STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS H. MCDANIEL,

Defendant-Appellant.

UNPUBLISHED
December 15, 2000

No. 210908
Oakland Circuit Court
LC No. 97-150835 FH

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Pursuant to a Supreme Court order, we consider as on leave granted defendant's appeal of his post jury trial conviction of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3). The trial court sentenced defendant, a fourth habitual offender, MCL 769.12; MSA 28.1084, to five to twenty years' imprisonment. We affirm.

Defendant first contends that the prosecutor's elicitation of inculpatory statements defendant made to a probation officer and the trial court in connection with a subsequently withdrawn guilty plea violated his constitutional rights against self-incrimination, MRE 410 ("[E]vidence of [a plea of guilty later withdrawn] is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions."), and MCL 791.229; MSA 28.2299 (establishing an "inviolate" privilege for "[a]ll records and reports of investigations made by a probation officer, and all case histories of probationer"). While defendant at trial objected to the prosecutor's inquiry concerning defendant's pretrial statements to a probation investigator, defendant did not argue that the prosecutor's inquiries violated his constitutional rights or MRE 410. Because defendant failed to properly preserve these issues, our review of them is limited to ascertaining whether any plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). Defendant did object, however, on the basis that the prosecutor's inquiries violated the statutory privilege, and therefore we must consider whether some error occurred in this respect that more probably than not resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 493-495; 596 NW2d 607 (1999).

Our review of the record convinces us that we need not address the merits of the issues raised by defendant because any error that occurred qualifies as harmless. Four police officers testified at defendant's trial regarding their participation in a nearly eight hour surveillance of defendant on the day of the robbery. In the early afternoon of January 28, 1997 at approximately

1:30 p.m., the officers located the target of their surveillance operation, a red Chevrolet Corsica, which they followed continuously until approximately 9:00 p.m. Ultimately, the Corsica stopped in the parking lot of a Royal Oak townhouse complex. Although officers testified that during the course of their lengthy observation of the Corsica throughout the day more than one individual occupied the Corsica at various times, when the Corsica made its way to and arrived in Royal Oak it contained only one individual, whom all four officers identified at trial as defendant.

City of Troy Officer Neil Piltz testified that he witnessed defendant's subsequent actions from behind the fence surrounding the townhouse complex parking lot, only several feet from the Corsica's parking spot, sometimes looking over the fence and occasionally watching through cracks in the fence. Although the sun had set some hours before, outdoor lights illuminated the parking lot to the extent that Piltz opined he had no difficulty observing the events. According to Piltz, defendant approached the back door of the nearest townhouse while looking around in all directions. Defendant reached and knocked on the back door, then peered in various windows. Piltz saw no lights inside the townhouse. Defendant returned to the Corsica several feet from Piltz, opened and closed a car door, then returned to the townhouse's back door carrying an apparently empty blue duffel bag. Defendant utilized a screwdriver to pry open the back door and walk inside. Through a window in an upstairs bedroom, located directly above the back door where defendant had entered the townhouse, a light was observed being turned on, and through that window Piltz observed defendant. During his activities in the bedroom, of which Piltz only was able to observe that defendant's arms were moving, engaged in some activity below the window's available line of sight, defendant several times returned to the window above the back door to look out into the parking lot. Piltz watched defendant after a short while leave the townhouse through its broken back door. Defendant approached the Corsica looking in all directions and carrying an apparently full duffel bag and, on top of the bag, two samurai swords.[1] After defendant placed his load inside the Corsica's back seat, Piltz radioed the other surveillance team members to arrest defendant. Officers swarmed the Corsica as defendant sat inside its front seat. Piltz testified to his absolute certainty that during the robbery no individual other than defendant approached the Corsica or the townhouse.

City of Troy Officer Scott Salter testified that he also participated in the surveillance of the Corsica, and at trial identified defendant as the lone occupant of the Corsica when it approached and arrived in Royal Oak. Salter was stationed at the front door of the townhouse during the robbery to prevent any escape in that direction, but when radioed reported to the parking lot to observe defendant walking toward the Corsica and carrying the large duffel bag and swords, which items he also identified in court. Salter likewise testified that during the events he observed no one other than defendant.

Two other officers who also participated in the surveillance of defendant on the day of the robbery testified at defendant's trial that they did not observe the actual occurrence of the robbery, but after being radioed arrived in the parking lot to witness an individual they identified at trial as defendant being placed under arrest. Both officers observed that a bent-tipped screwdriver was removed from defendant's pocket and at trial identified the screwdriver.

Two officers who inspected the townhouse after defendant's arrest testified that the door jam was splintered, the upstairs bedroom appeared in disarray, and that jewelry boxes were

[1] At trial Piltz identified the duffel bag and swords.

strewn about the bedroom and stairway. The officer who also inspected the Corsica discovered jewelry and another screwdriver inside the blue duffel bag. Two officers recalled their post robbery encounters with the townhouse residents, who identified as their property a small television set, jewelry and the swords recovered from the Corsica. One of the townhouse residents testified to returning home from work on the day of the robbery to discover a police officer present and the townhouse, especially the upstairs bedroom, in some disarray, and at trial identified several stolen objects.[2]

While we acknowledge the potentially prejudicial impact of erroneously admitted testimony concerning a defendant's failed or withdrawn plea of guilty of a charged crime,[3] in light of the strength of the untainted evidence of defendant's guilt in the instant case, we cannot conclude that "it is more probable than not that a different outcome would have resulted without the [allegedly] erro[neous admission of testimony violating MCL 791.229; MSA 28.2299]." *Lukity*, *supra* at 495.[4]

Defendant next argues that the prosecutor improperly suggested in his rebuttal closing argument that no deal for defendant's guilty plea ever existed. We agree with defendant that the challenged remarks demonstrated the prosecutor's inappropriate injection of facts unsupported by the evidence presented at trial. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). We again conclude, however, that in light of the strength of the untainted evidence it does not affirmatively appear that the prosecutor's actions more probably than not determined the outcome of defendant's trial.[5] *Lukity*, *supra*.

Defendant also asserts that the trial court improperly permitted the prosecutor to impeach defendant's trial testimony by utilizing evidence of defendant's 1983 breaking and entering conviction. The trial court did not, as MRE 609(b) requires, articulate on the record its analysis regarding the evidence's probative value and prejudicial effect. *People v Daniels*, 192 Mich App 658, 670-671; 482 NW2d 176 (1992). Given the evidence's minimal probative value, *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992), apparent similarity to the instant charged crime and remoteness in time, we agree with defendant that the court abused its discretion in admitting evidence of the 1983 conviction. MRE 609(a)(2)(B); *Daniels*, *supra* at 671. Once more, however, we conclude that in light of the weight of the untainted evidence of defendant's guilt this error did not affect the outcome of defendant's trial.[6] *Lukity*, *supra*.

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[2] The above summarized evidence represented almost the entirety of the prosecution's case. Defendant himself testified as the only witness on his behalf. Defendant denied being the robber, alleged that at the time of the robbery he had lent the Corsica to another individual, and averred that the police mistakenly detained him on the basis that defendant's wallet was recovered from the crime scene, transported defendant to the crime scene, then beat him up, burned his leg with a cigar and stripped him in an effort to coerce a confession.

[3] See *People v Dunn*, 446 Mich 409, 422-424; 521 NW2d 255 (1994).

[4] To the extent that a different standard of review applies to defendant's unpreserved allegations of constitutional and evidentiary error, in this case we detect no plain error that affected the outcome of defendant's trial. *Carines*, *supra* at 763.

[5] We note that the trial court instructed the jury that the attorneys' arguments and statements do not constitute evidence.

[6] We note that both the prosecutor during his closing argument and the court in instructing the

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Defendant further contends that "[t]he prosecutor repeatedly elicited improper and inadmissible other bad acts evidence about [defendant] in violation of MRE 404, which resulted in an unfair trial." The prosecutor questioned one of the officers at trial regarding his examination of the contents of the duffel bag found in the Corsica, then elicited that the officer had recovered from the Corsica's glove compartment more jewelry and watches, but that the officer did not know to whom the items found in the glove compartment belonged. When the prosecutor then sought to admit the jewelry found in the glove compartment, defendant objected that this evidence was irrelevant. Defendant did not contend before the trial court that the evidence violated MRE 404(b), and thus failed to preserve this argument for appeal. MRE 103(a)(1); *Grant*, *supra*. The trial court upheld defendant's objection based on relevance, and refused to admit the glove compartment's contents. We detect no error in this ruling. MRE 401 and 402. To the extent that defendant nonetheless alleges error because the jury "heard the prosecutor state that it had 'substantial probative value as circumstantial evidence that this stuff is just coincidentally found in a car. I don't think so and I think the jury is allowed to form whatever inferences it choose [sic],'" we detect no error arising from the prosecutor's proffered argument because the trial court rejected the prosecutor's claim and later instructed the jury that the lawyers' arguments and statements did not represent evidence.

Lastly, defendant suggests that the cumulative effect of the errors that occurred during his trial warrants reversal of his conviction. We assumed the existence of error in the admission of defendant's statements to a probation officer and in the course of a later withdrawn guilty plea, and acknowledged that the prosecutor improperly suggested to the jury that no plea agreement existed and that the trial court improperly admitted for impeachment purposes evidence of defendant's 1983 breaking and entering conviction. Reconsidering the potential effect of these errors in light of the untainted evidence presented, we cannot conclude that either separately or when considered together these errors had any effect on the outcome of defendant's case or resulted in a miscarriage of justice when the testimony of multiple police officer witnesses otherwise established that defendant was caught in the act of breaking into the victims' townhouse. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999) (finding reversal unwarranted where the "errors or arguable errors related to defendant's trial were of little consequence").

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

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jury directed the jurors to consider defendant's prior conviction solely as it affected defendant's credibility.