STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2010
v	No. 289265 Clare Circuit Court
ARTHUR REYES, Defendant-Appellant.	LC No. 08-003462-FH

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant Arthur Reyes appeals as of right his jury conviction for unlawfully driving away an automobile (UDAA).[1] The trial court sentenced Reyes as a fourth habitual offender[2] to 4 to 30 years in prison. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

At trial, the complainant, Angela McCaslin, testified that, on May 14, 2008, she was working the night shift at the Rockwood Lounge on Main Street in Farwell, Michigan. McCaslin stated that she drove to work in her gray 1998 Jeep Cherokee, which she parked behind the bar. She testified that she kept one set of keys with her and that she left another set of keys in her car.

According to McCaslin, Reyes came into the bar shortly before closing, at approximately 11:45 p.m., wearing a navy blue jogging suit. At that time, the only people in the bar were McCaslin; McCaslin's friend, Gloria Agle; and Reyes. McCaslin stated that she had seen Reyes in the past, but she did not know him personally.

McCaslin testified that Reyes ordered a draft beer, and she told him it was last call because it had been slow that night at the bar. Reyes sat at the very end of the bar, closest to the front door, while she and Agle were at the other end of the bar watching a movie. McCaslin stated there was banter back and forth between Reyes and her and Agle, but no real conversation.

[1] MCL 750.413.

[2] MCL 769.12.

Reyes mentioned he had been at DJ's, another bar a few blocks away, before coming to the Rockwood Lounge. McCaslin stated that she offered Reyes a cup of coffee, instead of dumping it out.

After Reyes finished his beer and coffee, he got up and went out the back door. McCaslin grabbed her keys, locked the front door of the bar, and then followed Reyes out the back door. As McCaslin was locking the back door, she saw someone inside her vehicle, turning the ignition on, so she unlocked the back door and walked outside. McCaslin testified that she waved and said "hey," but that did not deter the person in the car. She stated that when the car backed up under the floodlight, she could see that it was Reyes in her car, and she yelled at him to stop. She also ran up to the car, opened the door, and tugged on Reyes' shirt. But Reyes continued to back up while McCaslin hung on. Eventually, McCaslin had to let go, and Reyes left the parking lot in her vehicle. McCaslin testified that she did not give anyone, including Reyes, permission to drive her vehicle.

After Reyes drove off, McCaslin ran back into the bar and yelled to Agle that Reyes had stolen her car. Agle then ran to the front door to see if she could see Reyes, and McCaslin called the police.

Agle confirmed that she was at the Rockwood Lounge on May 14, 2008, keeping McCaslin company, when Reyes came in around midnight. She stated that Reyes ordered a draft beer, McCaslin gave him a cup of coffee, and he left out the back door. According to Agle, she saw McCaslin lock the front door, then follow Reyes to the back door. She heard McCaslin say, "Someone is stealing my Jeep," and saw her run out the back door. Agle testified that she went down to DJ's to see if anyone knew who Reyes was and where he lived, and she gave the police the information she obtained. She stated that McCaslin was crying and shaking after the incident. She further stated that she did not see what happened in the back parking lot.

Deputy Lawrence Kahsin of the Clare County Sheriff's Department testified that he was dispatched to the Rockwood Lounge on May 14, 2008. He spoke with McCaslin and obtained information from her regarding the vehicle, which he provided to dispatch, as well as a description of the suspect. He then went down to DJ's and obtained information regarding the identity of the suspect and his residence. According to Deputy Kahsin, he went to Reyes' house, where a female occupant told him that Reyes was in bed. The female allowed Deputy Kahsin to come in the house, and he found Reyes in bed.

Reyes admitted that he had a beer and coffee at the Rockwood Lounge. Deputy Kahsin found Reyes' wallet in a pair of blue jogging pants that were on the bedroom floor, which he seized as evidence. Deputy Kahsin then asked Reyes to accompany him to the Rockwood Lounge. Upon arrival, McCaslin identified the blue jogging pants as those Reyes had been wearing earlier that night. She also identified Reyes as the person who drove away in her vehicle. Deputy Kahsin further testified that the beer mug and coffee mug at the bar were processed for fingerprints, and the fingerprints found on the mugs matched Reyes' fingerprints.

The Isabella County Sheriff's department eventually recovered McCaslin's vehicle approximately a half mile from Reyes' house. The vehicle was not processed for fingerprints.

After deliberating, the jury found Reyes guilty of UDAA. He now appeals his conviction and sentence.

II. APPOINTMENT OF SUBSTITUTE COUNSEL

A. STANDARD OF REVIEW

Reyes argues that the trial court erred in failing to appoint substitute counsel for him. We review a trial court's decision regarding substitution of counsel for an abuse of discretion.[3] An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes.[4]

B. ANALYSIS

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel.[5] However, an indigent defendant "is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process."[6]

Reyes first requested substitute counsel at his arraignment, arguing that defense counsel failed to ask the questions at his preliminary examination that Reyes wanted counsel to ask. Reyes again requested substitute counsel at his pretrial hearing, citing defense counsel's alleged comment about a "pale community" as good cause for a substitution.[7] Finally, Reyes sent a letter to the trial court, requesting new counsel. However, at a status conference, Reyes stated that he was satisfied with defense counsel's representation. Therefore, Reyes waived any claim of error resulting from his third request for substitute counsel.[8]

Reyes' argument is essentially three-fold. First, he asserts that the trial court gave inadequate consideration to his requests for substitute counsel. Second, he argues that the trial court abused its discretion in failing to grant his request for substitute counsel because there was good cause for the same; that is, Reyes and his counsel were not on the "same page" when it

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[3] *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

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

[5] US Const, Am VI; Const 1963, art 1, § 20.

[6] *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991); see also *Traylor*, 245 Mich App at 462.

[7] Defense counsel explained that his comment pertained to the eye-witness identification at the crime scene, to point out that there are not a lot of Hispanics in the area; it did not have anything to do with jury prejudice, as Reyes alleged.

[8] *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (concluding that an expression of satisfaction with a trial court's action is a waiver of a party's right to raise any alleged error on appeal).

came to trial tactics. Third, he argues that a harmless-error analysis is not applicable because his Sixth Amendment right to counsel was violated by the trial court.

Reyes' first assertion, that the trial court "brushed off" his claims, is without merit. "When a defendant asserts that his assigned lawyer is not adequate or diligent or asserts . . . that his lawyer is disinterested, the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion."[9] Here, the trial court promptly addressed each of Reyes' requests and gave him an opportunity to express his concerns with defense counsel's representation.

Turning to Reyes' second argument, because Reyes failed to show good cause for a substitution of counsel, the trial court did not abuse its discretion in denying Reyes' requests. "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic."[10] While "[a] complete breakdown of the attorney-client privilege or disagreement over whether a particular line of defense should be pursued may justify appointing new counsel,"[11] "disagreements regarding trial strategy do not constitute sufficient grounds for the appointment of successor counsel."[12] Indeed, this Court has concluded that disputes over professional judgment and trial strategy are matters entrusted to the attorney.[13] Further, an allegation that a defendant lacks confidence in his attorney or he is generally unhappy with his attorney's representation does not constitute good cause for appointing substitute counsel.[14]

Here, Reyes' reasons for substitute counsel did not rise to the level of "a legitimate difference of opinion . . . between . . . defendant and his appointed counsel with regard to a fundamental trial tactic."[15] Indeed, Reyes' concerns were about pretrial matters, not about a fundamental trial tactic. Therefore, the trial court did not abuse its discretion in denying Reyes' requests.

Finally, we reject Reyes' assertion that a harmless-error analysis is not applicable because the trial court violated his Sixth Amendment right to counsel. The Michigan Supreme Court has articulated the limited circumstances that constitute structural error requiring reversal—a complete denial of counsel, a biased trial judge, racial discrimination in selection of grand jury, a denial of self-representation, a denial of a public trial, a defective reasonable-doubt

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[9] *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973); see also *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005).

[10] *Mack*, 190 Mich App at 14; see also *Traylor*, 245 Mich App at 462.

[11] *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979).

[12] *People v Krist*, 93 Mich App 425, 436-437; 287 NW2d 251 (1979).

[13] *Traylor*, 245 Mich App at 463.

[14] *Id*.

[15] *Id*. at 462.

instruction—and the denial of a request for substitute counsel is not one of them.[16] Further, in *People v Ginther*, the Michigan Supreme Court applied a harmless-error analysis to the trial court's decision regarding substitute counsel.[17]

In sum, we find no merit to Reyes' claims that the trial court erred in failing to appoint substitute counsel.

III. JURY INSTRUCTIONS

Reyes argues that the trial court should have sua sponte instructed the jury on the lesser-included misdemeanor offense of joyriding. However, Reyes expressly rejected the giving of this instruction. Therefore, this argument is waived.[18]

IV. ADMISSION OF EVIDENCE

Reyes argues, and plaintiff concedes, that the trial court erred in admitting the Michigan State Police laboratory report regarding the latent fingerprints through the investigating officer because the report was inadmissible hearsay. We agree.[19] However, we also agree with plaintiff's position that the trial court's error in admitting the laboratory report was harmless.[20] An error is harmless if it is clear beyond a reasonable doubt that a rational trier of fact would have found the defendant guilty absent the error.[21] While the laboratory report did identify the fingerprints taken off a beer mug and coffee mug at the Rockwood Lounge as Reyes', which placed Reyes at the scene of the crime, McCaslin and another witness testified that Reyes was at the lounge on the night of the incident, and the investigating officer testified that Reyes admitted to being at the lounge on that night. Therefore, because there was other evidence establishing that Reyes was at the scene, the error in admitting the report was harmless.

V. SENTENCING

A. STANDARD OF REVIEW

Reyes argues that he is entitled to resentencing because the prosecutor violated MCL 769.13(1) by failing to file an habitual offender enhancement notice in the circuit court.

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[16] *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000).

[17] *Ginther*, 390 Mich at 443. ("A judge's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that a conviction following such error be set aside").

[18] See *Carter*, 462 Mich at 214-216.

[19] *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); *People v Payne*, 285 Mich App 181, 196; 774 NW2d 714 (2009).

[20] *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005); *McDaniel*, 469 Mich at 413.

[21] *Shepherd*, 472 Mich at 347.

Reyes failed to preserve this issue. Therefore, this Court's review is for plain error affecting Reyes' substantial rights.[22] Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.[23]

B. ANALYSIS

While Reyes does not dispute that notice was given in the *district* court documents filed against him, he asserts that because they were not refiled in the *circuit* court, they do not comply with the statute.

MCL 769.12 provides that a person who has been previously convicted of three or more felonies shall be subject to an enhanced sentence if convicted of a subsequent felony. To enhance the sentence of a defendant, the prosecutor must file a written notice of intent within 21 days after the defendant's arraignment on the information charging the underlying offense.[24] The notice must "list the prior conviction or convictions that will or may be relied upon for purposes of the sentence enhancement[,]" and it must be filed with the court and served personally on the defendant or his attorney at the arraignment or served in any manner provided by law or court rule.[25] The purpose of MCL 769.13 is to ensure that a defendant has notice at an early stage in the proceedings that he could be sentenced as a habitual offender.[26] The prosecuting attorney must also file a written proof of service with the clerk of the court.[27] Failure to provide timely notice of intent to seek sentence enhancement under the habitual offender statute precludes such enhancement.[28] However, where there is no dispute that the defendant did in fact timely receive the required notice, the failure to file proof of notice may be harmless error.[29]

Here, Reyes was given notice of the enhancement on multiple occasions. First, it was specifically noted that Reyes was being charged as a fourth habitual offender on the petition and order for court appointed attorney, which he signed on May 15, 2008. Further, the felony complaint, felony warrant, and felony information all issued on May 15, 2008, gave notice of the enhancement—habitual offender-fourth offense—and specifically listed the prior convictions the prosecutor intended to rely on in support of the enhancement. And the enhancement was specifically noted on the record at Reyes' pre-trial hearing on June 23, 2008, only 14 days after his June 9, 2008 circuit court arraignment. Accordingly, because it is clear that Reyes was on

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[22] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[23] *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

[24] MCL 769.13(1); MCR 6.112(F).

[25] MCL 769.13(2).

[26] *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000).

[27] MCL 769.13(2).

[28] *Morales*, 240 Mich App at 574-575.

[29] *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999).

notice of the sentencing enhancement at the very early stages of his proceedings, the purpose of the statute was served, and we reject his argument.[30]

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Reyes argues that he was denied his right to the effective assistance of counsel. Whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact.[31] The factual findings are reviewed for clear error, and the matters of law are reviewed de novo.[32] However, because Reyes failed to move for new trial or evidentiary hearing below, our review is limited to the existing record only.[33]

B. APPLICABLE LEGAL PRINCIPLES

To establish a claim of ineffective assistance of counsel, Reyes bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that Reyes was denied a fair trial.[34] To meet the second part of the test, Reyes must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error.[35] A "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy."[36] Further, a reviewing court will not assess trial counsel's competence with the benefit of hindsight.[37]

C. FAILURE TO FILE MOTION IN LIMINE OR FOR A *WADE* HEARING FOR SUPPRESSION OF IDENTIFICATION EVIDENCE

Reyes first argues that defense counsel was ineffective for failing to file a motion in limine or for a *Wade* hearing to suppress the identification evidence at trial.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies a defendant due process of law.[38] To sustain a due process

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[30] *Morales*, 240 Mich App at 582.

[31] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[32] *Id.*

[33] *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

[34] *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999).

[35] *Id*. at 6.

[36] *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

[37] *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

[38] *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), citing *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967).

challenge, a defendant must show that the pre-trial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.[39] Further, just because the identification procedure is suggestive does not mean that it is constitutionally defective.[40]

Reyes eludes to the fact that the on-the-scene identification in this case was unduly suggestive because Deputy Kahsin said to McCaslin, "[W]e've got good news and bad news, we have the guy who took your Jeep, but we have not yet found your vehicle."

This Court has upheld prompt on-the-scene identifications.[41] However, in *People v Libbett*, this Court based its decision on the fact that there were no suggestions by law enforcement at the identification.[42] Here, there is conflicting testimony regarding whether Deputy Kahsin suggested that Reyes was the person who stole McCaslin's car. While McCaslin testified that Deputy Kahsin told her that they had "the guy," Deputy Kahsin testified that he said they had a subject matching her description. Therefore, the on-the-scene identification may have been tainted by Deputy Kahsin's suggestive comments.

Nevertheless, there was a sufficient independent basis for the in-court identification.[43] Therefore, Reyes cannot show any harm resulting from defense counsel's failure to suppress the pre-trial identification.

"If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification."[44] Factors used to determine if there is an independent basis include: (1) the witness' prior knowledge of the defendant; (2) the witness' opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness' level of certainty at the prior identification; (5) discrepancies between the pretrial identification and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant.[45]

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[39] *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

[40] *Id*. at 306.

[41] See e.g., *People v Libbett*, 251 Mich App 353-358; 650 NW2d 407 (2002); *People v Purofoy*, 116 Mich App 471; 322 NW2d 446 (1982); *People v Johnson*, 59 Mich App 187, 190; 229 NW2d 372 (1975).

[42] *Libbett*, 251 Mich App at 363.

[43] *Kurylczyk*, 443 Mich at 306; *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

[44] *Colon*, 233 Mich App at 304.

[45] *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998); *Colon*, 233 Mich App at 304-305.

Here, McCaslin testified that she had prior knowledge of Reyes, i.e, she had seen him in the Rockwood Lounge in the past. She also observed Reyes as he was stealing her car. Indeed, she was within arm's length of Reyes, holding onto his shirt, while he was in the car. The length of time between the crime and the initial identification was approximately one hour. There was no lack of certainty on McCaslin's part.

Accordingly, because the in-court identification was admissible at trial, counsel was not ineffective for failing to suppress the pre-trial identification.

D. FAILURE TO INVESTIGATE OR CROSS-EXAMINE WITNESSES REGARDING LACK OF FINGERPRINTS ON THE JEEP

Reyes further argues that his counsel was ineffective when he failed to investigate or cross-examine witnesses regarding the lack of fingerprints in the Jeep, and when he failed to consult an expert regarding latent fingerprints.

As to Reyes' claim that his counsel was ineffective for failing to investigate or cross-examine the witnesses regarding the lack of fingerprints in the Jeep,"[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."[46] Given Reyes' mistaken identification defense, it was sound trial strategy for defense counsel not to pursue fingerprint evidence from the Jeep. Identification of Reyes' fingerprints on or inside the Jeep would have been detrimental to Reyes' defense. Further, Reyes' claim that counsel was ineffective for failing to consult a fingerprint expert must fail because Reyes fails to explain what the expert would have testified to and how that testimony would have affected the outcome of his trial.[47]

E. FAILURE TO REQUEST A JURY INSTRUCTION ON THE LESSER-INCLUDED MISDEMEANOR OFFENSE

Next, Reyes argues that defense counsel was ineffective when he failed to request a jury instruction on the lesser-included misdemeanor offense. But defense counsel did initially request the jury instruction. It was only after consulting with Reyes that defense counsel advised the trial court that Reyes declined the instruction. Therefore, Reyes argument is without merit.

F. FAILURE TO GIVE A BENEFICIAL CLOSING ARGUMENT

Reyes also argues that his counsel was ineffective when he failed to give a beneficial closing argument. Reyes' argument is without merit. Defense counsel pointed out the inconsistencies in McCaslin's testimony, he noted the allegedly improper on-the-scene identification, and he argued that there was not enough time between the car being taken and Deputy Kahsin finding Reyes asleep in his bed for Reyes to be the perpetrator in this case.

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

[47] *People v Ackerman*, 257 Mich App 435, 455; 669 NW2d 818 (2003).

Therefore, defense counsel did give a beneficial closing argument. Moreover, as previously noted, "[t]his Court will not substitute its judgment for that of counsel in matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight."[48] And what arguments to present in closing is a matter of trial strategy.

G. FAILURE TO OBJECT TO TESTIMONY THAT AGLE WENT TO DJ'S BAR TO OBTAIN REYES' NAME AND ADDRESS

Reyes further argues that his counsel was ineffective when he failed to object to testimony that Agle went to DJ's bar and obtained Reyes' name and address. However, Deputy Kahsin also went to DJ's on the night of the incident and obtained the same information. Therefore, because the evidence was otherwise before the jury, Reyes was not prejudiced by counsel's failure to object to Agle's testimony.

H. FAILURE TO OBJECT TO SENTENCE ENHANCEMENT

Finally, Reyes contends that defense counsel was ineffective when he failed to object to Reyes' sentence enhancement. However, as we discussed previously, Reyes was on notice of the sentence enhancement. Therefore, any objection would have been futile, and counsel cannot be faulted for failing to make a futile or meritless objection.[49]

We affirm.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello

[48] *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

[49] *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).