STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2002
v	No. 229367 Kent Circuit Court
DALE GENE KAGE, Defendant-Appellant.	LC No. 99-001769-FH

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced to two to twenty years in prison. Defendant filed a motion for new trial, alleging he was denied a fair and impartial trial by a combination of ineffective assistance of counsel and prosecutorial misconduct. The successor trial judge denied the motion and affirmed that denial after reconsideration. Defendant appeals by right. We affirm.

I

The instant offense occurred on October 25, 1997, but defendant was not arrested until February 1999. In the interim, in 1998 the victim was convicted of two felonies, receiving and concealing stolen property over $100 (charges of UDAA were dismissed) and third-degree fleeing and eluding (charges of second-offense DWLS were dismissed). The latter conviction resulted in the victim being sentenced to prison.

When this case came to trial in May 2000, the victim appeared as a prosecution witness, wearing jail garb and handcuffs. On direct examination, the victim acknowledged that in 1998 he was charged with a "crime or two" and was convicted of giving a police officer a false name. The victim explained that he had been stopped by the police while driving without a license and he gave the name of a person who had a valid driver's license. When asked by the prosecutor if he had any other convictions involving theft or false statement, the victim admitted he was convicted of receiving and concealing stolen property over $100 and further testified:

Q. Okay. Is that the extent of your crimes involving theft or false statements?

A. Yes, sir.

Q. And all that happened in 1998?

A. Yes, sir.

Q. Any criminal convictions prior to that time?

A. No, sir.

II

Defendant argues the trial court abused its discretion denying his motion for new trial because defense counsel was ineffective for failing to object to the victim's testimony of the circumstances of his two 1998 criminal convictions and his testimony that he had no other criminal record. Defendant further argues that counsel erred by not asking the victim: a) whether his testimony might earn him parole; b) about being sent to prison for fleeing and eluding; c) about charges that were dismissed in plea bargains; and d) about probation violation and revocation. Defendant also argues counsel was ineffective for failing to object to alleged prosecutorial misconduct, including argument by the prosecutor that was unsupported by evidence and implied special knowledge. We disagree.

A

We review the trial court's decision on a motion for new trial for an abuse of discretion, *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), and review a court's factual findings for clear error, MCR 2.613(C). To establish ineffective assistance of counsel, defendant has the burden of overcoming a strong presumption that counsel's action constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*., 302-303.

In general, this Court reviews a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). When alleged error is unpreserved, as here, appellate review is for plain error affecting substantial rights. *Pfaffle, supra,* 288.

B

Defendant failed to meet his heavy burden of overcoming the presumption that he received effective assistance of counsel, *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and none of the alleged errors were sufficiently serious to establish the requisite prejudice, i.e., a reasonable probability that the result would have been different and that the trial was fundamentally unfair or unreliable. *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994); *Toma, supra*, 302-303. Defendant has also failed to show that the alleged prosecutorial misconduct denied him a fair and

impartial trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for new trial.

Defendant first argues that defense counsel erred in failing to object to the prosecutor's questions concerning the circumstances of the victim's prior convictions, which improperly bolstered the victim's credibility. Defendant relies on *People v Rappuhn*, 66 Mich App 17; 238 NW2d 400 (1975), and *People v Johnson*, 54 Mich App 678; 221 NW2d 452 (1974). Defendant's reliance is misplaced.

In the case at bar, the prosecutor's inquiry did not attempt to impeach defendant with an improper criminal charge, *Rappuhn*, *supra*, 21-22, nor use a prior conviction to create an improper inference that defendant was prone to commit the charged crime, *id.*, 22; *Johnson*, *supra*, 681. Rather, the prosecutor inquired into the circumstances of the victim's convictions that involved theft and dishonesty as they bore upon his credibility.

Defendant has failed to overcome the presumption that defense counsel's failure to object to the prosecutor's inquiry of the victim's convictions was trial strategy. The evidence admitted was a doubled-edged sword, and, as such, an issue of trial strategy. See, e.g., *People v Manning*, 434 Mich 1, 17-18; 450 NW2d 534 (1990) (disclosure of plea agreement with a testifying accomplice) and *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999) (curative instruction would have highlighted a volunteered comment that defendant had been incarcerated). The prosecutor apparently was attempting to show that the victim's convictions concerned relatively minor incidents. However, defense counsel may have welcomed the testimony to highlight that if the victim was willing to lie to the police about a minor matter like driving without a license, then how could he be trusted to tell the truth about something serious like armed robbery. Counsel's actions were well within the bounds of trial strategy and professional reasonableness. *Leblanc, supra*, 578, 582-583.

Next, defendant argues counsel erred by failing to object to testimony that the victim was not convicted of any crimes before 1998. Defendant presents no evidence to support his claim that this was false testimony (of which the prosecutor had knowledge), and any alleged error is not apparent from the record. *Ginther, supra*, 442-443.

Even if counsel erred in failing to object to this evidence, as in *Griffin, supra*, 46-47, error warranting reversal did not result. Here, the alleged bolstering was insignificant when compared to the substantial evidence otherwise impugning the victim's character. The victim was impeached with his subsequent convictions involving theft and dishonesty. Defense counsel was permitted to extensively question the victim concerning the source of the cash that he carried. The investigating officer testified that the area where the offense started had a high incidence of drug violations and that the possession of a significant quantity of unexplained cash and a cell phone, as the victim did, were indicia of drug dealing. Further, defense counsel vigorously attacked the victim's character and credibility in closing argument. Thus, even if counsel erred by not objecting to evidence that the victim's criminal record started in 1998, defendant has failed to show that he was prejudiced. *Toma, supra*, 309.

Next, defendant argues that counsel erred by failing to object to the alleged false and misleading argument by the prosecutor that "whatever problems [the victim] has had in his life

involving the criminal justice system, happened in 1998," and that he was otherwise a law abiding citizen. Defendant failed to show record support for his contention that the prosecutor's argument was based on false testimony. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). While a prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), he is free to argue the evidence and all reasonable inferences arising from it as it relates to his theory of the case. *Id*.

In the present case, the evidence not only supported the prosecutor's comments on the victim's criminal history, but the comments also were made in response to a vigorous defense attack that the victim was a criminal who could not be trusted to tell the truth (dishonesty is "the nature of the beast"). A prosecutor's comments must be read in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* An otherwise improper remark by the prosecutor may not require reversal where it addresses an issue raised by defense counsel. *Id*. Further, although some evidence suggested that the victim might have been a drug dealer, the victim testified that he was not, and therefore, the prosecutor's argument was supported by evidence. The argument did not imply that the prosecutor had special knowledge, not known to the jury, because it was supported by the victim's testimony.

Defendant also objects to the prosecutor's comment that the victim was not a drug dealer or a pimp. The prosecutor's comment must be read in context. *Id*. The prosecutor argued:

> Our theory has always been, and as the evidence has shown, it does not matter whether you are a drug dealer, whether you are a pimp, whether you are a prostitute, a preacher, or a teacher, or anyone else, some other person has no right to approach you with a gun and take your money or your property.

Thus, when the prosecutor's comment is read in context, it only related to the prosecutor's theory of the case that the protection of the law extended to everyone. Furthermore, the comment did not imply special knowledge, not known to the jury, but rather, pointed out that even if the victim was a drug dealer or pimp, the protection of the law still applied. The prosecutor's argument was proper. Defense counsel need not raise meritless objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant's argument that defense counsel erred by failing to question the victim more closely concerning his criminal record, and specifically, to ask the victim about being sent to prison for fleeing and eluding, about charges dismissed in plea bargains, or having his probation revoked, is without merit. The prosecutor limited his questioning of the victim to whether he had convictions for crimes involving theft or false statement, in another words, to convictions admissible for impeachment purposes. MRE 609; *People v Allen*, 429 Mich 558, 564, 605-606; 420 NW2d 499 (1988). The victim was not subject to impeachment with his conviction for fleeing and eluding because that crime does not involve theft, dishonesty, or false statement. *Id.;* MRE 609(a). Further, except to show bias,[1] the victim could not be impeached with charges that

[1] Defendant offered no evidence of bias in his motion for new trial.

were dismissed in plea bargains because they did not result in conviction. *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973); *People v Layher*, 238 Mich App 573, 577; 607 NW2d 91(1999), aff'd 464 Mich 756, 758, 762; 631 NW2d 281 (2001). Defendant has cited no authority supporting his contention that the prosecutor's limited questioning of the victim concerning his convictions for impeachment purposes, "opened the door" to defense cross-examination of dismissed charges or convictions outside the ambit of MRE 609. Failure to cite authority constitutes abandonment of this argument. *Watson*, *supra*, 587.

A convicted defendant may be granted a new trial based on any trial error that would warrant reversal on appeal. MCR 6.431(B). However, defendant has failed to overcome the presumption that his trial attorney was effective. *LeBlanc*, *supra*, 578; *Rockey*, *supra*, 76.

III

Defendant also argues that a new trial was warranted because the prosecutor made false arguments about the victim's criminal record and failed to disclose to defendant evidence that was favorable to defendant despite defendant's discovery request. We disagree.

To the extent defendant claims that his right to due process was violated by the prosecutor's failure to disclose exculpatory evidence, *Brady v Maryland*, 373 US 83; 83 S Ct 1194, 10 L Ed 2d 215 (1963), defendant presents a constitutional question subject to de novo review. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001); *People v Lester*, 232 Mich App 262, 276-277, 281; 591 NW2d 267 (1998).

The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions comply with fundamental fairness. *Id*., 276. The prosecutor has a constitutional duty to inform the defendant and the trial court whenever a government witness lies under oath. *Id.* Therefore, a prosecutor may not knowingly use false testimony to obtain a conviction and must correct false testimony if it is given. *Id.*, 277. In this case, the victim testified that he had convictions for giving a police officer a false name and receiving and concealing stolen property. The victim also testified that he had no other convictions involving theft or false statement and no convictions before 1998. Defendant presented no evidence to the trial court, and has proffered none to this Court, to establish that this testimony was false.

Although there is no general constitutional right to discovery, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), due process requires the prosecutor to disclose evidence that is both favorable to the defendant *and* material to the determination of guilt or punishment, *People v Fink*, 456 Mich 449, 453-454; 574 NW2d 28 (1998); *Lester*, *supra*, 281. The prosecutor must disclose any information that would materially affect the credibility of his witnesses. *Id*.

In moving for a new trial, defendant suggested that the victim's presentence reports could show that the victim's testimony concerning his criminal background may have been false or misleading. Defendant asserted that numerous sources of information about the victim's criminal history were available to the prosecutor, including LEIN (Law Enforcement Information Network) reports, the prosecutor's case files, circuit court files, and police records, which could support defendant's claim of misconduct by the prosecutor. Defendant offered no evidentiary support for his claim beyond mere speculation. Likewise, defendant's motion for reconsideration

offered no proof except to attach court records that reflected the victim was twice convicted in 1998. As discussed above, this information was consistent with the victim's testimony and did not disclose any other evidence usable for impeachment purposes. We find defendant's claim that false testimony was presented at trial or that the prosecutor withheld exculpatory evidence without merit.

Defendant has failed to establish a *Brady* violation. *Id.*, 281-282. Defendant has not shown that the prosecutor possessed evidence favorable to defendant, that defense counsel did not possess the information or could not have obtained it himself with any reasonable diligence. *Id*., 281. Even assuming that the prosecutor "suppressed" the victim's conviction for fleeing and eluding and charges dismissed in plea bargains, the information was not "material" because a reasonable probability does not exist that the evidence was outcome determinative. *Id.*, 281-282.

In this case, additional impeachment would have been insignificant against the backdrop of the victim testifying in court in jail garb and handcuffs. Further, as discussed above, substantial evidence was admitted impugning the victim's character and credibility. This evidence permitted defense counsel to vigorously attack the victim as a criminal who would lie because that was "the nature of the beast." Thus, even if the allegedly "suppressed" evidence had been submitted to the jury, it is not reasonably probable that the outcome of the proceedings would have been different, *id.*, 281-282, or would have "put the whole case in such a different light so as to undermine confidence in the verdict." *Fink*, *supra*, 454.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens