STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK A. FLECK,

Defendant-Appellant.

UNPUBLISHED
June 7, 2002

No. 231232
Wayne Circuit Court
Criminal Division
LC No. 00-001326

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving or concealing stolen property (RCSP), MCL 750.535(3)(a), unauthorized driving away of an automobile (UDAA), MCL 750.413, and larceny in a building, MCL 750.360.[1] He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of three to ten years each for the RCSP and UDAA convictions, and thirty-four months to eight years for the larceny conviction. He appeals as of right. We affirm.

I. Prior Convictions

Before trial, defendant filed a motion in limine to exclude two of his prior convictions under MRE 609. The first was a 1987 conviction for uttering and publishing. The second was a 1996 conviction for UDAA. The court denied the motion with respect to the 1996 conviction, but granted it with respect to the 1987 conviction, ruling that it was too old to be considered. However, during the trial, the trial court referenced the 1986 conviction, first in ruling on the prosecutor's objection and second, correcting a misstatement by defense counsel of the date of the 1986 conviction. Defendant argues that these comments by the trial court deprived him of a fair trial. We disagree.

Because defendant did not object to the challenged remarks at trial, this issue was not properly preserved thus precluding appellate relief absent plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Although it is unclear from the record whether the court modified its prior ruling to allow for the admissibility

[1] He was acquitted of an additional charge of felonious assault.

of the prior conviction, the record reveals that it was defendant himself who referenced the prior conviction for uttering and publishing during direct examination. The trial court's remarks in reference to this prior conviction did not affect defendant's substantial rights and does not warrant reversal.

II. Rebuttal Testimony

Next, defendant argues that the trial court erroneously allowed the prosecutor to present improper rebuttal evidence. We disagree. During his direct examination, defendant testified that his statement to the police lacked the detail of his trial testimony because Officer Brittain terminated the questioning and would not allow him to make a detailed statement. Over objection, the prosecutor called Officer Brittain to rebut this testimony.

The admission of rebuttal testimony is within the sound discretion of the trial court, and this Court will not disturb the trial court's ruling absent a clear abuse of that discretionary authority. *People v Nantelle*, 215 Mich App 77, 85; 544 NW2d 667 (1996). Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the other party. *Id*. Here, the challenged testimony was offered for the proper purpose of directly rebutting defendant's explanation of why his statement to the police did not contain the level of detail mentioned in his trial testimony. The court did not abuse its discretion in allowing this testimony.

III. Ineffective Assistance of Counsel

Next, defendant argues that he was deprived of the effective assistance of counsel. Because defendant did not raise this issue in a motion for an evidentiary hearing or a new trial, our review is limited to mistakes apparent on the record. *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). To justify reversal under either the federal or state constitutions, defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984). First, defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that he was not performing as the "counsel" guaranteed by the Sixth Amendment. Second, defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Because defendant bears the burden of demonstrating both deficient performance and prejudice, he necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant first contends that counsel was ineffective because he should have requested a mistrial due to the trial court's allegedly prejudicial comments regarding his prior conviction. We disagree. The first remark merely entailed the court's ruling on the prosecutor's objection. The court's second comment was intended to clarify confusion concerning the date of defendant's prior conviction. We cannot conclude that defense counsel was deficient for either not objecting to the court's comments or requesting a mistrial. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Defendant also contends that counsel mistakenly referred to his 1987 conviction as a 1997 conviction. However, defendant has not shown that he was prejudiced by the error because any confusion was cleared up when the trial court corrected the mistake.

Defendant also argues that counsel should have requested a mistrial based on the prosecutor's statement regarding his criminal record. The prosecutor asked defendant whether he had been convicted of crimes involving theft and dishonesty twice in the last ten years. Because defendant had already testified that he had two prior convictions in the past ten years, there was no basis for objecting to the prosecutor's question.

Finally, defendant submits that counsel should have more adequately rehabilitated him following the prosecutor's cross-examination regarding his statement to the police. However, on redirect, defense counsel elicited defendant's reason for not providing more detail in the statement. Defendant fails to explain what else counsel should have done in an effort to rehabilitate him. Defendant has not shown that trial counsel was ineffective in this regard.

IV. Double Jeopardy

Next, defendant argues that his dual convictions for RCSP and UDAA violate the double jeopardy prohibition against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, §15. We disagree. We review double jeopardy issues de novo, as a question of law. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

The purpose of the double jeopardy protection against multiple punishments for the same offense is to ensure that the defendant is not punished more severely than intended by the Legislature. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). The test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is to be used for analyzing claims under the US Constitution. *People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997). Under *Blockburger*, we look to see whether each statute requires proof of a fact which the other does not. *Id*. An examination of the statutes proscribing UDAA, 750.413, and RCSP, MCL 750.535, reveals that each provision requires proof of a fact that the other does not. Accordingly, defendant's convictions do not violate the Double Jeopardy Clause of the US Constitution. See *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998).

In analyzing a double jeopardy claim under the state constitution, we use more traditional means to determine legislative intent, such as the subject, language, and history of the statutes. *Denio*, *supra* at 708. To ascertain the intent of the Legislature, we consider facts such as whether the respective statutes prohibit conduct violative of distinct social norms, the punishments authorized by the statutes, whether the statutes are hierarchical or cumulative, and any other factors indicative of legislative intent. *Id*.; *Griffis*, *supra* at 101.

The RCSP statute discourages conduct violating the social norm regarding the theft of property. *People v Ainsworth*, 197 Mich App 321, 326; 495 NW2d 177 (1992). The UDAA statute is not principally aimed at preventing theft, but rather, is intended to deter the trespassory taking and use of property. *People v Hendricks*, 446 Mich 435, 448-449; 521 NW2d 546 (1994). Moreover, both statutes provide for the same maximum penalty, thereby reflecting a legislative intent to separately punish a violation of each statute. *People v Kaczorowski*, 190 Mich App 165, 170; 475 NW2d 861 (1991). Finally, there is no hierarchical or cumulative relationship between the statutes, which are found in different chapters of the penal code. *People v Squires*, 240 Mich App 454, 458-459; 613 NW2d 361 (2000); *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). Accordingly, we conclude that defendant's dual convictions for RCSP and UDAA do not violate his double jeopardy rights under the Michigan constitution.

VI. Cumulative Error

Finally, defendant argues that the cumulative effect of these individual errors deprived him of due process of law. We do not agree. Having found no error with regard to any of the issues discussed above, we reject defendant's claim that reversal is required. Where no actual errors are discovered, a cumulative effect of errors is incapable of being found. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly