STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2006
v	No. 262112 Oakland Circuit Court
RICHARD WESLEY YORK, Defendant-Appellant.	LC No. 2004-199391-FH

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

A jury convicted defendant Richard York of receiving or concealing a stolen motor vehicle[1] and sentenced him as a fourth-offense habitual offender[2] to 10 to 25 years' imprisonment. York appeals as of right. We affirm.

I. Basic Facts

On June 28, 2004, York responded to an ad in a Wayne County newspaper for a Ford Expedition, pretending to be an interested buyer. However, he had no intention of purchasing the car and absconded with the vehicle during a test drive. York testified that he planned the theft at the behest of another individual and that he delivered the Expedition to this other individual the day after he stole it. However, approximately one week after the theft, an Oakland County Sheriff deputy, driving an unmarked minivan, identified York in the Expedition in Madison Heights.

II. Admission Of Prior Convictions

A. Standard Of Review

York argues that the trial court erred when it admitted as impeachment evidence his prior convictions for second-degree retail fraud[3] and larceny by conversion.[4] Although York objected

[1] MCL 750.535(7).

[2] MCL 769.12.

[3] MCL 750.356d.

[4] MCL 750.362.

at trial to admission of his prior second-degree retail fraud conviction, he did so on other grounds than the ones he now contends should warrant reversal. Therefore, York has not preserved the argument that this conviction was improperly admitted and must show that any error in its admission was plain and affected his substantial rights.[5] However, because York objected at trial to the trial court's decision to admit the larceny by conversion conviction, we will review that issue for an abuse of discretion.[6] An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes.[7]

B. MRE 609

The prosecution may impeach the credibility of a witness with evidence of prior convictions if those convictions satisfy the criteria in MRE 609, which provides as follows:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
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> (2) the crime contained an element of theft, and
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> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

C. Second-Degree Retail Fraud

Second-degree retail fraud is punishable by less then one year in prison.[8] Thus, this prior conviction cannot be admitted for impeachment purposes under MRE 609(a)(2).

To be admissible under MRE 609(a)(1), the circumstances surrounding the crime must indicate that the defendant committed some act involving dishonesty or false statement. Although some of the specific conduct prohibited under MCL 750.356d does involve dishonesty or false statements, not every distinct circumstance under which a second-degree retail fraud

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[5] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

[6] *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

[7] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[8] MCL 750.356d(1).

conviction may arise involves dishonesty or false statements.[9] Here, the trial court admitted York's second-degree retail fraud conviction without evaluating the circumstances surrounding its commission; thus, we are unable to determine from the record before us whether that crime involved dishonesty or false statement.

Nonetheless, even if the retail fraud conviction did not involve dishonesty or false statement, reversal is not required because York has failed to show that the alleged error was outcome determinative.[10] Strong evidence of York's guilt exists even without considering the second-degree retail fraud conviction. York admitted at trial that he stole the vehicle on June 28, and an eyewitness observed him driving it on July 7. In addition, the prior conviction for second-degree retail fraud was admitted as one of four prior convictions. The prosecution only dealt with these convictions in a cursory fashion and did not comment on them during closing arguments. Under these circumstances, we conclude that York has failed to prove that the admission of this conviction was outcome determinative. Therefore, we need not reverse because any error that occurred when the second-degree retail fraud conviction was introduced did not rise to the level of "plain error" and did not affect York's substantial rights.

D. Larceny By Conversion

York does not dispute that his larceny by conversion conviction was a theft crime punishable by imprisonment in excess of one year. York contends that admission of the conviction should have been barred because its use for impeachment was more prejudicial than probative. In general, "[t]heft crimes are minimally probative" of truthfulness and admissible under MRE 609 only if the probative value of the evidence outweighs its prejudicial effect.[11] MRE 609(b) provides, in pertinent part, as follows:

> For purposes of . . . probative value determination . . . , the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify.

We conclude that the first factor for determining the probative value of the conviction—the age of the conviction—weighs in favor of probative value because York was released from prison on his larceny by conversion conviction in 2000.[12] Turning to the second factor, we must consider "the degree to which a conviction of the crime is indicative of veracity."[13] To be

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[9] *People v Parcha*, 227 Mich App 236, 246; 575 NW2d 316 (1997).

[10] See *id*. at 247.

[11] *People v Meshell*, 265 Mich App 616, 635; 696 NW2d 754 (2005); see also MRE 609(a)(2)(B).

[12] MRE 609(c).

[13] MRE 609(b).

convicted of larceny by conversion, a defendant must have "embezzled, converted to his own use, or hid the property with the intent to embezzle or fraudulently use it."[14] Because the crime involves an element of stealth, larceny by conversion is more probative of truthfulness than other crimes of theft.

To determine the prejudicial effect introduction of the conviction may have had, we must consider the larceny by conversion conviction's similarity to York's receiving or concealing a stolen motor vehicle charge.[15] There is nothing in the record to support a finding that there was any degree of similarity between the conviction for larceny by conversion and the charged offense that would result in its prejudicial impact outweighing the aforementioned probative value. Thus, we conclude that the trial court did not abuse its discretion when it determined that York's larceny by conversion conviction was indicative of veracity, was not similar to the charged offense, and was not more prejudicial than probative.

III. Departure From Sentencing Guidelines

A. Standard Of Review

York argues that the trial court departed from the minimum sentencing guidelines without citing a substantial and compelling reason for doing so and that the resulting sentence was cruel and unusual punishment. Under the sentencing guidelines act,[16] a trial court must impose a sentence within the guidelines range unless there is a "substantial and compelling" reason for departure.[17] We review the "substantial and compelling" determination for abuse of discretion.[18] In ascertaining whether the departure was proper, we must defer to the trial court's direct knowledge of the facts and the familiarity of the offender.[19]

B. Legal Standards

To determine whether a reason for departure is "substantial and compelling" the Court must look to the following factors set forth in *Babcock*: (1) the reason must be objective and verifiable, (2) the reason should keenly or irresistibly grab the attention of the court, (3) the reason must be of considerable worth in deciding the length of a sentence, and (4) the reason must be something that exists only in exceptional cases.[20] If a trial court finds that there are substantial and compelling reasons to believe that sentencing the defendant within the guidelines

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[14] *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001) (internal quotations omitted).

[15] Because York did elect to testify, we need not address the second factor listed in MRE 609(b) for determining prejudicial effect.

[16] MCL 769.31 *et seq*.

[17] MCL 769.34(3); *Babcock, supra* at 255-256.

[18] *Babcock, supra* at 264-265.

[19] *Id*. at 270.

[20] *Id*. at 257.

range is not proportionate to the seriousness of the defendant's conduct and criminal history, then the trial court should depart from the guidelines.[21] But any departure must be proportionate to both the seriousness of the defendant's conduct and the defendant's criminal record.[22]

C. Applying The Standards

York's minimum guidelines range was between 19 and 76 months.[23] In departing from this minimum range, the trial court cited York's lengthy criminal record and parole violations, which are objective and verifiable.[24] Parole violations are not accounted for in the sentencing guidelines; therefore, we conclude that it was not an abuse of discretion for the trial court to depart from the minimum guidelines range on this basis.[25] In addition, while York received the highest score possible for prior record variable (PRV) 1 (75 points), which accounts for "3 or more prior high severity felony convictions,"[26] and the highest score possible for PRV 2 (30 points), which accounts for "4 or more prior low severity felony convictions,"[27] these scores do not adequately reflect his *23* prior felony convictions.[28] Additionally, the departure in this case, three years and four months, was proportionate to both the seriousness of York's conduct and criminal record, and was within the range of principled outcomes. A proportionate sentence does not constitute cruel and unusual punishment.[29] Therefore, we conclude that the trial court did not abuse its discretion in departing from the minimum sentencing guidelines.

IV. Accuracy Of Sentencing Information

York argues that the trial court relied on inaccurate information during sentencing. However, this issue is not properly before us for two reasons. First, this issue is unpreserved because York failed to properly challenge the presentence investigation report (PSIR) pursuant to MCL 769.34(10).[30] And, second, York's counsel waived appellate review of this argument by verbally assenting to the accuracy of the PSIR.[31]

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[21] *Id*. at 264.

[22] *Id*.

[23] See MCL 777.21(3)(c); MCL 777.65.

[24] *People v Schaafsma*, 267 Mich App 184, 185-186; 267 Mich App 184 (2005).

[25] *Id*.

[26] MCL 777.51.

[27] MCL 777.52.

[28] MCL 769.34(3)(b); *Schaafsma*, *supra* at 186 (affirming a sentencing departure where the trial court found that the defendant's 10 felony convictions and 31 misdemeanor convictions were given inadequate weight under the sentencing guidelines).

[29] *People v Colon*, 250 Mich App 59, 65-66; 644 NW2d 790 (2002).

[30] See also MCL 771.14(5) and MCR 6.425(D)(2)(b).

[31] *People v Carter*, 462 Mich 206, 208-209, 213-214; 612 NW2d 144 (2000).

V. *Blakely v Washington*

York argues that, because the prosecutor did not prove the facts underlying the scoring of his guidelines during trial, the enhancement of his sentence represents an unconstitutional violation of his Sixth Amendment[32] right to a jury trial under *Blakely v Washington*.[33] The Michigan Supreme Court, however, has held that Michigan's sentencing scheme does not offend the Sixth Amendment on the basis that its minimum sentences are based on facts not determined by a jury beyond a reasonable doubt and that *Blakely* does not apply to Michigan's sentencing scheme.[34]

VI. Ineffective Assistance Of Counsel

A. Standard Of Review

York argues that he received ineffective assistance of counsel at trial. Because it is unpreserved, we consider York's claim only to the extent that counsel's claimed mistakes are apparent on the record.[35]

B. Legal Standards

A defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel.[36] First, the defendant must show that his attorney's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms.[37] In doing so, the defendant must overcome the presumption that trial counsel's performance constituted sound trial strategy.[38] Second, the defendant must show that this performance so prejudiced him that he was deprived of a fair trial.[39] To establish prejudice, a defendant must show a reasonable probability that the outcome would have been different but for counsel's errors.[40]

C. Applying The Standards

York argues that he was deprived of his constitutional right to effective assistance of counsel because trial counsel failed to adequately investigate and prepare for trial and failed to

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[32] US Const, amend VI.

[33] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[34] *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006).

[35] *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

[36] *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[37] *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994).

[38] *Strickland*, *supra* at 690-691.

[39] *Id*. at 687-688; *Pickens*, *supra* at 309.

[40] *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

call alibi witnesses. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[41] Ordinarily, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy."[42] The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.[43]

York's argument relies solely on information and allegations that are not part of the lower court record. In addition, York fails to provide any indication of what these witnesses would have testified to or how the purported evidence would have been outcome determinative. Thus, there is no basis to conclude on the existing record that York was denied a substantial defense or that defense counsel was ineffective for failing to call certain witnesses or introduce certain evidence.[44]

York also argues that his counsel erred when he opened the door to testimony from the investigating officer that York admitted that he knew the unmarked minivan was being driven by a police officer, a statement that effectively places York in the Expedition in Oakland County on July 7. The trial court had originally told the jury to disregard this testimony when the investigating officer presented it. When defense counsel asked York on direct examination about this statement, the trial court instructed the jurors that they could now consider it. York has failed to demonstrate that this alleged error was outcome determinative. The prosecution was required to prove that York possessed the vehicle in Oakland County. York argues that the challenged testimony essentially constituted an admission that he possessed the car in Oakland County. However, York specifically admitted at trial to stealing the vehicle in Wayne County and to delivering it to another individual in Oakland County. An Oakland County deputy sheriff observed York driving the vehicle in Oakland County. This evidence provides more than adequate support for the proposition that York possessed the vehicle in Oakland County. Any deficiencies that may have existed in York's counsel's performance can, therefore, not be said to have contributed to the outcome of the case.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen

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[41] *Strickland*, *supra* at 691.

[42] *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

[43] *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

[44] *Id*.