STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 1999
v	No. 209819 Lapeer Circuit Court
ROBERT HAROLD VIARS, Defendant-Appellant.	LC No. 97-006150 FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant pleaded guilty of assault and battery, MCL 750.81(1); MSA 28.276(1), and a jury convicted him of aggravated stalking, MCL 750.411i; MSA 28.643(9). The trial court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, to four to ten years' imprisonment with credit for one day. We affirm but remand for correction of the judgment of sentence.

I. Basic Facts And Procedural History

This case arose from two incidents in May 1997 where defendant allegedly followed and physically assaulted the complainant, a woman with whom he had a romantic relationship and who obtained a personal protection order (a "PPO") against him. At trial, the complainant testified that in April 1997, while she was going through a divorce from her husband, she began an affair with defendant. The complainant further testified that when her marital problems began, she went to live at her friend's home on Squaw Creek Road in Fostoria for several weeks. Defendant and his father testified that defendant was living at the home on Squaw Creek Road on May 29, and defendant asserted that he continued to live there at the time of trial.

The complainant stated that she decided to end the affair with defendant because defendant wanted their relationship to become more involved: he wanted her to quit her three jobs and file for welfare, and she did not want to do that. The complainant testified that when she informed defendant that she wanted to end their affair, defendant became angry and started swearing at her. She claimed that defendant then began stalking and harassing her; he called her at work and showed up unannounced at her job and at her girlfriend's house.

The complainant claimed that her first contact with defendant after she sent him the PPO was on May 29, 1997. The complainant stated that she picked up her fourteen-year-old daughter and was inside her friend's house making a sandwich while waiting for her other children to arrive when defendant entered the kitchen, grabbed her by the neck, began choking her so that she could not breathe, and then threw her out the door.[1]

The complainant testified that on the following Saturday, as she was going to her car after leaving her part-time job with The Lapeer County Press, defendant approached her from behind in the parking lot and grabbed her by her hair. The complainant further testified that she and defendant struggled in the parking lot, but she was able to break free and get in her car. She claimed that defendant stood in front of her car to prevent her from leaving and she had to "just about run him over" in order to leave.[2] The complainant claimed that as she was stopped at a red light, defendant drove up in his mother's truck, got out, and started walking to her car and that when defendant approached her car, she drove through the red light and went straight to the Lapeer County Sheriff's Department. She explained that no one was in the front part of the office, so she left and went to the Michigan State Police post to speak to Trooper Cookenmaster, the officer to whom she had reported the incidents that led to her obtaining the PPO. Trooper Cookenmaster stated that he was shown the PPO and the certified mail receipt that established that defendant had received a copy of the PPO. Trooper Cookenmaster spoke with defendant on the telephone, and defendant denied the incident had occurred. Trooper Cookenmaster further testified as follows:

> *Q. [The prosecutor]:* Did you ask that he come in and give a statement?
>
> *A [Cookenmaster]:* Sure, I did.
>
> *Q.* And what was his response?
>
> *A.* I believe he was going to come in on the 2nd, I believe it was. And then I believe it was on the 2nd also he called back and said that he wasn't going to be able to make it and that Mr. Fulks [apparently, defendant's attorney] was going to give me a call.
>
> *Q.* Did you have any contact after that point with the Defendant?
>
> *A.* I don't believe I did. I think – well, I mean me and Mr. Fulks talked several times. But I don't believe I ever talked to Mr. Viars again.

Trooper Cookenmaster was also asked questions about his opinion of the complainant's truthfulness. During the Trooper's testimony, the prosecutor asked him to describe the complaint's condition when she reported the alleged incident involving defendant. The following colloquy then took place:

> *Q.* And what do you ordinarily look for when you take a statement from an individual under those circumstances?
>
> *A.* The believability of their story, the way they present the story to me, their body language.

Q. So, in other words, as a nine-year officer with the State Police, you're not taking everything at face value just because somebody tells you; correct?

A. Oh, no, sir.

Q. Is it fair to say that there's a certain amount of credibility or a gut check that goes on when you take a statement?

At this point, defendant objected that Trooper Cookenmaster could testify about his observations, but he could not testify about the complainant's credibility. The trial court ruled:

> I think he can testify as to the credibility of that report at that moment, based upon his observations as a police officer. I'll allow him to give an opinion as to that.

The prosecutor's exchange with Trooper Cookenmaster then continued as follows:

Q. Could you give an opinion, please, for the jury[?]

A. Can you repeat what it is that I can give an opinion on[?]

Q. Sure. I asked you – things aren't always as they seem. And, as an officer, you're trained and you have experience in assessing the credibility of someone who makes a statement to you; is that fair to say?

A. That's fair to say.

Q. That factors into how you handle or conduct an investigation to some degree; correct?

A. Right. It points me into one direction or another sometimes, yes, sir.

Q. And were you pointed in a particular direction in this case?

A. Yes, sir. Just based on my experience in these nonverbal issues, I believed her story to be true.

In her testimony at trial, the complainant claimed that after the incident in the parking lot, she did not return to her job with The Lapeer County Press because she was frightened and did not feel safe. She asserted that defendant called her at one of her other jobs and he also repeatedly dialed her pager number. The complainant denied that she initiated any of the telephone calls or that she initiated any contact with defendant since she filed the PPO. She testified that she was still terrified and that she could not sleep; she always had to "watch her back" and she cautioned her children to be careful.[3]

Defendant's father testified that he observed defendant and the complainant together at a pig roast on the Memorial Day weekend of May 22, 1997 (prior to the issuance of the PPO), and claimed that they left together to go to a motel.

Immediately prior to trial, defendant pleaded guilty to assault and battery. In the following colloquy with the trial court, defendant described what happened:

> *The Court*: tell me what happened on or about May 29th, 30th or 31st of 1997 that would cause you to be guilty of an assault and battery on [the complainant].
>
> *Defendant:* Well, she – this has been going on for a while and she got a PPO on me on the 7th or 8th of May or something and she kept coming to the house where [I] live. One thing led to another. I asked her to leave a couple times, she didn't. Her daughter was there because my dad's girlfriend was watching her kids. And she wouldn't leave. And one thing led to another, so I just, pretty much, put her outside. I told her not to come back. I mean, if she had it so bad there, everybody was so mistreating her bad, why was she coming there?
>
> *The Court:* How did you –
>
> *Defendant:* Well, I grabbed her by her shoulders. There's like a double door. To get outside, you got to open one door and open the other door to get out. So I grabbed her, opened [the] door and just put her outside pretty much. I mean I didn't physically strike her or anything like that, I just grabbed her and threw her outside. That was the assault.
>
> *The Court:* Was this a heated, angry exchange at that time?
>
> *Defendant:* Well, I was pretty mad. I mean I wanted her to leave. I didn't want her there. She's the one that had the PPO on me. What's she doing at my residence?
>
> *The Court:* Did you threaten her at that time also?
>
> *Defendant:* No, I didn't. I told her just not to come back to the house.
>
> *The Court:* Did you injure her in any way?
>
> *Defendant:* No.
>
> *The Court:* Just picked her up and put her out?
>
> *Defendant:* Pretty much.

During his testimony at trial, defendant explained that he pleaded guilty because "technically I did assault her by touching her"

At trial, defendant proposed to offer the testimony of the complainant's former husband regarding her alleged reputation for untruthfulness. The trial court stated that it would not allow impeachment on collateral issues and directed that the proposed testimony first be taken outside the

presence of the jury. At the hearing on the proposed testimony, the former husband testified that the complainant was his ex-wife. When asked if he knew her reputation in the community for truth telling, he initially responded, "Not at first," and then, after a follow-up question inquiring if he currently knew her reputation, he responded, "I know of – yeah, I do." The prosecutor objected to a lack of foundation for this opinion and the trial court cautioned that "[y]ou do need foundation as to how it is that he knows her reputation. Reputation is more than their personal contact, it involves more than that." The former husband was then asked about his contacts with the complainant and about whether he knew her friends and her employer. The following colloquy then occurred:

> *Q.* And do you have knowledge of her reputation for truth telling?
>
> *A.* Well, I've caught her in several lies, yeah.
>
> *Q.* Okay. And can you tell us what her reputation in the community for truth telling is[?]
>
> *A.* I don't think it's very good.

During the prosecutor's cross-examination, the following exchange occurred:

> *Q.* And, with respect to this so-called reputation in the community, what exactly are you talking about?
>
> *A.* What exactly – he asked me about in the community.
>
> *Q.* You don't know, do you; you don't know what her reputation is in the community?
>
> *A.* I do now. Believe me.
>
> *Q.* From who have you heard that?
>
> *A.* So many people. I don't even like talking about it. I was married to the woman.
>
> *Q.* I know you're bitter from the divorce and I don't have a problem with that. What I want to find out is whether you know what her reputation in the community is or not. Do you?
>
> *A.* Hearsay, more or less.

The trial court then questioned former husband as follows:

> *Q.* . . . We're talking about truthfulness.
>
> *A.* Truthfulness. I caught her in so many lies, it's not even funny. That's why we're not married today.

Q. So, between you and her, you think she lied to you, and was not truthful to you?

A. Many, many times.

Q. But do you have any direct information that she would have lied or cheated other people?

A. Other people? Yeah, I think she cheated everybody she knew.

Q. Do you know or are you guessing?

A. No. I know she's cheated a lot of people that I knew.

Q. And you had personal knowledge of that?

A. Yes, I did.

Q. Over what period of time?

A. Over a period of five years.

* * *

Q. And how is it that you know that she cheated other people?

A. Things I've seen her do, you know, cheat all of her friends. She's left all of her friends now for whatever she's doing now, which I have no idea. I have no contact with her, you know. But she's thrown away every friend she had over whatever she's doing. I have no idea, I don't know.

Q. You really don't know, do you, what the reasons for that are?

A. I have no idea. I can't explain it. If I could explain it, if I could have talked to her, I would still be married to her. You know, I don't know.

After ascertaining that the complainant was responsible for criminal charges that resulted in her former husband's conviction for brandishing a firearm, the trial court ruled:

> I don't believe that under MRE 608 that the offer of proof reaches the requirement for opinion or reputation testimony. I think it's overly vague and I think that the bias of the witness certainly has a lot to do with his ability to testify to that. And I don't believe it's going to be probative for the jury to hear that kind of testimony and I will not allow it.

Following his conviction and sentence, defendant moved for a new trial, alleging that his trial counsel had been ineffective (1) in pleading defendant guilty to assault and battery before trial, and (2) in failing to

present the testimony of several witnesses who could have testified regarding the alleged on-going relationship between defendant and the complainant prior to the issuance of the PPO.[4] The trial court denied defendant's motion and his request for an evidentiary hearing, ruling that: (1) there was no newly-discovered evidence because the proposed evidence was known to defendant at the time of trial; (2) the prosecution submitted sufficient evidence to support defendant's conviction for aggravated stalking regardless of the admission of the fact that defendant pleaded guilty to assault and battery; and (3) the proposed testimony of defendant's witnesses concerning the incidents prior to the issuance of the PPO would not have had any bearing on whether there was sufficient evidence to support the jury's verdict regarding the stalking incidents on the following weekend and later in the summer.

II. Preservation Of The Issues And Standard Of Review

A. Ineffective Assistance Of Counsel

Defendant raised the issue of ineffective assistance of counsel in his motion for a new trial, advancing two of the three claims he now presents on appeal. This Court will consider this issue, but since there was no evidentiary hearing, review is limited to mistakes apparent on the existing record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). This Court reviews the existing record to determine if defendant has shown that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

B. Testimony As To Truthfulness

The trial court considered the former husband's proposed testimony as to the complainant's character for truthfulness outside the presence of the jury and ruled that it was not admissible because it did not satisfy the requirements of MRE 608. Defendant objected to the admission of Trooper Cookenmaster's testimony regarding his opinion of the complainant's credibility based on his observation of her, and the trial court ruled that he could offer such an opinion "based upon his observations as a police officer." The defendant therefore preserved these issues for appellate review. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). This Court reviews questions regarding the trial court's admission of evidence for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997).

C. Sentencing

Whether a judgment of sentence contains a factual error is a factual determination. Ordinarily, factual determinations are reviewed for clear error, *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996); however, where the question has not been passed on by the trial court, this Court's review, of necessity, is de novo since there is no existing "finding" to review.

III. Ineffective Assistance Of Counsel

Defendant contends that his trial counsel failed to provide effective assistance by: (1) failing to present several witnesses who could testify that the complainant continued to see defendant even after

she obtained a personal protection order; (2) for allowing him to plead guilty to the assault and battery charge prior to trial; and (3) for failing to object when Trooper Cookenmaster volunteered that defendant indicated he would "only speak through a lawyer." We disagree.

There is a presumption that counsel provided effective assistance, and the defendant bears the heavy burden of overcoming that presumption. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant also bears the burden of overcoming the "strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The decision whether to present particular witnesses is a matter of trial strategy that may constitute ineffective assistance only where a failure to present the witnesses deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant was not deprived of a substantial defense as the testimony he wished to present through his proposed witnesses was either inadmissible or was cumulative to his father's testimony. Moreover, these witnesses were apparently known to defendant and his counsel and they decided not to present them at trial. This Court will not second-guess trial counsel on matters relating to trial strategy. *Pickens*, *supra* at 330.

Further, it was defendant's decision to plead guilty on the advice of his counsel, *Effinger*, *supra* at 71, and pleading guilty to the misdemeanor offense while contesting the felony was a matter of trial strategy. *Pickens*, *supra* at 330. Finally, deciding not to object to Trooper Cookenmaster's statement was a matter committed to counsel's trial strategy and this Court will not second-guess counsel on such matters. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *Id*. Counsel's decision was not unreasonable since, by not objecting, he did not draw the jury's attention to the remark. Moreover, since defendant's statements were offered voluntarily at a time before he had been arrested, Trooper Cookenmaster's testimony concerning those statements was proper. *People v Sholl*, 453 Mich 730, 738; 556 NW2d 851 (1996).

IV. Testimony As To Truthfulness

Defendant essentially argues that the trial court abused its discretion by refusing to admit testimony from the complainant's former husband regarding his opinion of her character for truthfulness or untruthfulness or her reputation in that regard, and also by admitting testimony from Trooper Cookenmaster concerning his assessment of the complainant's credibility.

With regard to the proffered testimony from the former husband, we disagree with the trial court's conclusion "that the offer of proof [did not reach] the requirement for *opinion* or reputation testimony" (emphasis supplied). During the offer of proof outside the jury's presence, the former husband said that he was married to the complainant for over five years and had "caught her in so many lies, it's not even funny." From this offer of proof, it is plain that the former husband asserted a basis to testify to his opinion that the complainant had a character for untruthfulness. See *People v Brownridge*, 459 Mich 456, 462; 591 NW2d 26 (1999) (present version of MRE 608(a) allows opinion evidence

to be used to attack a witness' character for truthfulness). We note that the trial court did not expressly consider whether such testimony from the former husband should nevertheless have been excluded under MRE 403,[5] and we presume for purposes of our analysis that the trial court abused its discretion by excluding the opinion testimony from the former husband.

However, nonconstitutional error in a criminal case is not a ground for reversal unless it affirmatively appears that "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, ___ Mich ___; ___ NW2d ___ (Docket No. 110737, rel'd 7/13/99), slip op at 13. While the former husband's testimony may have called into question the complainant's general honesty, it would have done little to establish any motive on her part to falsely accuse defendant in this case of stalking her. Further, it was brought out during the offer of proof that the complainant was apparently heavily involved with circumstances that culminated in her former husband pleading guilty to a firearm-related misdemeanor. If the trial court had admitted opinion (or reputation) testimony from the former husband that the complainant had a character for untruthfulness, the prosecution would have, in all likelihood, sought to, and been permitted to, pursue the former husband's motive to attack the complainant based on her involvement in his prior criminal prosecution. See *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995) (bias of a witness "is always a relevant subject of inquiry upon cross-examination"). We believe that this would have seriously undermined the former husband's testimony in the eyes of the jury. Against this background, we conclude that any error in the exclusion of opinion or reputation testimony from the former husband about the complainant's character for untruthfulness is not a ground for reversal, because it is not more probable than not that it was outcome determinative. *Lukity, supra.*[6]

Regarding Trooper Cookenmaster's testimony, we conclude that the trial court erred by permitting the Trooper to testify that he believed the complainant's story was true. This testimony was merely an inadmissible lay witness' opinion on the believability of the complainant's story, *People v Smith*, 425 Mich 98, 113; 387 NW2d 814 (1986), and it was for the jury to determine whether a particular witness was credible, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Admission of this testimony was also improper because one witness is not permitted to comment on the credibility of another witness. *Id*. However, the error in this case does not justify reversal. In light of the other testimony, this error does not warrant reversal as it does not affirmatively appear that it was more probable than not that the error was outcome determinative. *Lukity, supra*. The initial portion of Trooper Cookenmaster's testimony – describing the complainant's emotional state – was proper. Defense counsel dealt with the Trooper's assessment of the complainant's credibility on cross-examination by getting him to acknowledge that he had previously been manipulated by an "alleged victim." Furthermore, this was not simply a one-on-one credibility contest since the complainant's daughter testified, corroborating much of her mother's testimony, and defendant acknowledged that he had assaulted the complainant on one occasion. Finally, the prosecutor did not refer to Trooper Cookenmaster's credibility assessment in his closing argument and thus did not seek to capitalize on this improper testimony. Thus, we conclude that it was not more probable than not that the trial court's error was outcome determinative.

V. Sentencing

Defendant asserts that his judgment of sentence erroneously indicates that his aggravated stalking conviction was obtained by a guilty plea while his assault and battery conviction came from a jury verdict when, in fact, the opposite is true. Additionally, we note that the trial court needlessly vacated the misdemeanor conviction when it enhanced defendant's felony sentence as an habitual offender. The judgment also incorrectly indicates defendant was convicted of domestic violence rather than assault and battery. We remand to the trial court for correction of these errors by the ministerial act of issuing an amended judgment of sentence. *People v Miles*, 454 Mich 90, 98-99; 559 NW2d 299 (1997); *People v Maxson*, 163 Mich App 467, 471; 415 NW2d 247 (1987).

Defendant's convictions are affirmed, but this case is remanded for the issuance of an amended judgment of sentence. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] Defendant, by contrast, contended that he was watching television with his father when the complainant started arguing with him about the PPO "and one thing led to another." Defendant claimed that he asked the complainant to leave, and that when she refused he lost control, grabbed her, and carried her outside. Defendant denied that he grabbed the complainant by the throat or physically abused her by slapping her or pulling her hair.

[2] Again by contrast, defendant denied that he followed the complainant, that he waited for her in the parking lot of The Lapeer County Press, or that he grabbed her hair, assaulted her, or harassed her in the parking lot; he claimed that he was at his mother's home when this incident allegedly occurred.

[3] Again in sharp contrast, defendant asserted that he and the complainant got together after the date of the PPO – that she came to his house to see him and that she used his car to get back and forth to work. The defendant denied stalking, threatening, harassing, or trying to frighten the complainant.

[4] Defendant presented the affidavits of three individuals in support of this contention. Essentially, these affidavits attempted to establish that defendant lived at the Squaw Creek Road address – a fact that, while contrary to the complainant's testimony, did not constitute a major issue at trial – and that defendant and the complainant were together on the Memorial Day weekend preceding the stalking incident.

[5] MRE 403 allows a trial court to exclude relevant evidence if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[6] While defendant vaguely invokes federal constitutional case law regarding the right to effective cross-examination (a matter different from the issue at hand in which defendant sought to present direct examination testimony from a witness) and certain constitutional provisions, he has not established, or even reasonably presented, a claim of constitutional error.