STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 2013
v PARIS HUGHES, Defendant-Appellant.	No. 304182 Wayne Circuit Court LC No. 10-012684-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CHAZ JACKSON, Defendant-Appellant.	No. 305717 Wayne Circuit Court LC No. 10-012684-FC

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

In docket no. 304182, defendant Paris Hughes appeals as of right his jury trial convictions of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349b, two counts of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a short-barreled shotgun, MCL 750.224b. He was sentenced to concurrent sentences of 15 to 25 years for armed robbery, 10 to 20 years for first-degree home invasion, 5 to 15 years for unlawful imprisonment, one to four years for each count of felonious assault, two years for felony-firearm, and one to five years for possession of a short-barreled shotgun.

In docket no. 305717, defendant Chaz Jackson was convicted of first-degree home invasion, MCL 750.110a(2). He was sentenced to 130 months to 20 years.

Defendants were tried and convicted in separate jury trials. Their appeals were consolidated by order of this Court to advance the efficient administration of the appellate process. We affirm in both cases.

I. FACTUAL BACKGROUND

Minnifield, the victim, was at the gym on the night in question when he received a phone call notifying him that his house had been broken into. When he arrived home, the alarm was still sounding, the side door was unlocked, and his bedroom window was open. He called the police, who arrived over an hour later, and who left after asking minimal questions. Minnifield went into his basement and fell asleep watching television.

Minnifield awoke some time later to find two men standing over him, one of whom was pointing a shotgun at his face. Both men were wearing hooded sweatshirts and masks, so Minnifield never saw their faces. The man with the shotgun told Minnifield to turn off the security alarm. After Minnifield turned off the alarm, the men laid Minnifield on his stomach in the kitchen, bound his hands and feet with duct tape, and duct-taped a towel around his head. One man stayed with him, holding a shotgun to his back, while a second looked through his house.

At some point during the burglary, the police arrived at Minnifield's residence. One of the intruders untied Minnifield and tried to take him back to the basement. On the way to the basement, Minnifield was able to escape and run outside. The two men inside the house fled and the police officers pursued them. The police found defendant Hughes nearby, lying next to a white car, as if trying to hide. Hughes was sweating, he had a cut on his head, and he had shotgun shells and a hockey mask in his pocket. Defendant Jackson also was apprehended nearby trying to climb a fence. He was out of breath and sweating profusely. He later told the police that he was the lookout in the backyard, not one of the men who entered the house. The police discovered the shotgun on the floor in Minnifield's basement, a broken window in the bedroom, and a bag full of tools and duct tape. The house had been ransacked.

At Hughes' trial, Minnifield testified that he did not keep any weapons in his house and that he had never seen the shotgun used by his assailants before the night in question. At Jackson's trial, approximately six weeks later, Minnifield testified that the shotgun found in his house had always been there and was for protection. Minnifield admitted that he had lied about this fact at Hughes' trial because he was scared of going to jail, as possession of the shotgun was illegal. He claimed that all other testimony he gave was truthful.

Hughes was convicted of armed robbery, first-degree home invasion, unlawful imprisonment, two counts of felonious assault, felony-firearm, and possession of a short-barreled shotgun. Jackson was convicted of first-degree home invasion. Both Hughes and Jackson now appeal.

II. HUGHES' MOTION FOR NEW TRIAL

A. Standard of Review

Hughes asserts that he is entitled to a new trial on the basis of newly discovered evidence in the form of Minnifield's post-trial admission that the shotgun used by the assailants was his, and had been inside the home before the break-in. We review "for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The trial court abuses its discretion when it selects a decision outside the realm of reasonable and principled outcomes. *Rao*, 491 Mich at 279.

B. Analysis

At Hughes' trial, Minnifield testified that the shotgun used in the crimes did not belong to him and had not been in his home before the break-in. However, at the time of Jackson's trial, Minnifield testified that the shotgun was in his house before the crimes occurred. This Court granted Hughes' motion to remand so that he could file a motion for new trial. The trial court denied Hughes' motion for a new trial, finding that regardless of Minnifield's testimony about owning the gun, his story of the crimes was corroborated by police officer testimony. The trial court did not abuse its discretion.

To demonstrate that a new trial based on newly discovered evidence is warranted a defendant must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Rao*, 491 Mich at 279 (quotation marks and citation omitted). As this Court explained in *People v Terrell*, 289 Mich App 553, 564; 797 NW2d 684 (2010), "[t]he key to deciding whether evidence is 'newly discovered' or only 'newly available' is to ascertain when the defendant found out about the information at issue. A witness's shifting desire to testify truthfully does not make that witness's testimony 'newly discovered' evidence." (Quotation marks and citation omitted.)

In the instant case, Hughes was aware of the information at issue—Minnifield's ownership of the shotgun and his statements denying it—before trial. At the preliminary examination, Minnifield denied that the gun was his. However, during Hughes' trial, defense counsel requested a hearing outside the presence of the jury to discuss the admission of a police report. The relevancy was that in the report, the responding officer indicated that Minnifield claimed ownership of the shotgun on the night of the incident. The parties stipulated to admission of the officer's report at Hughes' trial.

Following admission of the report, Minnifield was re-called to the witness stand. He again denied ownership of the shotgun and claimed that he had never seen it before the night in question. Immediately thereafter, closing arguments commenced and the defense directed the jury's attention to the relevant statements in the police report. Highlighting the discrepancy

between Minnifield's testimony at trial and the police report, Hughes argued that Minnifield had lied to the jury regarding ownership of the shotgun.

Thus, while it is true that Minnifield did not confess to lying until after Hughes' trial, this evidence is not newly discovered, just newly available. Minnifield's "shifting desire to testify truthfully does not make [his] testimony 'newly discovered' evidence." *Terrell*, 289 Mich App at 564. Therefore, the trial court did not abuse its discretion in denying Hughes' motion for new trial.

III. JURY VOIR DIRE

A. Standard of Review

Jackson appeals on three separate grounds. First, he argues that by refusing to allow counsel for either party to participate in the voir dire process, the trial court denied Jackson his due process right to a fair trial. Because defendant failed to raise this issue below, this Court's review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

B. Analysis

"A defendant who chooses a jury trial has an absolute right to a fair and impartial jury" and "[t]he purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The scope and conduct of voir dire is within the trial court's discretion. *Id.* at 619. The court abuses that discretion when it does not adequately question jurors regarding potential bias. *Id.* "Defendant does not have a right to have counsel conduct the voir dire, nor does he have a right to individual, sequestered voir dire. Neither does he have a right in every case to have the court ask questions submitted by counsel." *Id.*

In Jackson's trial, voir dire was conducted entirely by the court, consistent with the Michigan Supreme Court's holding in *Tyburski*, 445 Mich at 618, that defense counsel does not have a right to conduct voir dire. There is no indication that either party made an attempt to participate more fully in the process of voir dire, or that the trial court thwarted such efforts. A review of the questions asked by the court demonstrates that there was a thorough inquiry into bias, and there is no indication that the jurors did not understand the concept of reasonable doubt. Moreover, once the jury had been selected, Jackson never expressed any dissatisfaction with it. Because Jackson fails to show plain error affecting his substantial rights, reversal is not warranted.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Next, Jackson claims that he was denied the effective assistance of counsel when his counsel failed to challenge the admissibility of police officer testimony that Jackson admitted to being the lookout. Whether a defendant received effective assistance of counsel is a mixed question of fact and law so that a trial court's factual findings are reviewed for clear error and

questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. Analysis

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . . ." *Id.* at 687. The Court has held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

In the present case, Jackson alleges that his defense counsel should have filed a motion to suppress a police officer's testimony regarding Jackson's admission that he was the lookout. Jackson contends that this testimony was untruthful, unrecorded, and untrustworthy. Yet, this is a challenge to the weight and credibility of the evidence, not to its admissibility. "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). While clearly defendant would have preferred that this evidence not come in at trial, he offers no legal justification for why this evidence was inadmissible. Therefore, any motion to suppress the testimony would have been futile, and trial counsel is not ineffective for failing to advance a futile or meritless position. *People v Buie*, 298 Mich App 50, 66; 825 NW2d 361 (2012).

V. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

Finally, Jackson contends that the evidence presented at trial was insufficient to support a conviction for first-degree home invasion. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196.

B. Analysis

To prove the underlying crime of first-degree home invasion, the prosecutor must prove each of the following elements beyond a reasonable doubt: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) the defendant intended when entering the dwelling to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Baker*, 288 Mich App 378, 384; 792 NW2d 420 (2010); MCL 750.110a(2).

To convict a defendant under an aiding and abetting theory, the prosecution must prove: "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v Plunkett*, 485 Mich 50, 61; 780 NW2d 280 (2010) (quotation marks and citation omitted).

In the instant case, Minnifield testified that he awoke in his home to find two masked men standing over him and pointing a shotgun in his face. He testified that the men took him upstairs and, using duct tape, bound his hands and feet and wrapped a towel around his head. The men asked Minnifield where he kept his keys and phone. One of the men stayed with a shotgun trained on Minnifield's back as the other man began to search the house. When the police arrived, Minnifield managed to escape and the police chased after the two intruders. The police discovered Hughes lying on the ground next to Jackson's vehicle, with three shotgun shells and a hockey mask on his person. Defendant Jackson was found hopping a fence in a nearby residential backyard. A police officer testified that Jackson admitted to owning the vehicle Hughes was found lying next to, and to acting as a lookout for two men during the robbery.

Thus, the evidence sufficiently demonstrated that Hughes committed first-degree home invasion when he broke into Minnifield's residence without permission and committed an assault, felony, or larceny while Minnifield was present. *Baker*, 288 Mich App at 384. Moreover, considering all of the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Jackson, who was found nearby and sweating, was the second intruder in the house. Or, a reasonable jury could have found that Jackson, who admitted to a police officer that he acted as the lookout, at least performed acts or gave encouragement to assist in the first-degree home invasion and intended the commission of the crime. *Plunkett*, 485 Mich at 61. This is especially true considering '[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Jackson, however, highlights his testimony that he dropped off Hughes and another man in the area but had no knowledge of what they planned to do and never told the police that he acted as a lookout. However, we view all evidence in a light most favorable to the prosecution and resolve all conflicts in its favor. *Ericksen*, 288 Mich App at 196. Therefore, there was sufficient evidence to sustain defendant Jackson's conviction.

VI. CONCLUSION

Because defendant Hughes failed to establish that there was newly discovered evidence, he is not entitled to a new trial. Defendant Jackson likewise failed to demonstrate that he is entitled to a new trial because voir dire was proper, he was not denied the effective assistance of counsel, and sufficient evidence supported his conviction. We affirm in both docket no. 304182 and 305717.

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood