STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2010
V	No. 293658 Muskegon Circuit Court
RAYMOND GOSHA HARDIN, Defendant-Appellant.	LC No. 09-057455-FH

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting or obstructing a police officer, MCL 750.81d(1), and driving with a suspended license, second offense, MCL 257.904(3)(b). He was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of 14 to 36 months' imprisonment for the resisting or obstructing conviction, and one year for the driving with a suspended license conviction. He appeals as of right. Because there was no error in allowing the prosecutor to question defendant's character witnesses about alleged dishonest statements defendant had made to law enforcement officials, and because prior record variable (PRV) 2 was properly scored, we affirm.

At the trial in this matter, the prosecution presented evidence that two police officers, who knew that defendant's operator's license had been suspended, observed defendant driving a short distance. The officers testified that after defendant stopped and exited his car, he disregarded commands to stop and then resisted when the officers attempted to arrest him. Despite defendant's testimony that he cooperated once he became aware that the police were detaining him, and his claim that the police used excessive force against him, the jury found defendant guilty of resisting or obstructing a police officer.

On appeal, defendant argues that the trial court erred in allowing the prosecutor to question his character witnesses about allegations of earlier untrue statements made by defendant, and also erred in scoring PRV 2 of the sentencing guidelines. We disagree with both allegations of error.

I. QUESTIONS TO CHARACTER WITNESSES

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). "A trial court abuses its discretion

when it fails to select a principled outcome from a range of reasonable and principled outcomes." *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). However, appellate claims over matters that are affirmatively waived at trial are extinguished, leaving nothing for the appellate court to review. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Defendant called two ministers as character witnesses, both of whom testified concerning defendant's reputation for truthfulness and integrity in the church community. The first witness testified that he had known defendant for nearly five years. When asked about defendant's reputation in connection with church-related activities, the witness replied, "He handles himself well," and added that he had never known defendant to lie. The witness indicated that defendant's reputation for truth and veracity in the church community was good. On cross-examination, the prosecutor engaged in the following line of questioning:

> *Q.* Have you heard that he lied to the police about being in a hit and run accident?
>
> *A.* No. I didn't hear that.
>
> *Q.* Have you heard that he lied to the jail deputies about drinking on work release?
>
> *A.* No, I didn't hear that.
>
> *Q.* Have you heard that he lied to the police when he was an aggressor in a fight and said that the victim had a knife?
>
> *A.* No, I didn't hear that.

Defense counsel objected, explaining:

> These questions are kind of unclear what he's referring to regarding an accident and things like this. I don't know if it involves convictions or not and he's also talking about an assaultive type of offense here and I don't see the relevance of this. He's asking these types of questions and we don't know if these are convictions or this happens to be in some police report or some unfounded allegation. It's just to[o] vague to ask that type of question.

The trial court inquired about the factual bases for the prosecutor's questions and the prosecutor responded that the information was contained in police reports. The court cautioned the prosecutor to avoid inflammatory, unusual, or unnecessary comments. Defense counsel further protested, "Is it required that he gives us a date or year[?] Just throwing out things here, you know, I would think it would have to, you know, let's enunciate something," whereupon the trial court directed the prosecutor to show the police reports to defense counsel. At that point, defense counsel asked the court if it deemed the year of the alleged events relevant, to which the court replied, "I haven't said anything about it yet and I'm declining to unless there's some Rule of Evidence that you want to cite . . . ." When the court asked about the oldest event to which the prosecutor intended to refer, the prosecutor respondent that the event occurred in 1998. The trial court then permitted the prosecutor to proceed.

The second character witness testified that he had known defendant for "four or five years." Asked about defendant's reputation for truth and veracity, the witness answered, "Positive, shows up on time, does what he says he's gonna [sic] do," then answered affirmatively when asked if defendant was "truthful," if his "veracity" was "good," and if he was "known in the community that you deal with for speaking the truth." The following exchange then took place on cross-examination by the prosecutor:

> *Q.* [W]ere you aware that the defendant, or have you heard that the defendant lied about being in a hit and run accident to the police?
>
> *A.* No.
>
> *Q.* Have you heard that he lied to jail deputies about drinking while on work release?
>
> *A.* No.
>
> *Q.* Have you heard that he lied to police about seeing a person with a knife?
>
> *A.* No.
>
> *Q.* Were you aware that he lied about taking a pair of prescription sunglasses from Eye Care One?
>
> *A.* No.
>
> *Q.* And were you aware of the fact that he actually lied about, to jail deputies about having a job so he could get released from the jail on work release?
>
> *A.* No.
>
> *Q.* You weren't aware of those things?
>
> *A.* No.

In *People v Dorrikas*, 354 Mich 303, 316-317; 92 NW2d 305 (1958), our Supreme Court observed:

> [T]he general rule seems to be well established that a character witness who has testified to the good reputation of the defendant in a criminal case may be asked on cross-examination, for the purpose of testing his credibility and indicating the weight to be given to his testimony, whether he has heard reports of prior conduct on the part of defendant tending to affect his reputation for honesty and integrity,[and] it is equally well established that such cross-examination shall be limited as to time and, in some instances, place.

In *Dorrikas*, the Court impliedly disapproved of questioning of character witnesses over matters that took place more than 11 years before trial, at a time when the defendant did not live within the community whose opinion of the defendant's honesty the character witness was describing. *Id.* at 322. The Court additionally noted that questions concerning rumors of "remote" events, unless revived by recent misconduct, might well be precluded, and that a reformed criminal "should not be subjected to embarrassment for previous mistakes." *Id.* at 321-322. The Court decreed that a trial court should not permit a prosecutor to cross-examine a character witness about earlier conduct of a defendant that reflects on that defendant's character for truthfulness and integrity without

> (1) the trial judge determining, in the absence of the jury, whether or not the criminal acts actually took place, the time of their commission, and a determination as to whether they were relevant to the issue being tried, and (2) the trial judge making a careful instruction to the jury as to the reasons testimony as to the criminal acts is being admitted. [*Id.* at 326.]

In this case, the discussion concerning whether the matters over which the prosecutor questioned the character witnesses actually took place, and if so when and where, and the relevance of such questioning, was conducted during the course of trial and in front of the jury. Further, although the trial court admonished the jury to decide the case solely on the basis of the evidence, and instructed that the statements, questions, and arguments of counsel are not evidence, the court provided no specific instructions regarding the jury's use of the challenged questions.

Nevertheless, we conclude that most of defendant's appellate objections were extinguished by defense counsel's waivers below. Counsel properly expressed concerns about whether the challenged questions were grounded in fact, when they took place, and whether they were relevant, but then persisted in objecting to only the relevance of a 1998 event after being shown the police reports from which the prosecutor was gathering the information.

The trial court inquired about the factual bases for the prosecutor's questions, and thereafter indicated its own presumptive satisfaction that the prosecutor had a sound basis for posing the questions. Defense counsel could have asked for additional safeguards outside the jury's presence, and could have requested an evidentiary hearing and a decision over the accuracy of the police reports, and the propriety of the prosecutor's questions, but did not. The trial court had no reason to believe that defense counsel did not share the court's satisfaction with the police reports as establishing the factual foundation for the prosecutor's questions. Because defense counsel demonstrated his satisfaction with the factual bases for the challenged questions, apparently including the details concerning times and places as indicated (except for complaining that a 1998 event was too old to retain relevance) counsel waived appellate objections. See *Carter*, 462 Mich at 214-216.

Unfortunately, defendant nowhere specifies which of the challenged questions concerned allegations dating from 1998, thus making it impossible for us to identify the pertinent question for purposes of evaluating its relevance or prejudice. We deem this lack of specificity fatal to the issue. See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) ("[a] party may not merely state a position and then leave it to this Court to discover and rationalize the basis for

the claim"). In any event, even if defendant had identified the specific question, a preserved, nonconstitutional error is not a ground for reversal unless the defendant proves that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant has not alleged that any error was outcome determinative.

Defendant additionally protests that there was no special instruction limiting the jury's use of the challenged evidence. See *Dorrikas*, 354 Mich at 326. However, defense counsel declined invitations to object to the instructions as given, on the record, thus forfeiting appellate objections. Further, while the second of the two character witnesses was on the stand, the trial court informed the jury, "I'm limiting the testimony of the reverends to [defendant's] reputation for truth and veracity," and added, "I'm not saying he doesn't do other good things but that's where I'm limiting the testimony and that's why I'm constraining the witnesses a little bit to not talk about good things that [defendant] did or didn't do but it's just the reputation on truth or veracity." At the close of proofs, the trial court reminded the jury that it was to consider all of its instructions together.

"Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). Furthermore, imperfect instructions do not require reversal if they nonetheless fairly presented the issues to be tried and adequately protected the rights of the accused. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). A criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). We conclude that the trial court's instructions, considered as a whole, adequately informed the jury that the questioning of the character witnesses was to be considered only for the purpose of assisting in the evaluation of how much weight to give the witnesses' accounts. For these reasons, defendant has failed to establish that he is entitled to any appellate relief on this issue.

II. PRIOR RECORD VARIABLE 2

This Court reviews a sentencing court's factual findings for clear error. See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). However, the proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

The trial court assessed ten points for PRV 2, which is what MCL 777.52(1)(c) prescribes where "[t]he offender has 2 prior low severity felony convictions." Subsection 2 defines "low severity felony conviction" as follows:

> (a) A crime listed in offense class E, F, G, or H.
>
> (b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.
>
> (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

(d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

Many of the convictions listed in defendant's presentence report involve misdemeanors. Of the felony convictions, one was for delivering or manufacturing a controlled substance in violation of MCL 333.7401(2)(a)(*iv*). A violation of this statute subjects the offender to up to 20 years' imprisonment. Accordingly, this offense qualifies as a high-severity felony. See MCL 777.51(2).

Defendant's record also includes two convictions from North Carolina. One conviction was for embezzlement that resulted in a sentence of three years' imprisonment. The other was a larceny conviction, and resulted in a two-year sentence. The latter conviction was classifeid as a misdemeanor under North Carolina law. Defendant suggests that both of the North Carolina convictions were used to score PRV 2, and argues that the trial court erred in using the misdemeanor conviction for that purpose. However, defendant does not provide a record citation to show that the trial court in fact included the North Carolina larceny conviction in scoring PRV 2. We further note that, in addition to the North Carolina conviction and three-year sentence for embezzlement, defendant's record includes an earlier conviction for resisting or obstructing a police officer. That offense, whether prosecuted under MCL 750.81d or MCL 750.479, is a felony, subjecting the offender to a sentence of as little as two years, and as much as twenty years. Because that earlier conviction for resisting or obstructing drew no term of incarceration, it is logical to conclude that the facts behind it constituted a low-severity form of that felony.

Because the record discloses two low-severity felony convictions apart from the North Carolina larceny conviction, we affirm the trial court's decision to score ten points for PRV 2, and need not reach the question of whether a sister-state's two-year misdemeanor conviction may be counted for purposes of scoring that variable.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto