilty party in a case of criminal sexual conduct, or when a pertinent character trait is offered by the accused, or by the prosecution to rebut the same. MRE 404(a).

The prosecution elicited testimony regarding defendant's violent nature. There was no apparent proper purpose, since no pertinent character trait of defendant or any victim was offered by defendant and the crime did not involve violence, homicide, or criminal sexual conduct. See MRE 404(a). Thomas testified that defendant was "very angry" and that he would get especially angry when he was high. She said she was "scared of him," and "scared to tell him things I felt . . . because he would get angry." Thomas said they broke up partly because she "was tired of my daughter feeling the way she was feeling," and that she was scared for her daughter's safety.

Defense counsel's failure to object to this line of testimony is problematic. There is no sound reason apparent on the record for failing to object to this testimony regarding defendant's bad character, which does not fall within an evidentiary exception. However, even if defense counsel's performance fell below an objective standard of reasonableness by failing to object, defendant cannot establish that he was prejudiced by this failure to object. Without this testimony regarding defendant's violent nature, there is still ample evidence in the record weighing heavily in favor of defendant's guilt. Defendant was the only person to have gone upstairs before the safe was discovered missing. Thus, defendant cannot show he had a reasonable probability of receiving a different verdict had this evidence been stricken.

D. FAILURE TO OBJECT TO PROSECUTION'S REMARKS

Finally, defendant objects to the prosecution's references to Elexus Dumond's testimony during closing arguments and cross-examination of defendant. Elexus testified that she saw defendant trying to open a "box" sitting on the dashboard of Thomas's car at some point after the safe was reported stolen. The prosecution repeatedly stated that Elexus called the object defendant was working on in Thomas's car a "lockbox." Although this was inaccurate, the jurors heard Elexus's testimony for themselves, as well as defendant's testimony that he heard her say "box." Defendant also explained that he was probably working on a stereo faceplate at the time. Furthermore, the jury was instructed not to consider anything in counsel's statements or questions as evidence. Thus, this undermines any prejudice worked by the prosecutor's statements. Defense counsel is presumably aware of the law regarding the nonevidentiary nature of counsel's questions and statements. It is not unexpected that defense counsel would fail to

object to such statements due to this nonevidentiary nature, particularly when to do so may make defense counsel appear argumentative to the jury. This failure to object does not fall outside the realm of sound trial strategy and, therefore, does not constitute ineffective assistance of counsel. Moreover, as mentioned before, there was ample evidence showing that defendant stole the safe; thus, defendant cannot establish how his guilty verdict would have been any different had trial counsel objected to any "lockbox" reference.

We find that defendant was not denied the effective assistance of counsel. Defense counsel's actions were substantially within the realm of sound trial strategy, and although some may not have been, defendant was not prejudiced as a result of these actions.

II. JURY INSTRUCTIONS

Defendant next claims the trial court misinterpreted the safe breaking statute and gave improper jury instructions in accordance with that incorrect interpretation. He claims the statute includes, and the jury instructions omitted, an additional element of the crime – that the breaking into of the safe need take place *inside the building or place where it was located*. However, defendant has waived the issue.

Waiver of an issue will extinguish any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver has been defined as the "intentional relinquishment or abandonment of a known right." *Id.* (internal quotations and citations omitted). The doctrine of waiver is presumed to be applicable in both constitutional and statutory provisions. *Id.* at 217-218. Here, after the jury instructions were read, the trial court asked, "Before I get into anything else are there any corrections or changes that either counsel feels ought to be made to the instructions just now given to the jury?" Defense counsel answered, "No, Judge, we're fine with them."

The present situation is nearly identical to the situation in *Carter*. In *Carter*, the defendant's counsel was asked if there was any comment regarding the court's ruling regarding a jury instruction, and counsel replied, "Satisfaction with that part of it, Judge." *Id.* at 212. The Court in *Carter* found that defendant had waived the issued because the defense counsel "expressed satisfaction with the trial court's decision." *Id.* at 215. Defense counsel in the present case similarly expressed satisfaction to the instructions, which waived any issue related to the jury instructions.

Moreover, even if we were to review the issue, the Michigan Supreme Court has already determined that the location of the safe breaking is not an element to the charged offense under MCL 750.531.

MCL 750.531 states, in relevant part, as follows:

> Any person who, with intent to commit the crime of larceny, or any felony . . . shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or felony, be guilty of a felony . . . .

The elements of the crime were provided in jury instructions as follows: "[F]irst, that the [d]efendant, Mr. Saunders, attempted to break into a safe, whether he succeeded or not. The second element is that the [d]efendant intended to commit [l]arceny – it is not necessary that the crime of [l]arceny be completed." These instructions mirror the model instructions for this crime and do not require the safe breaking to have occurred in any particular "building or place." See CJI2d 18.5.

In *People v Greenway*, 365 Mich 547, 548; 114 NW2d 188 (1962), the defendant was charged and convicted under MCL 750.531 "with breaking a safe *taken from* a restaurant with intent to commit the crime of larceny." (Emphasis added.) The Supreme Court determined that the prosecution's alteration of the defendant's information on his charge of safe breaking, from referring to a safe "in a certain building" to "taken from" the building, was not "of the essence nor in issue" and did not prejudice the defendant. The Court held that the offense charged was not "changed by the amendment from breaking a safe to taking a safe." *Id.* at 549. Therefore, the Supreme Court necessarily found that a safe's location is not an element of MCL 750.531. Accordingly, even if defendant did not waive the issue, the *Greenway* holding would be fatal to defendant's claim of instructional error.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto