

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MAURICE GREGORY,

Defendant-Appellant.

UNPUBLISHED

August 21, 2012

No. 304973

Wayne Circuit Court

LC No. 10-010429-FC

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL.750.227b. He was sentenced to serve concurrent terms of imprisonment of 14 to 30 years for the robbery conviction, and three to six years for the assault conviction, to follow a consecutive term of 5 years' imprisonment for the felony-firearm, second offense, conviction. He received credit against the latter sentence for 257 days' time served. Defendant appeals as of right. We affirm.

This case arises from the execution by the police of an undercover drug buy. The prosecution presented evidence that defendant met the undercover police officer in a parking lot, entered the officer's vehicle on the passenger's side, and therein produced a firearm and robbed the officer. The officer then accessed his hidden firearm and shot defendant in the right side of his face. Defendant fled on foot, but was quickly apprehended and arrested. Defendant had in fact brought no drugs to the scene.

Defendant testified on his own behalf, denied robbing the undercover officer, and maintained that he was shot while outside the vehicle after the bullet shattered one of its windows.

Before defendant testified, the prosecution moved the trial court for permission to impeach defendant with a prior conviction of receiving and concealing stolen property. Defense counsel expressly declined to object. The prior conviction was admitted into evidence. On appeal, defendant claims defense counsel was ineffective for failing to object to use of that prior conviction to impeach him, on the ground that it had occurred more than ten years before defendant's testimony, and was thus inadmissible for impeachment purposes under MRE 609(c). Plaintiff confesses error in this regard.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, where, as here, the defendant has failed to move for a new trial on grounds of ineffective assistance, or evidentiary hearing to explore the issue,¹ this Court’s review is limited to mistakes apparent on the record. See *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

A valid ineffective assistance claim requires fulfillment of a two prong test: whether “counsel’s performance was deficient,” and upon such a finding, whether the “deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.” *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The deficiency prong is met if the defendant can show that “his attorney performed below an objective standard of reasonableness under prevailing professional norms.” *People v Pickens*, 446 Mich 298, 343; 521 NW2d 797 (1994). The prejudice prong is met if the defendant can show that “there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Because the prosecution concedes that defense counsel erred by failing to object to the prosecution’s motion, the first prong of *Strickland* is not at issue. Our analysis is confined to whether defense counsel’s deficient performance prejudiced defendant.

Defendant argues that witness credibility was a crucial aspect of trial, on the ground that only his own testimony could explain how the undercover officer’s bullet could have entered the right side of his face. Defendant asserts that by allowing the prior conviction into evidence, the prosecution successfully impeached defendant’s credibility. Consequently, defendant argues, had the prior conviction not been admitted, there is a reasonable probability that the outcome would have been different.

The erroneous admission of a prior conviction is harmless when the evidence “overwhelmingly establish[es]” a defendant’s guilt. See *People v Parcha*, 227 Mich App 236, 247; 575 NW2d 316 (1997); *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988). In this case, we conclude that admission of the prior conviction could hardly have had a significant prejudicial impact on defendant. The evidence weighed overwhelmingly against him. Defendant was armed with a handgun and was not carrying drugs, thus, demonstrating the intent to rob the undercover officer. The officer testified that defendant aimed his weapon at him and threatened to kill him. An evidence technician testified that the gun had a live round in its chamber, its hammer was cocked, and its safety was off. Although questions may remain concerning how the officer’s bullet entered the right side of defendant’s face while he sat in the front passenger seat, expert medical testimony indicated that it was unlikely that the bullet passed through an intermediary object before entering defendant’s face. Defendant’s assertion that the bullet traveled through the passenger door, while he was counting \$6,000 in a parking lot in broad

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

daylight, thus seems highly improbable. Moreover, upon defendant's arrest, he admitted to the police that drug dealers "had given him a gun to rob [the officer]."

Defendant argues that, in addition to the damage to defendant's credibility, the admission of the prior conviction may have resulted in the jury's misusing the prior conviction by improperly holding it against defendant on general principle in the case at hand. Although defendant cites case law regarding potential misuses of prior convictions by jurors, defendant ignores the facts of what occurred at the trial court in the present case, including that the court instructed the jury as follows:

There has been evidence that the defendant has been previously convicted in the past. You may only consider that evidence in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose. A past conviction is not evidence that the defendant committed the alleged crimes in this particular case.

This instruction expressly prohibited the jury from considering the prior conviction as evidence that defendant had a propensity for crime, and should for that reason be presumed guilty of the crimes alleged in the present case. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008), lv den 482 Mich 1186 (2008).

In light of the overwhelming evidence of defendant's guilt, we conclude that there is not a reasonable probability that the outcome of the proceeding would have been different but for the admission of the prior conviction. Defendant has thus failed to show a prejudicial impact resulting from the error he has identified in trial counsel's performance. See *Stanaway*, 446 Mich at 687-688.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh