STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

CARL BOONE,

Defendant-Appellant.

UNPUBLISHED
March 22, 2002

No. 229131
Wayne Circuit Court
LC No. 99-009662

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for armed robbery, in violation of MCL 750.529, following a jury trial. We affirm.

Defendant asserts that the trial court erred by not granting his motion for a new trial, offered on the basis that the verdict was against the great weight of the evidence. We disagree.

We review challenges to a trial court's decision on a motion to set aside a conviction for being against the great weight of the evidence for abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1999). We find such an abuse of discretion "only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *Id.* (citations omitted). In so doing, we do not interfere with the jury's functions of deciding the weight to be given evidence and of determining the credibility of witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Viewed in that light, the conviction does not merit reversal.

Defendant has shown that there were inconsistencies in the complaining witness's testimony. These inconsistencies were brought to the attention of the jury, as was the conflict between this witness's testimony and that of his alleged accomplice. The jury was also made aware of the explanations the complaining witness gave for these inconsistencies, asserting that he initially concealed his use of cocaine from the police because he did not want his wife to know that he was a drug user, and that he had forgotten some of the details about how specific items were taken from him during the robbery as a result of being rendered unconscious when he was hit over the head with a metal pipe during the robbery. We cannot agree with defendant that these explanations or the rest of the complaining witness's story suffer from "inherent implausibility," and we reiterate that it was the function of the jury, and not of the trial court or

of this Court, to resolve credibility questions. *Terry, supra,* 452. The jury resolved the credibility questions in favor of the prosecution.

It is proper for a court to set aside a jury verdict as being against the great weight of the evidence "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon,* 456 Mich 625, 642; 576 NW2d 129 (1998). In making this determination, a court may not function "as a thirteenth juror." *Id*. at 647. When the testimony of the complaining witness, the testimony of police officers and the physical evidence corroborating the broad outlines of the complaining witness' complaint that there was a physical struggle in which he was injured and that property was removed from his home, and the undisputed fact that defendant was in the victim's home on the night the property was taken and that the missing property was found in the trunk of his vehicle the next day, we cannot say that the evidence preponderates heavily against the verdict; therefore, we cannot find that the trial court abused its discretion in denying the motion for a new trial.

Defendant also argues that he received ineffective assistance of counsel because his trial counsel failed to move for a mistrial when a hostile prosecution witness unexpectedly volunteered the statement that defendant was on parole when the crime was committed – a statement the trial court immediately told the jury to disregard – and because counsel failed to object to a jury instruction as to the consideration to be given to the flight of a suspect. Again, we disagree.

The standard for review of an ineffective assistance of counsel claim is set forth in *People v Hoag,* 460 Mich 1, 5-6; 594 NW2d 57 (1999), where, citing *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994), and quoting *Strickland v Washington,* 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the Supreme Court stated:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

In attempting to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy, and must establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *People v Johnson,* 451 Mich 115, 124; 545 NW2d 637 (1996).

We conclude that defendant's trial counsel was not ineffective when evaluated under the above standards. There is no reasonable probability that the result would have been different had

counsel moved for a mistrial when the reference to parole was made. The court, on its own initiative, immediately admonished the jury that it was not to consider whether this reference was accurate, and that whether defendant was on parole was not an issue in the case. Moreover, to the extent that defendant is arguing that he was seriously and irretrievably prejudiced by the obvious inference that he was a criminal, he had already told the jury as much himself, admitting quite frankly that he was a cocaine dealer. The effect of the witness's statement, which the jury was immediately admonished to ignore, was at most cumulative and comparatively slight in light of defendant's own admissions. Moreover, the statement by the witness was unresponsive and volunteered, and was neither anticipated nor encouraged by the prosecutor; accordingly, it would not have justified a mistrial, *People v Hackney*, 183 Mich App 516, 531-532; 455 NW2d 358 (1990), and it was not ineffective for counsel to fail to object to it.

We further find the trial court's instruction on flight to have been proper, as the prosecutor did in fact introduce evidence that defendant attempted to evade arrest through the testimony of the arresting officer. Because the instruction was not improper, any objection would have been futile. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra