STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 7, 2002
v	No. 228021 Kent Circuit Court
KENNETH ANDRE EASON, Defendant-Appellant.	LC No. 00-000764-FH

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a building with intent to commit larceny, MCL 750.110. He was sentenced as a fourth habitual offender, MCL 769.12, to three to thirty years' imprisonment. Defendant appeals as of right. We affirm.

I. Facts

Defendant was charged with larceny from a Southern Fish Fry Restaurant that took place in the early morning hours of November 28, 1999. On that date there were two bank bags of money, one containing approximately $150 and the other containing approximately $134, taken from the Southern Fish Fry along with other assorted monies.

Defendant testified that he and Ivy Dumas-Sandifer, a woman with whom he was having an extramarital affair, had left a motel and drove to a strip mall in order to get something to eat. The restaurant of choice was located in the same strip mall as the Southern Fish Fry. Defendant's testimony was that upon arrival he saw two hooded males running from behind the Southern Fish Fry, that the two males dropped a bag, he picked it up without looking inside of it, and had Sandifer drive him home. Defendant testified that after attending church the following morning he spoke with his minister, decided that it was best that he not keep the money, and called the Southern Fish Fry to report that he had the money taken from the store.

Sandifer, however, testified to the contrary. Sandifer testified that after leaving the hotel, she drove her car to the strip mall so that she and defendant could get something to eat. Upon arriving at the strip mall and finding that the restaurant they had hoped to dine at closed, defendant instructed her to go behind the Southern Fish Fry. As a result, Sandifer drove her car behind the Southern Fish Fry, assuming that defendant knew someone inside who could get them

something to eat. However, once she stopped the car behind the Southern Fish Fry, defendant exited the vehicle and entered the Southern Fish Fry through the back door. Defendant exited some three or four minutes later, and upon reentering the car, defendant had a brown bag which he was "fiddling" with, and which he ultimately placed into his coat. Defendant then instructed Sandifer to drop him off at an undisclosed location.

Essie May Alexander, a manager at the Southern Fish Fry, also testified at trial. Alexander testified that defendant was a management trainee at her store and that he had worked the shift prior to her on Saturday, November 27, 1999.[1] Alexander testified that all the employees, including defendant, were aware that the back door to the restaurant was broken and that if opened from the inside, it could be difficult to close. Alexander also testified that the door was in such a condition that it could be opened from the outside by either swiping a credit card between the door jam and the door, or by shaking or jiggling the door. Alexander further testified that as a management trainee, defendant was aware of where the "money tills" were located and how they operated.

Alexander testified that she and two other employees worked the late shift at the Southern Fish Fry and that the restaurant was closed at approximately 2:15 a.m. At the time of closing, Alexander testified that there was approximately $68 left in the two cash drawers, two bank money bags containing approximately $134 and $150 respectively, and that those were left in the store upon closing.

Alexander opened up the store in the afternoon on Sunday, November 28, 1999. Alexander testified that upon arrival she almost immediately noticed that the back door to the restaurant was open, and that she then proceeded to discover that the money had been stolen. Alexander immediately called a manager from another Southern Fish Fry, and then contacted the police. Soon after speaking with the police, Alexander received a telephone call from defendant. According to Alexander, defendant said "hello" and then asked Alexander if anything "was going on." Alexander asked defendant what he meant by that, and defendant asked if there was "anything fishy" going on. Alexander indicated that indeed there was, as the restaurant had been broken into and money had been stolen. No other discussion took place during this conversation.

Sometime later that day, defendant again called Alexander and this time indicated to her that he had a moneybag at his home. Defendant explained to Alexander that he had picked the moneybag up early that morning after seeing two hooded males running from the restaurant. Alexander asked him to bring the moneybag to the restaurant because the police wanted it, but because of an inability to obtain transportation, Alexander and the police instead went to defendant's home. Upon arriving at defendant's home, Alexander saw the moneybag from the store sitting just outside defendant's home.

Defendant called Sandifer her at her place of employment two to three days later. Defendant told Sandifer that if two detectives contacted her, to let them know that they saw "two

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[1] Apparently defendant actually left work early that day at approximately 7:00 p.m. Defendant went to his brother's home and "drank beer" and "had fun."

dudes in hoods" running from the Southern Fish Fry, that they had dropped the moneybag, and that defendant had picked it up without looking inside of it. In response to this, Sandifer stated that she had hoped defendant had not done what she had thought he had done in her car, to which defendant replied he hadn't done anything and that everything was okay.

Defendant testified that Sandifer had a motive to fabricate her testimony because she did not like his wife, the former spouse of Sandifer's brother:

> The reason being because she don't like my wife, because she knows my wife. And for her, to hurt my wife in any kind of way, well, either get me away from my wife or somehow or another drag me through the mud.

Defendant also presented his sister as a witness, who testified that she had been summoned to the prosecutor's office the week before trial and overheard Sandifer say that she was going to "hang" defendant. In rebuttal, the prosecutor presented the testimony of Sandifer's son, who was present while his mother was at the prosecutor's office, and who denied his mother said she was going to hang defendant, but that his mother did say, "That was pretty ------ up that he had to rob that place in my car."[2]

Following a jury trial, defendant was convicted of breaking and entering a building with intent to commit larceny. This appeal followed.

II. Analysis

A. Ineffective Assistance of Counsel

Defendant first contends that he was denied the effective assistance of counsel when his trial counsel failed to object when he was impeached with evidence of a prior conviction. During cross-examination, the prosecutor impeached defendant with the prior conviction as follows:

> *Q*. Now it's also true that you've been convicted before of a crime involving theft or dishonesty, correct?
>
> *A*. I think back in '86.
>
> *Q*. Okay. In fact it was a larceny in a building, wasn't it?
>
> *A*. Yes.

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[2] Another theory put forward by defendant was that another Southern Fish Fry employee, Kelly Jackson, had committed the crime. Defendant presented evidence that Jackson's pager and a Christmas ornament with a picture of her children was found near the back door of the restaurant after the crime had occurred.

Q. And it was not '86.

A. When was it?

Q. I'll show you this. '87.

A. Okay. '87.

Because defendant failed to move for an evidentiary hearing under *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973), or a new trial, we are left to review this claim for errors apparent on the existing record. *People v Knapp,* 244 Mich App 361, 385; 624 NW2d 227 (2001).

In *People v Garza,* 246 Mich App 251, 255; 631 NW2d 764 (2001), this Court set forth the standards to be applied in reviewing claims of ineffective assistance of counsel:

> To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial. *People v Williams,* 240 Mich App 316, 331; 614 NW2d 647 (2000). A defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *Id.* Furthermore, this Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise. *Id.* Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell,* 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett,* 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant's 1987 larceny in a building conviction was patently too old to be admitted for impeachment purposes. MRE 609(c).[3] Indeed, the prosecution admits that it was error to have the conviction admitted into evidence. In any event, because the parties all agree that it was error to have such evidence admitted, the question becomes whether counsel's failure to object fell below an objective standard of reasonableness such that, but for counsel's error, the result of the proceedings would have been different. *Garza, supra.*

This issue presents a very close question. However, in deciding this issue, we are very mindful of the heavy burden placed upon defendant in establishing a claim of ineffective assistance of counsel. *Garza, supra.* We are also cognizant of the constitutional notion that a criminal defendant is not entitled to a perfect trial, only a fair trial. *People v Pickens,* 446 Mich 298, 314; 521 NW2d 797 (1994), citing *People v Beach,* 429 Mich 450, 491; 418 NW2d 861 (1988). Our Court has, on several prior occasions, held that the failure to object to potentially

[3] MRE 609(c) provides that convictions over ten years old may not be used for impeachment purposes. *People v Rodgers,* 248 Mich App 702, 716; __ NW2d __ (2001).

damaging evidence does not result in the ineffective assistance of counsel where the questioning is brief and where an objection could have only emphasized the testimony in the minds of the jurors. See, e.g., *People v Barker*, 161 Mich App 296, 304; 409 NW2d 813 (1987); *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). With these principles in mind, defendant in this case has failed to overcome the presumption that his trial counsel's failure to object was sound trial strategy. Defendant's trial counsel may have decided that it would be more beneficial not to object to this brief line of questioning, and thereby, not emphasize the conviction. Thus, counsel's split-second decision not to object is deemed reasonable trial strategy devised to diminish any impact the testimony would have on the jury. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *Barker, supra; Lawless, supra.* Accordingly, we cannot say that trial counsel's decision fell below an objective standard of reasonableness. *Garza, supra.* Therefore, we find that defendant was not denied the effective assistance of counsel and we need not review any claims of prejudice.[4]

B. Prosecutorial Misconduct

Defendant also argues that he was denied a fair trial when the prosecution committed several instances of misconduct. We disagree. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999). When reviewing claims of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *Id.* at 435. However, any unpreserved errors will be reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* In that regard, where a curative instruction could have alleviated any prejudicial effect, error requiring reversal will not be found. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Although we hold that the prosecutor engaged in some misconduct, the alleged errors did not individually or collectively deny defendant a fair trial. *Knapp, supra* at 387-388.

Defendant first claims that the prosecutor improperly argued facts not in evidence. A prosecutor may not make a statement of fact to the jury that is not supported by the evidence, but he is free to argue the evidence and any reasonable inferences that may arise from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Schutte, supra* at 721. First, there was record support for the prosecutor's arguments that defendant

[4] We note that defendant does state in his brief that the trial court abused its discretion in admitting the evidence, but because the trial court was never given the opportunity to exercise its discretion, there is no error. *People v Rice (On Remand)*, 235 Mich App 429, 438-439; 597 NW2d 843 (1999). Furthermore, defendant does not argue that a plain error occurred, which affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). It is well established that an appellant may not merely announce his position on appeal and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

stashed the money in a garbage bag and that defendant's sister took the money that was not recovered. *Bahoda, supra* at 282; *Schutte, supra* at 721.

However, the prosecutor erred by using unsworn nonverbal gestures of non-witnesses to argue that defendant had not worn a coat on the night of the offense that the defense sought to admit. Likewise, the prosecutor erred by informing the trial court, in the presence of the jury, what a prospective witness, who would not be presented as a witness, might testify about. Nevertheless, the prosecutor withdrew his objection to the coat, and later, presented testimony calling into question defendant's claim that he wore the coat in evidence on the night in question. Furthermore, the non-produced witness' testimony was cumulative and did not contain facts consequential to the case. Moreover, a timely curative instruction could have cured any possible prejudice. Therefore, we find no error requiring reversal. *Watson, supra* at 586; *Schutte, supra* at 721.

Defendant also claims that the prosecution committed misconduct by characterizing defendant's version of events as a "story." First, any error by the prosecutor in referring to defendant's version of events as a "story" was cured by a contemporaneous objection and subsequent correction by the prosecutor. Furthermore, the prosecutor may properly argue from the facts that defendant is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Third, defendant claims that the prosecutor improperly shifted the burden of proof by arguing that the jury would have to believe defendant's "story" in order to find him not guilty and by arguing that defendant failed to produce witnesses to corroborate his testimony. However, the prosecutor merely argued that the evidence proved defendant's guilt beyond a reasonable doubt despite defendant's exculpatory version of events, which the prosecutor argued was unworthy of belief. "Further, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof." *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). In the present case, the prosecutor merely attacked the credibility of defendant's theory that he had innocently come into possession of the bank bag of money and was convinced by his minister to locate its rightful owners and return it based on the evidence presented at trial and the inconsistencies therein.

Defendant further claims that the prosecutor improperly injected his personal beliefs into his closing argument. Viewed in context, the prosecutor merely commented that he believed that the evidence proved defendant's guilt beyond a reasonable doubt. It is not improper for the prosecutor to argue that defendant is unworthy of belief based on inconsistencies in his statements and testimony. *Launsburry, supra* at 361. Further, the prosecutor need not argue reasonable inferences and conclusions in the blandest possible terms. *Id*. Accordingly, the prosecutor's comments during closing argument were not improper.

Defendant's argument that the cumulative effect of the alleged instances of prosecutorial misconduct denied him a fair trial is without merit. Because errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial have not been identified, there can be no cumulative effect of errors meriting reversal. *Knapp, supra* at 388.

C. Impeachment Evidence

Defendant next argues that the trial court erred in limiting his cross-examination of Sandifer. However, the record does not support defendant's argument that the trial court precluded impeachment of Sandifer. The prosecutor correctly points out that defense counsel made no effort to impeach this witness with criminal convictions. Rather, another prosecution witness, Jackson, was impeached with prior convictions for retail fraud and writing bad checks. Therefore, we find no error.

D. Habitual Offender Sentence

Defendant also argues that he was improperly sentenced as a habitual offender because the prosecution failed to file a timely notice that it intended to seek such an enhancement. We disagree. Defendant failed to preserve this issue by objecting at or before sentencing. *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Accordingly, alleged sentencing errors that have been forfeited are reviewed for plain error affecting substantial rights. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000), citing *Carines, supra* at 774.

Defendant claims the prosecutor did not comply with the twenty-one-day period because he did not receive notice of the prosecutor's intent to seek enhancement. When the prosecution intends to seek enhancement of a defendant's sentence as an habitual offender, it must file notice of its intent within twenty-one days after the defendant's arraignment or if arraignment is waived, within twenty-one days after filing the information. MCL 769.13(1); *People v Bollinger*, 224 Mich App 491, 492; 569 NW2d 646 (1997). Here, the prosecutor's habitual notice was included in the complaint and the felony information filed with trial court charging defendant with the underlying offense, thereby complying with the filing requirements of MCL 769.13(1). Furthermore, both defendant and his attorney signed a "waiver of circuit court arraignment on information," which indicated that defendant (a) received a copy of the information, (b) read the information or had it read or explained to him, and (c) understood the substance of the charge. Therefore, defendant received notice of the prosecution's intent to seek a sentence enhancement under the habitual notice statute and defendant's claim is without merit.

E. Proportionality

Finally, defendant argues that the maximum sentence imposed in this case is disproportionate to the circumstances surrounding the case. However, under the legislative sentencing guidelines,[5] "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000), quoting MCL 769.34(10) (emphasis in original). Accordingly, this Court must affirm sentences falling within the appropriate guidelines range. *Id.* In this case, because the trial court imposed a

[5] The legislative sentencing guidelines apply to the present case because the instant offense was committed on or after January 1, 1999. MCL 769.34(1) and (2); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001).

sentence within the appropriate guidelines range, and because the record does not establish that the trial court relied upon inaccurate information, appellate relief from the sentence imposed is not available. MCL 769.34(10); *Babcock, supra*.

III. Conclusion

Although we have found that the errors in this case do not require reversal under the applicable legal standards, we are compelled to comment on the trial antics of the prosecutor. Presenting the jury with a twelve-year old conviction that was clearly inadmissible was either (1) intentional or (2) the work of a prosecutor unfamiliar with the basic rules of evidence. Under either scenario, the prosecution should have known better than to submit such evidence to the jury.

The same holds true for the prosecutor's reference before the jury regarding the non-verbal actions of non-witnesses located in the courtroom and to the expected testimony of a person who was not going to be presented as a witness. These two actions, like the use of defendant's prior conviction, resulted from either sloppy practice or an intentional disregard for the rules. Either way, neither we nor the people of this State, whom the prosecutor represents, would expect this type of trial work to be repeated.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray