STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 23, 2005
v	No. 254013 Calhoun Circuit Court
GLEN ESTELLE, Defendant-Appellant.	LC No. 2003-002352-FH

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of second degree home invasion, MCL 750.110a(3), and was sentenced as an habitual offender, fourth or higher, MCL 769.12, to a prison term of five to twenty years. He appeals as of right. We affirm.

On appeal, defendant raises three issues. The first issue is whether the court erroneously introduced hearsay evidence into defendant's trial by questioning a witness. The second issue is whether OV 13 was properly scored. And finally, defendant claims he was denied the effective assistance of counsel, raising several alleged errors by his attorneys at the trial level.

Defendant claims that the testimony of a witness in response to the trial court's questioning was inadmissible hearsay that requires reversal of his conviction. Because defendant did not object to the admission of the challenged evidence, he must demonstrate plain error affecting substantial rights. He must show that he is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 614 allows the trial court to interrogate witnesses called by either party. Any objection must be made at the time of the questioning or at the next opportunity when the jury is not present. "While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair or partial." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Even if the trial court elicits testimony that damages a defendant's case, the questions can be harmless. *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996).

In this case, the trial court questioned several witnesses without objection. Defendant complains that one witness' reply introduced hearsay into the trial and is a ground for reversal. MRE 801 defines hearsay as a statement that is offered to prove the truth of the matter asserted and is made by someone other than the person testifying. MRE 802 makes hearsay inadmissible. At the conclusion of her testimony, the court ask the witness, defendant's girlfriend, from whom she had gotten information that the items brought to her home and that she had purchased were stolen. She answered with not only who told her, but the content of what was said. The answer was non-responsive to the question. It cannot be said that the court interjected error into the proceedings. The court did not elicit the hearsay and did nothing more than attempt to clarify the testimony of that witness and other witnesses. The questions were "not intimidating, argumentative, prejudicial, unfair or partial." See *Cheeks*, *supra* at 589.

Furthermore, defendant offered a similar statement in his own testimony and testified that he told a police officer that " my sisters done came over like today saying that I supposedly had broken into somebody's house."

Had the testimony been objected to, it was clearly inadmissible hearsay. However, an error in the admission of evidence is not always a ground for reversal unless refusal of this Court to take action appears inconsistent with substantial justice. Thus, reversal is required only if the error is prejudicial; the defendant must show that it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the improperly admitted evidence. *People v McLaughlin*, 258 Mich App 636, 650; 672 NW2d 860 (2003).

Defendant argues that the prosecution's case turned upon the admissions defendant allegedly made to a police officer and had the hearsay not been admitted erroneously, the outcome of his trial likely would have been different. However, the proofs in this case were beyond defendant's confession. Defendant lived near the victim and was familiar with her home. He admitted at trial that he was using marijuana with the co-defendant on the day of the home invasion. Defendant's girlfriend testified that he had a drug problem. The stolen items were found in his home. And, when confronted by the victim, he hung his head and walked away. In light of this evidence, defendant has not shown plain error that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, *supra* at 763.

Defendant's argument regarding the scoring of Offense Variable (OV) 13 is without merit given the holding in *People v McDaniel*, 256 Mich App 165; 662 NW2d 101 (2003). Defendant concedes as much but raised this issue only to preserve it for appeal purposes. Given that our Supreme Court has dismissed the appeal in the *McDaniel* case, *People v McDaniel*, ___ Mich ___; 692 NW2d 387 (2005), this Court need not address this issue and is bound to follow *McDaniel*, *supra*. MCR 7.215(J).

Defendant raises the issue of ineffective assistance of counsel in his supplemental brief. He claims four areas where counsel was allegedly ineffective: 1) failure to move to suppress his statement to Thomas and secure a *Walker*[1] hearing, 2) failure to impeach Thomas with his prior

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

testimony, 3) failure to call a witness to impeach Richmond, and 4) failure to impeach the victim with prior statements. All of these claims must fail.

A claim of ineffective assistance of counsel is a mixed question of law and fact. This Court normally reviews the findings of the trial court for clear error and then decides de novo whether those facts constitute a violation of defendant's constitutional right to effective assistance of counsel. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In this case, there was no hearing in the trial court pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Therefore, this Court looks only to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Our Supreme Court in *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994), adopted the standard set forth in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to prove that

> counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment...[and] 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.

The standard of counsel's performance is an objective one of reasonableness under prevailing professional norms. The prejudice suffered by the defendant must be such that there is a reasonable probability that, but for the error on the part of counsel, the outcome of the proceedings would have been different. There is a presumption that counsel is competent and the burden is on the defendant to overcome that presumption. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant had two attorneys at the trial level. Neither attorney filed a motion to suppress defendant's non-custodial statement to a police officer. Defendant is not claiming that the statement is involuntary, but that he never made the statement attributed to him. Voluntariness, not credibility, is the proper subject for a *Walker* hearing. Questions of credibility are for the trier of fact to decide. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

To provide effective assistance of counsel, defense counsel is not required to pursue meritless motions. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Both counsel here performed reasonably in not filing a motion to suppress defendant's statement when there was no issue of voluntariness, only credibility. Defendant's claim that the motion had merit and would have changed the outcome of his case is unsupported by facts. The officer's testimony regarding defendant's statement was not the only evidence against him. The stolen items were found in defendant's home and he admitted being with the person he claims actually committed the home invasion.

Contrary to defendant's claim on appeal, the officer did testify at the preliminary hearing that defendant had told him of co-defendant and others being involved. There was no

inconsistent statement with which to impeach the officer at trial. Therefore, trial counsel acted reasonably and effectively in his representation of defendant.

Defendant also erroneously claims that trial counsel failed to impeach the victim with a prior inconsistent statement that she made to the police regarding the co-defendant. Counsel did cross examine the victim on the issue and question her about her earlier statements. Defendant refers to a police report that is not part of this record and, therefore, cannot be considered by this Court. Presumably, the investigating officer's report was what counsel was referring to when conducting the examination of the victim. The reference at trial was to a statement given to the officer in the month after the home invasion in which the victim reported that the co-defendants had given back some of her stolen property. The victim admitted to knowing the co-defendant and going to his home to talk to him about the break-in. She denied that the co-defendant gave her any of her property back. What defendant apparently does not understand is that counsel does not control the testimony of the witnesses. Counsel should examine and impeach when possible. This, he did. Defendant was not denied the effective assistance of counsel.

Defendant also complains that counsel did not call a witness who had been interviewed by the police. The officer testified that the witness was one of the people she interviewed in her canvas of the neighborhood. The content of the witness' statement was not disclosed to the jury. There is no record of what she would have testified to if she had been called as a witness. There was no reason to call her to "rebut false testimony by the officer," as defendant argues. Defendant offers this Court the statement claimed to have been made by the witness to the police. If the witness had been called by defense counsel and testified as defendant states in his brief (i.e., that she saw him looking into windows at the apartment complex), defendant's case would have been hurt, not helped.

Whether to call a particular witness is a matter of trial strategy and this Court will not substitute its judgment for that of counsel in a matter of trial strategy. Defendant has not shown that a reasonable probability exists that the unknown testimony would have altered the outcome of the trial. Under the circumstances, defendant was not deprived of the effective assistance of counsel. *People v Avant*, 235 Mich App 499; 597 NW2d 864 (1999).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens