

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN RAY MARVIN,

Defendant-Appellant.

UNPUBLISHED

February 5, 2009

No. 282907

Antrim Circuit Court

LC No. 07-004096-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2)(a), receiving or concealing a stolen firearm, MCL 750.535b, and possessing a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, to be served consecutively to prison terms of 2-½ to 20 years for the home invasion conviction and 1 to 10 years for the receiving or concealing conviction. He appeals as of right. Because there is no reasonable probability that, but for counsel's failure to object to the admission of a witness's prior inconsistent statement, which inculpated defendant and served to prove the truth of the matter asserted, the result of defendant's trial would have been different, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

On November 9, 2006, sometime between late morning and approximately 4:00 p.m., Peter Zoulek's house was broken into and three pairs of field glasses, a rifle, and a rifle case were stolen. That evening, around dinnertime, 5:00 or 6:00 p.m., defendant sold a rifle to Rex Bartholomew for \$200. The next day, Zoulek visited M&M Hunting, where he informed Mike Tompkins that his rifle had been stolen. He described the rifle to Tompkins. Thirty minutes after Zoulek left M&M Hunting, Bartholomew entered the store and told Tompkins that, just the day before, he had gotten a deal on a nice gun. As Bartholomew and Tompkins discussed the gun, Tompkins discovered that Bartholomew had purchased Zoulek's rifle. Bartholomew returned the rifle to Zoulek.

At trial, Edward Morris testified that he had talked with a police officer about a conversation he had with defendant regarding the stolen rifle. Morris could not remember what he had told the officer during the interview. After being shown the officer's report, Morris stated

that he did not remember making all the statements contained in the report. Specifically, Morris stated that he did not remember whether he told the police officer that defendant had told him that defendant had broken into Zoulek's house and taken the rifle. But, according to Morris, if he had made such a statement to the officer, the statement was true. He would not have lied to the officer. Morris did recall, however, that defendant told him that defendant received the rifle from a person unknown to Morris, but Morris did not remember defendant telling him about an EZ-Mart gas station.

State Trooper Bob Ziecina testified that he interviewed Morris in June 2007 and that Morris told him that he had a conversation with defendant concerning the stolen rifle. But when Ziecina was asked by the prosecutor to relate the content of Morris's conversation with defendant, the trial court sustained defendant's hearsay objection. However, for impeachment, the trial court allowed the prosecutor to ask Ziecina whether Morris and defendant had discussed defendant receiving the rifle from a person at the EZ-Mart gas station. Ziecina testified that Morris never claimed to have "heard about the subject at the East Jordan EZ-Mart gas station and that [Robert] Ward and [defendant] had broken into Zoulek's house."

Ziecina also testified concerning his interview with defendant. Defendant informed Ziecina that he was at the East Jordan EZ-Mart gas station with Ward on November 9, 2006, when he ran into Frank Porter, an acquaintance who owed him \$75. Defendant asked Porter for the \$75. Porter replied that he did not have the money with him, but he had a gun in his vehicle and that if defendant sold the gun Porter would pay him \$75 out of the money received for the gun. Defendant sold the gun to Bartholomew, and Porter paid his debt to defendant out of the \$200 Bartholomew paid for the gun. Ward's trial testimony corroborated defendant's story.

II. Ineffective Assistance of Counsel

On appeal, defendant contends that he was denied the effective assistance of counsel. Because no *Ginther*¹ hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Defendant claims that counsel was ineffective for (1) failing to object when the prosecutor asked Morris if his statements to Ziecina were truthful, (2) failing to object to the admission of Morris's statement to Ziecina for impeachment purposes because Morris's statement to Ziecina was not "really inconsistent" with Morris's testimony, (3) failing to move to strike Bartholomew's testimony that Morris told him that defendant was involved in the theft of the rifle, and (4) failing to request a jury instruction on the use of prior inconsistent statements that was crafted to the facts of the present case.

The right to counsel guaranteed by the United States and Michigan Constitution, US Const, Am VI; Const 1963, art 1, § 20, includes the right to the effective assistance of counsel. *US v Cronin*, 466 US 648, 654; 104 S Ct 2039, 2044; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

that, but for counsel's error, the result of the proceedings would have been different. *People v Scott*, 275 Mich App 521, 526; 733 NW2d 713 (2007). A reasonable probability is one sufficient to undermine confidence in the outcome. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel is presumed to have provided effective assistance and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

The four claims of ineffective assistance raised by defendant arise either directly or indirectly from the admission of Morris's prior statement to Ziecina concerning his conversation with defendant about defendant's involvement in the home invasion and the theft of Zoulek's rifle. Having reviewed the trial transcript, we believe that resolution of these issues is controlled by whether trial counsel was ineffective for failing to object to the admission of Morris's statement to Ziecina for impeachment on the basis that Morris's statement directly inculpated defendant as the person who committed the home invasion and stole Zoulek's rifle. We conclude that even though trial counsel's failure to object fell below an objective standard of reasonableness, defendant was not prejudiced by counsel's deficient performance.

Extrinsic evidence of a prior inconsistent statement is admissible to impeach a witness. MRE 613(b).² "The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). However, a prosecutor may not introduce evidence of a statement that directly inculpates the defendant under the guise of impeachment if (1) the substance of the statement is relevant to the central issue of the case and (2) there is no other testimony from the witness for which his credibility was relevant to the case. *Id.* at 682-683; *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994).

Here, the substance of Morris's statement to Ziecina was relevant to the central issue of the case, whether defendant broke into Zoulek's house and stole Zoulek's rifle. Morris's statement to Ziecina about his conversation with defendant inculpated defendant as the perpetrator and refuted defendant's story that he received the rifle from Porter. In addition, there was no other testimony from Morris for which his credibility was relevant. Morris's testimony concerned his conversation with Morris and what he had told Ziecina about that conversation. Thus, whether Morris could be believed was only relevant with respect to whether he made the statement to Ziecina that defendant told Morris that he and Ward committed the home invasion. See *Stanaway*, *supra*, 446 Mich 693. Morris's prior inconsistent statement, therefore, served the improper purpose of proving the truth of the matter asserted, *id.*, and was inadmissible to impeach Morris, *Kilbourn*, *supra* at 682-683. Because Morris's prior inconsistent statement, which provided direct evidence that defendant committed the home invasion and stole Zoulek's rifle, was inadmissible, counsel's failure to object fell below an objective standard of reasonableness under prevailing professional norms. *Scott*, *supra*.

² Morris's statement to Ziecina was inconsistent with Morris's trial testimony. Morris told Ziecina that defendant told him that Ward and defendant committed the home invasion, but at trial Morris testified that defendant told him that defendant received a gun from a third person. It is clear from Morris's testimony that he and the prosecutor were referencing the Zoulek's rifle.

However, we do not believe there is a reasonable probability that, but for counsel's failure to object to the admission of Morris's prior inconsistent statement as impeachment evidence, the result of defendant's trial would have been different. *Id.* We recognize that Morris's prior inconsistent statement was the only direct evidence that defendant committed the home invasion and stole Zoulek's rifle. However, the jury was instructed that it could infer that defendant stole the rifle if it found that defendant had possession of the rifle and the rifle was "recently stolen." See *People v Miller*, 141 Mich App 637, 641; 367 NW2d 892 (1985). The evidence established that defendant possessed the rifle, at most, seven to eight hours after it was stolen from Zoulek's house. Thus, the evidence allowed the jury to infer that defendant had stolen the rifle. In addition, as stated by the prosecutor, defendant's story required "a perfect storm." According to defendant, he obtained the rifle from Porter at the EZ-Mart gas station. Porter, an acquaintance of defendant, not only happened to owe defendant \$75 but also happened to have a rifle belonging to Zoulek, defendant's parents' former landlord, in his vehicle. Given these coincidental circumstances, along with the fact that defendant was aware that Zoulek owned firearms, that Bartholomew likely discussed with defendant that he was looking for a new gun, and that Ziecina was unable to locate Porter, it is very unlikely that any reasonable jury would believe defendant's story. Because defendant's story as to how he obtained the rifle is not easily believable and because defendant possessed the rifle, at most, seven to eight hours after it was stolen, there is no reasonable probability that, but for counsel's failure to object to the admission of Morris's prior inconsistent statement as impeachment evidence, the result of defendant's trial would have been different. *Scott, supra.*

Morris's prior inconsistent statement to Ziecina served the improper purpose of admitting the truth of the matter asserted. Because the admission of Morris's prior inconsistent statement did not prejudice defendant, then the other specific actions of trial counsel that defendant alleges fell below an objective standard of reasonableness, all of which to some degree are grounded in the admission of Morris's statement to Ziecina, could not have prejudiced defendant. We, therefore, need not address defendant's specific claims as to how counsel was ineffective.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra