STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 8, 2012
v	No. 301697 Chippewa Circuit Court
SEAN MICHAEL SULLIVAN, Defendant-Appellant.	LC No. 09-000159-FH

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions for attempted breaking and entering with intent to commit a larceny, MCL 750.110, and aiding and abetting the possession of burglar's tools, MCL 750.116. Following a jury trial, the trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to 47 months to 15 years in prison for each offense. We affirm.

I

In the early morning hours of June 12, 2009, there was an attempted breaking and entering at the Hydro Spray Car Wash. The building's door and one of the building's windows had been damaged. A shovel was found outside the building next to the door. Two sets of footprints were found leading from the building into the nearby woods. The car wash's video surveillance system recorded two people walking across the camera's view wearing long pants, dark-colored heavy jackets or sweatshirts, and stocking caps. One of those people was carrying an item that could be a shovel. Police believed that one person was wearing a glove. The people could not be identified from the video.

Officer Jason Wyma radioed the description of the clothing of the two people seen in the video. Shortly after, police located defendant and Mark Nolan[1] wearing clothes that matched the

[1] The Michigan Offender Tracking Information System (OTIS) reflects that Mark Nolan entered a guilty plea for an attempted breaking and entering that occurred in Chippewa County on June 12, 2009.

description provided by Officer Wyma. The two were discovered near the rear of a store located 300 yards from the car wash, through the woods. Both men's pants and shoes were soaking wet, causing police to conclude that they had been walking through the woods. Police found gloves and a broken hammer in Nolan's pocket. Defendant and Nolan were arrested. In their interrogations, defendant denied trying to break into the car wash, but Nolan stated that defendant was involved.

The trial court had previously ruled that Nolan's statement that defendant was involved would not be admissible because it was inadmissible hearsay. While Detective Langendorf was testifying, the prosecution asked him whether he confronted defendant with the evidence obtained from Nolan's interrogation. The following exchange occurred:

> *Q.* And do you recall how you approached that with [defendant]?
>
> *A.* During the course of the interview with [defendant], when explaining to him the reason I believe he is involved in this crime, I indicated to him that Mr. Nolan told me he was involved.

At this point, defense counsel objected to the exchange and the objection was sustained. Defense counsel then moved for a mistrial. After dismissing the jury and chastising the prosecution and Detective Langendorf for referring to something that they had both been informed was inadmissible, the court ended proceedings for the day. The trial court did not order the jurors to disregard the testimony before dismissing them.

The following day, the trial court addressed the motion for a mistrial. It stated that, on the previous day, it had instructed the jury to disregard the statement. The trial court denied the motion for a mistrial and instead stated that it would give the jury a limiting instruction when it gave them its final instructions before deliberations. Detective Langendorf's testimony was the last piece of evidence presented to the jury. The trial court did not instruct the jurors regarding Detective Langendorf's testimony. After giving the instructions, the trial court asked the prosecution and defense if they were satisfied with the instructions, and each party stated that the instructions were sufficient. The jury voted to convict defendant of attempted breaking and entering with intent to commit a larceny and aiding and abetting the possession of burglar's tools.

II

Defendant argues that the gloves and hammer possessed by Nolan were not adapted and designed for burglary and that he was not aiding and abetting Nolan's possession of them; therefore, there was insufficient evidence to convict him of aiding and abetting the possession of burglar's tools. We disagree. Challenges to the sufficiency of the evidence in a criminal trial are reviewed de novo to determine whether, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002). The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 750.116 states:

> Any person who shall knowingly have in his possession any nitroglycerine, or other explosive, thermite, engine, machine, tool or implement, device, chemical or substance, adapted and designed for cutting or burning through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years.

In this case, defendant cites *People v Dorrington*, 221 Mich 574; 191 NW 831 (1923), for the proposition that common household items are not burglar's tools. *Dorrington* does not stand for that proposition. In *Dorrington*, the Court found that the defendant's household keys, an alarm clock with battery, and knitting needles were not burglary tools not because they were common household items, but because there was no evidence that the defendant intended to use them in a burglary and their common household nature did not mean that they could be presumed to be used for the purpose of a burglary. *Id.* at 574-575. Here, police found gloves and a bent hammer that was missing its head but retained its claws in Nolan's possession. The metal plate guard on the car wash door had been bent backward. Thus, it is not unreasonable for the jury to have concluded that Nolan's gloves and hammer were intended to be used in the burglary.

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39.

As discussed above, it is not unreasonable for the jury to have concluded that the gloves and hammer were used in the burglary. As an extension of that conclusion, it would not be unreasonable for the jury to have concluded that one person, while participating in the burglary, would have used or encouraged the use of the tools later found in the other participant's possession. Thus, it is not unreasonable for the jury to have concluded that defendant aided and abetted Nolan's possession of the burglar's tools.

III

Defendant next argues that the trial court abused its discretion in denying the motion for a mistrial after Detective Langendorf's testimony included inadmissible hearsay. We disagree. This Court reviews the denial of a motion for mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). An abuse of discretion occurs where a trial court chooses an outcome that is outside the principled range of outcomes. *Id.* "A trial court should grant a mistrial 'only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *Id.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). To the extent that defendant asserts that an instructional error occurred,

defendant must demonstrate that the omission constituted plain error that affected his substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

As this Court stated in *Haywood*, a mistrial is not required when a witness provides a nonresponsive answer to a proper question. *Haywood*, 209 Mich App at 228. However, as this Court has previously recognized, police officers "have a special obligation not to venture into forbidden areas of testimony which may prejudice the defense." *People v McCarver* (On Remand), 87 Mich App 12, 15; 273 NW2d 570 (1978). As a consequence, the *McCarver* Court held that "[i]f an officer brings out the fact that a defendant has previously been convicted or charged with crime, even if the answer could be considered nonresponsive, reversible error will have occurred." *Id.* A nonresponsive answer by a police officer, "depending upon its character and the circumstances involved, may constitute grounds for mistrial." *People v Page*, 41 Mich App 99, 101; 199 NW2d 669 (1972). Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

In this case, the trial court spent significant time contemplating the propriety of a mistrial. Upon the motion of the defense, the trial court ordered the prosecution to provide it with a brief explaining whether a mistrial was necessary. The trial court stated that it did not believe a mistrial was needed. This decision was not the result of a conclusion that there had been no error or impropriety during Detective Langendorf's testimony. To the contrary, the trial court placed great emphasis on the fact that the prosecution was explicitly told that it could not introduce evidence of Nolan's statement regarding defendant's involvement and that Detective Langendorf understood the prohibition on hearsay and knew that Nolan's statement was inadmissible. The trial court determined that a mistrial was unnecessary because it was an extreme remedy that should not be granted when an instruction was capable of curing the error. The trial court, having observed the proceedings, determined that while the testimony was improper, its prejudicial effect could be cured through a specific instruction. Defendant has failed to persuade us that the trial court's conclusion was improper. Thus, the trial court's denial of the motion for mistrial was premised on a sound application of this Court's precedent. Accordingly, we affirm the trial court's denial of the motion for a mistrial.

IV

Defendant next argues that the trial court erred in failing to instruct the jury to disregard the final piece of testimony of Detective Langendorf. However, the record indicated that trial counsel affirmatively approved of the trial court's instructions. A party waives appellate review of an instructional error when it approves of that instruction. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). As a result, we are precluded from addressing the issue on appeal.

V

Defendant next argues that he was denied the effective assistance of counsel as a result of his attorney's failure to object to the omission of the curative instruction and to preserve the

claim of instructional error. We disagree. Because there has not been a *Ginther*[2] hearing related to defendant's claim of ineffective assistance of counsel, our review is limited to the errors that are evident on the record properly before this Court. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

In order to prevail on an appeal based on a claim of ineffective assistance of counsel, defendant must establish that his attorney's assistance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id.* Counsel is not ineffective for failing to make meritless or futile objections. *People v Riley* (After Remand), 468 Mich 135, 140; 659 NW2d 611 (2003).

In this case, defense counsel affirmatively approved the trial court's jury instructions after those instructions did not specifically instruct the jury to disregard Detective Langendorf's trial testimony, which had been excluded because it was held to be hearsay. But during the trial court's instructions, the trial court stated:

> Now, at times during the trial, I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in, and nothing else.

In making that instruction, the trial court instructed the jury not to consider excluded evidence, and to make their decision only on the evidence that the trial court let in. By sustaining defense counsel's hearsay objection, the trial court excluded Detective Langendorf's statement. The jury was instructed to not consider excluded evidence, which would include Detective Langendorf's statement.

The dissent's argument is based on the premise that the trial court intended to give a limiting instruction other than the one quoted above, but forgot to do so; and that trial counsel then forgot that the trial court was going to give such an instruction and failed to object to the omission. Thus, the dissent's argument that defendant received ineffective assistance of counsel by the failure to object to the instruction as given requires us to conclude that both the trial court and defense counsel acted incompetently in handling this matter. We are unwilling to reach such a conclusion based upon the record before us.

After denying the motion for mistrial and declining to give an immediate jury instruction, the trial court stated that it would "give specific instructions in the final instructions of the case as to what they are to do about what they did hear." The trial court did not specify what form those instructions would take. Accordingly, there is no particular reason to believe that the trial court initially intended to give any instruction other than that which was given. And there is no particular reason to believe that the trial court, as the dissent suggests, failed to give any instruction that it had determined was necessary.

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Of course, even if the trial court instructed the jury exactly as it intended, there remains the possibility that trial counsel was ineffective for failing to object to the instructions as given and not request a more specific instruction regarding Detective Langendorf's statement. This, however, ventures into the area of trial strategy. As noted above, there is a strong presumption that defense counsel's action constituted sound trial strategy. Because there was no *Ginther* hearing, we do not know why defense counsel failed to object to the instructions as given.[3] It is possible that defense counsel, at the time of the trial court's initial ruling, had anticipated that the trial court would give a more specific cautionary instruction than that which was ultimately given, but had forgotten that by the time the jury instructions were given. But it is also possible that defense counsel was, in fact, satisfied with the instruction as given. A more specific instruction would carry with it the risk of highlighting that testimony in the minds of the jurors. It may well be that defense counsel chose, as a matter of strategy, to allow the more general instruction as given to do its job of cautioning the jury not to consider excluded testimony without drawing greater attention to the excluded testimony of Detective Langendorf that a more specific instruction would do. While there is an argument that defense counsel should nevertheless have requested such an instruction, we are not persuaded that that argument is sufficiently strong to overcome the strong presumption of sound trial strategy. *Toma*, 462 Mich at 302. Nor is adequate to overcome the equally "'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Harrington v Richter*, 562 US ___; 131 S Ct 770, 790; 178 L Ed 2d 624 (2011).

In sum, the dissent's position is based upon a number of assumptions not supported by the record. It assumes that the trial court intended, or even would having been willing upon request, to give a cautionary instruction more specific than that which was given. It assumes that both the trial court and defense counsel simply forgot about the (nonexistent) promise of a more detailed cautionary instruction. And it assumes that had defense counsel objected to the instructions as given and requested a more specific instruction, the trial court would have given such an instruction and that there was a reasonable likelihood that such an instruction would have changed the outcome of the trial; that is, that the failure to request such an instruction prejudiced defendant's defense. We are not convinced that the record supports making these assumptions. In order for defendant to show prejudice, he must demonstrate that the likelihood of a different outcome was "substantial, not just conceivable." *Harrington,* 131 S Ct at 792. The record before us simply does not support such a conclusion.

VI

Defendant next argues that the trial court departed from the sentencing guidelines; therefore, he is entitled to a resentencing. We disagree. On appeal, courts review the reasons given for a departure for clear error. *People v* Smith, 482 Mich 292, 300; 754 NW2d 284 (2008). The conclusion that a reason is objective and verifiable is reviewed as a matter of law. *Id.*

[3] In his brief on appeal, defendant offers nothing more than his unsubstantiated statement that it is his belief that if called to testify, trial counsel would state that she had no reason for not requesting a more specific instruction other than mere forgetfulness.

Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. *Id.* A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. *Id.*

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3).

In this case, the sentencing guidelines provided for a sentence of nine to 46 months' imprisonment. Defendant received a minimum sentence of 47 months. This is a departure of one month from the sentencing guidelines. Defendant had seven prior felony convictions, two misdemeanors, and a juvenile record. These included earlier breaking and entering. Defendant had been to jail and to prison, and while in prison he had incurred nine major misconducts. Defendant had been on parole for less than three months at the time of this offense. The trial court stated that defendant appeared to be making no serious effort to recover from substance abuse and that he constituted a danger to the community when it sentenced him. An extensive criminal history reflecting past sentences had failed to rehabilitate a defendant and concerns for the protection of society can justify departing from sentencing guidelines. *People v Solmonson*, 261 Mich App 657, 671; 683 NW2d 761 (2004). Thus, defendant's criminal history, failure to rehabilitate himself, and danger to society are substantial and compelling reasons for a one-month departure from the sentencing guidelines. Accordingly, we affirm.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly