

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID HENDRICKSON,

Defendant-Appellant.

UNPUBLISHED

December 12, 2006

No. 263559

Gratiot Circuit Court

LC No. 04-004889-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon-in-possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, MCL 769.10, to concurrent terms of 150 to 225 months for the armed robbery conviction and 36 to 90 months for the felon-in-possession conviction, to be served consecutively to his 60-month term for the felony-firearm conviction. Defendant appeals as of right. We affirm his convictions and sentences but remand for the ministerial task of correcting his presentence report. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Around 10:30 p.m. on July 13, 2004, a masked gunman entered and robbed a party store in Gratiot County. Two witnesses in the store, owner Laura Powell and her son, described the gunman as between 5'9" and 6' and about 180 pounds. Powell claimed that she stared at the man for about ten minutes during the robbery. The man fled after he took the money. On September 10, 2004, Jeff Hendrickson, the brother of defendant, was arrested and charged with the armed robbery. After his arrest, Hendrickson called his parents and his brother from the jail stating that he did not rob the store and that he knew who did it but could not "send my little brother to prison." Powell testified at Hendrickson's preliminary examination. After the preliminary examination, Powell told the prosecutor that Hendrickson was not the gunman. Later, when defendant returned to the party store, Powell recognized him as the gunman, and defendant was charged.

Hendrickson entered a plea agreement to testify that he drove the getaway car for defendant and that defendant robbed the party store to get money for a car. During the trial, the prosecutor disclosed this plea agreement, without objection from defendant's counsel. Also during the trial, both Hendrickson and the prosecutor referred to Hendrickson's polygraph

examination to establish when he agreed to testify against defendant. Defense counsel did not object.

Defendant first argues that his defense counsel was constitutionally ineffective for failing to object to the prosecutor's references to the plea agreement. He contends the prosecutor was vouching for Hendrickson's credibility by eliciting testimony that Hendrickson had already pleaded guilty to lesser charges before trial in exchange for an agreement to testify against defendant. We disagree. Although defense counsel did not raise this issue below, ineffective assistance of counsel may be raised for the first time on appeal. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). This Court reviews de novo claims of ineffective assistance of counsel. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish ineffective assistance of counsel under either the federal or Michigan constitutions, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 312-313; 521 Mich 797 (1994); *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005).

A prosecutor may not vouch for the credibility of a witness on the basis of some special knowledge of a witness's truthfulness. A simple reference to a plea agreement containing a promise of truthfulness is not itself a basis for reversal unless it is used to suggest that the government had some special knowledge. *People v Bahoda*, 448 Mich 261, 276-277, 280; 531 NW2d 659 (1995). From our review of the testimony, we do not find any suggestion that the prosecutor had any special knowledge of Hendrickson's veracity. The prosecution simply disclosed the plea agreement that allowed the witness to plead to a lesser offense in exchange for his testimony against defendant. Because the reference to the plea agreement was not improper, defense counsel was not constitutionally ineffective for failing to object to the disclosure of the plea agreement.

Defendant also argues that his defense counsel was constitutionally ineffective for failing to object and move for a mistrial after Hendrickson testified that he took a polygraph examination. We disagree. Reference to a polygraph examination is inadmissible at trial, but is not an error that necessarily requires reversal. In determining whether reversal is required, a court should consider whether the defendant objected or requested a cautionary instruction, whether the reference was inadvertent, whether there were repeated references, whether the reference was an attempt to bolster a witness's credibility, and whether the results of the test were admitted. *McGhee, supra* at 631; *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000).

Hendrickson's initial reference to the polygraph examination was in response to a question by defense counsel regarding when he agreed to testify against defendant. The initial reference appears to have been inadvertent and not designed to bolster Hendrickson's credibility. The reference did not disclose the results of the examination. Further, defense counsel did not move to remedy the reference. Similarly, the second reference, which was made by the prosecutor, was also used to establish when Hendrickson agreed to testify against defendant. Again, the reference does not appear to bolster Hendrickson's credibility, and the results of the examination were not disclosed. Because the references to polygraph examination did not enhance the credibility of the witness, defense counsel was not constitutionally ineffective for failing to object and move for a mistrial.

Finally, defendant argues that the presentence report should be corrected to strike a reference to his father being on parole. Defendant preserved this issue when defense counsel objected to the accuracy of the reference in the presentence report. The trial court clearly indicated that it did not rely on defendant's father's parole status in sentencing defendant and agreed to eliminate the reference in the presentence report. Nevertheless, a reference to defendant's father's parole status remains in the presentence report. Accordingly, we remand for the limited purpose of correcting presentence report. MCR 6.425(E)(2).

Affirmed, but remanded for the ministerial task of correcting defendant's presentence report. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly