STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2012
v	No. 304997 Oakland Circuit Court
MICHAEL KAREEM HALL, Defendant-Appellant.	LC No. 2010-230399-FH, 2010-230400-FH

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering,[1] second-degree fleeing in a vehicle,[2] unauthorized driving away of an automobile,[3] and driving without a license, second or subsequent offense.[4]. He was sentenced, as a fourth habitual offender,[5] to prison terms of 2½ to 40 years for breaking and entering, eight to 40 years for second-degree fleeing in a vehicle, eight to 40 years for unauthorized driving away of an automobile, and 365 to 538 days for driving without a license, second or subsequent offense. Defendant appeals by right. We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant failed to preserve his claim of ineffective assistance of counsel by requesting an evidentiary hearing in the lower court under *People v Ginther*,[6] and his motion in this Court to

[1] MCL 750.110.

[2] MCL 257.602a.

[3] MCL 750.413.

[4] MCL 257.904.

[5] MCL 769.13.

[6] 390 Mich 436; 212 NW2d 922 (1973).

remand for an evidentiary hearing was denied. Review is, therefore, limited to mistakes apparent on the record.[7]

To establish a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different.[8] Effective assistance of counsel is presumed and the "defendant bears a heavy burden to prove otherwise."[9] Decisions to decline to object to procedures, evidence, or an argument may fall within sound trial strategy.[10] Defense counsel is afforded wide latitude on matters of trial strategy, and this Court abstains from reviewing such decisions with the benefit of hindsight.[11]

Defendant argues that his trial counsel erred when she did not attempt to use past convictions to impeach a prosecution witness. Under MRE 609(a), evidence of a witness's prior convictions is admissible only if it involves dishonesty or false statement or it involves theft. If the conviction was for a crime of theft, it is admissible only if, inter alia, the trial court finds "significant probative value on the issue of credibility."[12] When determining whether the prior convictions have "significant probative value on the issue of credibility," the court "shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity."[13] Additionally, "[e]vidence of a conviction under [MRE 609] is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date."[14]

Defendant argues that his trial counsel was ineffective when he failed to impeach the key witness against defendant, codefendant Lamass Bey, with Bey's prior convictions. Defendant argues that his counsel's failure in this regard violated defendant's Sixth Amendment right to confrontation. In support of his argument, defendant cites *People v Redmon*,[15] in which this Court held that the 10 year limitation in MRE 609(c) yielded to the right to confrontation because the defendant claimed the past convictions motivated the witness to lie.

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[7] See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[8] *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

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

[10] *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008).

[11] *Id.* at 242-243.

[12] MRE 609(a)(2)(B).

[13] MRE 609(b).

[14] MRE 609(c).

[15] 112 Mich App 246, 256; 315 NW2d 909 (1982).

We note that we cannot determine with certainty whether *Redmon* even applies here. Defendant claims that "a period of more than ten years has elapsed since the date of [Bey's] conviction[s] or of the release of the witness from the confinement imposed for [those] conviction[s]," but provides no evidence to support that claim. However, even if *Redmon* does apply, we are not persuaded that defendant's trial counsel's failure to impeach Bey with his prior convictions amounted to ineffective assistance of counsel. Bey's prior convictions were theft offenses.[16] Accordingly, they would only have been admissible if the trial court had determined that they were of "significant probative value on the issue of credibility,"[17] by "consider[ing] only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity."[18] Both of these factors weigh against admissibility in this case; therefore, it is not clear that the trial court would have admitted Bey's prior convictions even if defendant's trial counsel had sought their admission. Moreover, even assuming, arguendo, that the trial court would have admitted the evidence of Bey's prior convictions, defendant's counsel was effective. The evidence of Bey's prior convictions was not the sole evidence bearing on his credibility, and defense counsel impeached Bey's credibility in a variety of other ways. For example, defendant's trial counsel impeached Bey's credibility by pointing out that Bey had received a plea agreement and a reduction in his sentence in exchange for his testimony, and Bey admitted that he was guilty of a felony. Defendant's trial counsel impeached Bey regarding his assertion that he had not resisted arrest despite police testimony to the contrary. Bey admitted to being a willing participant in crimes in the instant case. Accordingly, defendant has failed to meet his burden to show that his counsel's decision with regard to Bey's prior convictions did not amount to reasonable trial strategy.

Defendant argues that defense counsel further erred by allowing evidence that he was previously convicted of fleeing and eluding. Defendant argues that his prior convictions were matters for sentencing, not for the jury. We disagree. Defendant was charged with second-degree fleeing in a vehicle under MCL 257.602a(4), which states, in pertinent part:

> (4) . . . an individual who violates subsection (1) is guilty of second-degree fleeing and eluding, a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both, if 1 or more of the following circumstances apply:
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> * * *
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> (b) The individual has 1 or more prior convictions for first-, second-, or third-degree fleeing and eluding, attempted first-, second-, or third-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

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[16] Specifically, Bey had been previously convicted of larceny and unarmed robbery.

[17] MRE 609(a)(2)(B).

[18] MRE 609(b).

> (c) The individual has any combination of 2 or more prior convictions for fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

Indeed, in the instant case, under the statute's plain language, the prosecution was required to prove beyond a reasonable doubt that defendant had a prior fleeing and eluding conviction. Any argument to the contrary would have been meritless, and "[t]rial counsel is not required to advocate a meritless position."[19]

II. PROSECUTORIAL MISCONDUCT

Defendant identifies several portions of the trial where he claims the prosecution committed misconduct. Because defendant did not preserve this issue for appeal, the prosecutor's actions are reviewed for "outcome-determinative plain error."[20] Reversal is warranted only if the plain error resulted in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings."[21]

The ultimate inquiry when evaluating a claim of prosecutorial misconduct is whether the prosecutor's actions denied the defendant his right to a "fair and impartial trial."[22] Prosecutors are generally "afforded great latitude regarding their arguments and conduct at trial."[23] Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case."[24] This Court "must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context."[25] To that end, a prosecutor's remarks "must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial."[26]

First, defendant argues that the prosecution committed misconduct when it elicited testimony from one police officer which, defendant claims, vouched for the credibility of other officers. Specifically, defendant argues that it was improper for the prosecution to have officers testify that they observed defendant and Bey talking in a friendly manner in the booking room.

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[19] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

[20] *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

[21] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

[22] *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

[23] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[24] *Id*.

[25] *Callon*, 256 Mich App at 330.

[26] *Id*.

Defendant also argues it was improper for the prosecutor to ask one of the officers if he had any reason to doubt the other officers' veracity regarding their observations of defendant and Bey.

A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about a defendant's guilt.[27] However, that is not what occurred here. Here, defendant's trial counsel attempted to cast doubt on the police's procedures by asking Detective Thull, one of the investigating officers, why there was no videotape of the booking process, implying that the absence of such a recording showed that the investigation had been mishandled. However, the officers' testimony merely stated what occurred in the booking room in the absence of a videotape recording. Only after defendant's counsel questioned the integrity of the officers' testimony did the prosecution ask Detective Thull whether he "[had] any doubts in [the other officers'] veracity or ability in this case." In short, Detective Thull was not asked to comment on fellow officers' credibility, but was merely responding to defense counsel's line of questioning.

Second, contrary to defendant's assertion on appeal, the prosecutor did not commit misconduct by attempting to mislead the jury regarding the deal Bey received for testifying. The prosecutor accurately explained that the sentencing court, rather than the prosecutor, would decide whether Bey was honest and impose his sentence. Bey and defense counsel stated several times that the witness was receiving a sentencing agreement. Defendant cites no authority for the assertion that the prosecution had a duty to explain what sentence Bey might otherwise receive. The prosecution was properly arguing the evidence.

Defendant argues further that the prosecutor vouched for his own witnesses and expressed his own opinion when he argued that only people who had honest work or were up to no good would be out on a night like that. However, the prosecutor was merely arguing the evidence and a reasonable inference; multiple witnesses testified that it was a cold and icy night.

Defendant also argues that because the above issues amounted to prosecutorial misconduct, his trial counsel was ineffective for failing to object to the prosecution's actions. We disagree. Because we detect no prosecutorial misconduct, it was objectively reasonable trial strategy for defendant's trial counsel not to object to the prosecutor's actions.

III. SENTENCING

Finally, defendant argues that his sentence was inappropriate because the court used facts to increase the minimum sentence that were not found by a jury or admitted be defendant, in violation of *Blakely v Washington*.[28] This argument has previously been rejected by the

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[27] *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

[28] 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

Michigan Supreme Court, which has held that Michigan's sentencing scheme does not violate *Blakely*.[29] Accordingly, defendant's sentencing argument is without merit.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro

[29] See *People v McCuller (On Remand)*, 479 Mich 672, 689-690; 739 NW2d 563 (2007) ("[A] sentencing court does not violate *Blakely* principles by engaging in judicial fact-finding to score the OVs to calculate the recommended *minimum* sentence range, even when the scoring of the OVs places the defendant in a straddle cell or a cell requiring a prison term instead of an intermediate sanction cell. The sentencing court's factual findings do not elevate the defendant's maximum sentence, but merely determine the defendant's recommended minimum sentence range, which may consequently qualify the defendant for an intermediate sanction.").