

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE DAMON ASHWORTH,

Defendant-Appellant.

UNPUBLISHED

April 17, 2008

No. 273817

Saginaw Circuit Court

LC No. 02-021750-FH

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, carrying a dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 57 months to 8 years for the felonious assault conviction, 57 months to 10 years for the felon in possession conviction, and 43 months to 10 years for the carrying a dangerous weapon conviction, to be served consecutive to a prison term of 20 to 40 years for the home invasion conviction, and another consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from an incident in April 2002, in which a man appeared at the house of Diana Barajas and repeatedly banged on the front door. When Barajas answered the door, the man then insisted on seeing proof of insurance for Barajas's husband's truck. The man was carrying a notepad, flashed a badge, and was dressed like a police officer or other official. After Barajas told the man that her husband was not home and that she could not obtain the proof of insurance, the man entered her home and pulled out a gun. The man "dragged" Barajas by the arm through her home as he checked the rooms. Barajas's mother, Maria Faith, was able to escape from the house with Barajas's infant child, and Barajas was also able to eventually get out of the house. The man thereafter left the house and drove off in a blue car. A passing motorist, Kelly Henderson, and a neighbor, Robert Killmer, offered assistance. Henderson and Killmer also saw the suspect drive off in the car, and Killmer obtained the license plate number of the car, which was found to be registered to defendant's girlfriend.

Defendant first argues that the trial court abused its discretion by not allowing him to recall Henderson in order to question her about her prior knowledge of defendant. We disagree.

Whether to allow a witness to be recalled is within the trial court's discretion. *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 630; 329 NW2d 760 (1982). "Absent an abuse of discretion, the trial court's denial of a request to recall a witness will not be reversed." *Id.*

During defense counsel's cross-examination of Henderson, she revealed that she previously knew defendant when he was a resident at a juvenile detention center where she worked from 1982 to 1991, but "did not know him in the lineup." At the conclusion of the first day of trial, defendant advised the trial court that he remembered Henderson from the past and explained that he had once gotten into trouble for reporting that she was involved in an extramarital affair. Defendant was concerned that Henderson had identified him in the earlier lineup because she had seen his name on paperwork before the lineup. Defendant sought to recall Henderson for further cross-examination on this subject. The trial court questioned why defense counsel had not cross-examined Henderson on this subject when he had the opportunity earlier, and counsel explained that defendant had not recognized Henderson previously, and that counsel had no prior information that Henderson knew defendant. The trial court stated that it would take the matter under advisement and would decide on the next day of trial what to do.

Before trial resumed, a detective investigated defendant's allegations. When the court revisited this issue on the next day of trial, it received testimony from the detective on a separate record. According to the detective, Henderson stated that she was involved in a relationship with another employee at the Saginaw County Juvenile Detention Center in the mid 1980s. Henderson stated that she was separated from her husband at the time, and the relationship was not a secret to other staff and detainees at the detention center. The detective also spoke to the person with whom Henderson was involved in the relationship. He denied that the relationship caused any problems with management at the detention center. Henderson also told the detective that her identification of defendant at the lineup was based solely on what she observed on the date of the offense. She explained that, because of the lapse of time, approximately 20 years, defendant's appearance had changed since he was a juvenile and she did not recognize him at the lineup as someone she had previously known, and it was not until later that she recognized defendant's name. Following this testimony, the trial court denied defendant's request to recall Henderson.

Initially, we reject defendant's argument that the trial court's decision denied defendant his right to confront and cross-examine the witnesses against him. In *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998), this Court discussed a defendant's constitutional right of confrontation and cross-examination:

A defendant has a constitutional right to confront the witnesses against him, US Const, Am VI; Const 1963, art 1, § 20. If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). Yet, there are limits to this right to confront witnesses. The Confrontation Clause "'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993) (Boyle, J.), quoting *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985). Rather, the Confrontation

Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). [Emphasis in original.]

In this case, defendant unquestionably was afforded the opportunity to confront and cross-examine Henderson. Further, when Henderson disclosed on cross-examination that she knew defendant when he was a resident at the juvenile detention center in the mid-1980s, defendant was not restricted in his ability to cross-examine Henderson on this subject. Thus, there was no violation of defendant's right of confrontation, or his corollary right to cross-examination. Instead, the issue is whether the trial court abused its discretion when it declined to allow defendant to recall Henderson after she had been excused.

We find no abuse of discretion. The trial court considered the matter carefully, had a detective investigate defendant's concerns relative to defendant's reasons for wanting to recall the witness, and conducted a hearing on a separate record to evaluate the need and importance for having the witness recalled. Defendant's principal concerns were that Henderson may have identified him at the pretrial lineup because she recognized him from her previous employment at the detention center, and that she may be biased against him because he had reported that she was involved in an extramarital affair. The separate record testimony failed to reveal support for either of these concerns. Significantly, Henderson denied recognizing defendant at the pretrial lineup, which was understandable considering that it had been approximately 20 years since Henderson had seen defendant, who was then a juvenile and was now a much older adult, and that defendant himself never previously recognized Henderson even though she had testified at several earlier hearings at which defendant was present. Under the circumstances, the trial court did not abuse its discretion by denying defendant's request to recall Henderson.

Next, defendant argues that the prosecutor's misconduct denied him a fair trial. Because defendant did not object to the challenged conduct at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

"A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). But prosecutorial misconduct may not be predicated on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the trial court, so long as it does not prejudice the defendant. *Id.* at 660-661.

Defendant first argues that the prosecutor improperly interjected speculative evidence when he questioned a detective about whether she found a gun hidden under the skirt of defendant's mobile home. The detective denied finding a gun, but testified that cobwebs had been disturbed in an area where a gun could have been stored. Even if this line of questioning

could be considered improper, because the detective admitted that no gun was found, defendant's substantial rights were not affected.

Defendant also argues that it was improper for the prosecutor to question Jennifer Howell, defendant's parole officer, about the fact that she worked for the Department of Corrections and supervised defendant while he was on parole, thereby revealing that defendant had previously been in prison. However, defendant's status as a convicted felon was relevant to the felon in possession of a firearm charge, a necessary element of which is that defendant was previously convicted of a felony. Further, defendant admitted that he had two prior convictions for armed robbery arising from separate incidents. Thus, the jury was aware of defendant's criminal history. Additionally, Howell was a relevant witness because she took a statement from defendant in which he explained that he had loaned his car to other possible suspects, but did not mention Charles Aldridge. For these reasons, defendant has failed to show either that the prosecutor's questioning of Howell constituted plain error, or that his substantial rights were affected.

Lastly, we find no merit to defendant's argument that the prosecutor improperly questioned his girlfriend, Michelle Napier, about his possible involvement in a gang. The prosecutor only asked Napier if defendant associated with a particular group of men from the same neighborhood; there were no references to gangs or gang membership. There was testimony in this case that defendant had loaned his vehicle to two of his longtime friends, and that defendant and these friends grew up together in the same neighborhood. On this record, there was no plain error.

Defendant next argues that trial counsel was ineffective. Although defendant raised this issue in a motion for a new trial and moved for an evidentiary hearing, the trial court denied both motions. Because an evidentiary hearing was not conducted, our review of this claim is limited to errors apparent from the record. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996). However, we shall also consider defendant's alternative request to remand for an evidentiary hearing.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant argues that counsel was ineffective for not objecting to the prosecutor's conduct previously addressed in this opinion. We previously concluded, however, that the prosecutor's conduct either was not improper or was not prejudicial. Thus, there is no basis for concluding that counsel's failure to object to the prosecutor's conduct deprived defendant of the effective assistance of counsel. We also disagree with defendant's argument that counsel should have objected to the detective's testimony about the search for a gun on the basis of hearsay, because the detective testified that she was acting on a tip. This testimony was not offered to prove the truth of the matter asserted, but only to explain why the detective searched for a gun.

Therefore, it was not hearsay. MRE 801; *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Because there was no basis for a hearsay objection, counsel was not ineffective for failing to object on this ground.

Defendant next argues that counsel was ineffective for failing to cross-examine Kelly Henderson about her prior contact with and knowledge of defendant. Defendant argues that effective cross-examination on this subject would have diminished the value of her pretrial identification.

This issue was explored on a separate record after Henderson was excused as a witness. It is apparent from that record that counsel was unaware that Henderson previously knew defendant before his cross-examination. When Henderson revealed on cross-examination that she later recognized defendant's name from her previous employment at the detention center, counsel established that this was "many moons ago." Even if counsel was deficient for not further exploring this area, defendant has not established that he was prejudiced. The separate record testimony indicates that Henderson did not recognize defendant at the pretrial lineup as someone she had known previously, and it was not until after she identified defendant at the lineup that she later recognized his name. In light of this evidence, there is no reasonable probability that the result of defendant's trial would have been different had counsel further cross-examined Henderson on this subject.

Defendant also argues that counsel was ineffective for failing to call his first attorney, Gena Amos, to testify that defendant had named another individual as a suspect early in the case. At different points during the police investigation, defendant named other individuals as possible suspects, including Charles Aldridge, but they did not match the physical description of the perpetrator that the witnesses provided. At trial, defendant testified that the offense was committed by Aldridge, who had borrowed his vehicle on the date of the offense. Aldridge was no longer alive, having died in February 2003.

The decision whether to call Amos as a witness was a matter of trial strategy. *Davis, supra*. Defendant has not overcome the presumption of sound strategy, particularly considering that calling Amos as a witness may have required defendant to waive the attorney-client privilege. Further, although defendant raised this issue in his motion for a new trial, he did not provide an offer of proof, such as an affidavit from Amos. Therefore, he failed to provide factual support for his claim that Amos could have provided favorable testimony.

We decline to grant defendant's alternative request for a remand for an evidentiary hearing on his ineffective assistance of counsel claims, because defendant has not demonstrated that an evidentiary hearing is necessary. The record is sufficient to review defendant's first two ineffective assistance of counsel claims, and defendant failed to make a satisfactory offer of proof showing factual support for his third claim (involving the failure to call Amos as a witness). Therefore, a remand is not warranted. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

Defendant also argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence. This Court reviews a trial court's decision on a motion for a new trial based on newly discovered evidence for an abuse of discretion. Any factual findings made

by the trial court are reviewed for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

In order to grant a new trial based on newly discovered evidence, the defendant must show that the evidence; (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

In support of his motion, defendant submitted an affidavit from Derrick Braddock, who averred that Charles Aldridge had confessed to him on the date of the offense that he committed the crimes of which defendant was charged. Defendant also submitted photographs of Aldridge showing him with a bald or closely-shaven head.

Defendant offered his own testimony at trial that Aldridge had possession of his car at the time of this offense. Braddock's affidavit is cumulative of defendant's trial testimony in this regard. Furthermore, the trial court found that the allegations in Braddock's affidavit were not credible. Braddock had been defendant's longtime friend for more than 20 years. According to Braddock's affidavit, Aldridge confessed to the crime on the date of the offense, which was more than four years before defendant's trial. Although Braddock stated that he did not come forward sooner because Aldridge was also a longtime friend and he did not want to choose between Aldridge and defendant, Aldridge died in February 2003, more than three years before defendant's trial, so there was no reason not to come forward sooner in order to protect Aldridge. Braddock also stated that he did not come forward because he thought that defendant would "beat" the charges, but defendant was previously convicted in September 2003,¹ and Braddock did not come forward with this information at that time. The trial court also determined that the autopsy photographs of Aldridge did not compel a new trial because there was no showing that the photographs depicted Aldridge's appearance at the time of the offense, which occurred approximately nine months earlier. Moreover, defendant testified at trial that Aldridge did not have hair on his head at the time of the offense and the photographs were cumulative of this testimony. Given these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Next, defendant challenges the trial court's scoring of the sentencing guidelines. A trial court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

Defendant argues that ten points were improperly scored for offense variable (OV) 4 because there was no evidence of a psychological injury to a victim requiring professional treatment. We disagree.

¹ This Court previously reversed defendant's convictions because of improper prosecutorial questions and comments, and ineffective assistance of counsel. *People v Ashworth*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2005 (Docket No. 251881).

Ten points should be scored for OV 4 if “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). In scoring this variable, it is only necessary that the serious psychological injury *may* require professional treatment. “[T]he fact that treatment has not been sought is not conclusive.” MCL 777.34(2). See *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005).

At trial, Barajas testified that defendant was armed with a gun while he pulled her through the house. Her mother and infant child were also in the house and she prayed to God that defendant would not shoot them. Barajas was still shaking and terrified when the police arrived and was afraid to go back into her house. At defendant’s trial, which was more than four years after the offense, Barajas testified that the incident still had an emotional impact on her. Although Barajas had not sought professional treatment, the evidence supported the trial court’s determination that she suffered a psychological injury that may require professional treatment.

Defendant also argues that 15 points should not have been scored for OV 8, which is proper where the victim is asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a). Barajas testified at trial that defendant grabbed her after entering the front door and, while armed with a gun, forcibly “dragged” her through the house to check the other rooms. She was moved from the front area of the house, which was visible to the public from the outside, to the rear of the house. This evidence was sufficient to show that Barajas was moved to a place of greater danger during the offense. *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996). Thus, the trial court did not err in scoring 15 points for OV 8.

Defendant also challenges the trial court’s score of 15 points for OV 10, based on predatory conduct. MCL 777.40(1)(a). “Predatory conduct” is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a).

There was evidence that defendant was dressed like a police officer or other official, carried a notepad, and displayed what appeared to be a badge when the victim answered the door. This conduct facilitated defendant’s entry into the victim’s home. We conclude that this evidence supports the trial court’s 15-point score for OV 10.

Finally, in light of our disposition of the foregoing issues, defendant has not demonstrated that the cumulative effect of multiple errors denied him a fair trial. *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto