STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
v	No. 309787 Crawford Circuit Court
MICHAEL JOSEPH BEAVER, Defendant-Appellant.	LC No. 11-003202-FH

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of first-degree home invasion, MCL 750.110a(2), two counts of larceny of a firearm, MCL 750.357b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 150 months to 30 years for the home invasion conviction and 28 to 90 months for each of the larceny and felon-in-possession convictions. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Sometime in January 2010, Ryan Plaga received a tip that the owner of a home located in a remote part of northern Michigan did not occupy the house during the winter months. Plaga testified that in the early morning hours of February 3, 2010, he and defendant, who then lived with Plaga, broke into the home. According to Plaga and Leah Deardorff, Plaga's then-girlfriend, Deardorff had driven the two men to the house. Plaga testified that he entered the home through a window and let defendant in through the front door. During the break-in, one of two safes inside the residence was opened with keys provided by Damon Pamame, tried jointly with defendant, but the keys did not work on the other safe. Plaga then contacted Pamame, who drove to the scene, and the three men slid the 300-pound safe through the snow and hoisted it into Pamame's truck. In total, at least 21 firearms, televisions, computers, a stereo, jewelry, and hunting supplies, including knives and ammunition, were taken from the home. Police investigation eventually led to Plaga, who implicated both defendant and Pamame. At trial, defendant denied any involvement in the break-in. He testified that he had gone up north in November 2009, but had left around January 20, 2010, after seeing numerous weapons in Plaga's garage. Defendant said he had to leave because he was a convicted felon and could not legally be around firearms.

Defendant moved for a new trial, asserting in part that newly discovered impeachment evidence offered by Ronald Ray and William Robinson, two inmates who had been housed with Plaga at one point, would make a different result on retrial probable. Defendant submitted the affidavits of Ray and Robinson. In the affidavits, the two inmates averred that Plaga had implicated himself and Deardorff in a home invasion, during which Plaga pushed Deardorff through a window so she could open the front door. At an evidentiary hearing, Ray testified that he overheard Plaga telling other inmates about breaking into numerous houses and that Plaga had helped his girlfriend through a window. According to Ray, Plaga mentioned taking safes, guns, computers, and a television. On cross-examination, Ray admitted that he did not know whether Plaga was referring to the home invasion at issue here. The trial court denied the motion.

II. MOTION FOR A NEW TRIAL

Defendant first argues that the trial court erred by denying his motion for a new trial. According to defendant, the newly discovered impeachment evidence would make a different result probable on retrial because it contradicted the testimony of Plaga, Deardorff, and William Bingley, who testified that defendant was present when Bingley purchased firearms from Plaga in February 2010. We review the trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

A new trial is warranted on the basis of newly discovered evidence if a defendant can establish "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." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotation marks omitted). When the new evidence is impeachment evidence, a new trial may be warranted if that evidence satisfies the *Cress* test. *Grissom*, 492 Mich at 319. "More specifically, newly discovered impeachment evidence satisfies *Cress* when (1) there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence and (2) a different result is probable on retrial." *Id.* The only prong of the *Cress* test in dispute on appeal is whether the newly discovered impeachment evidenced has the necessary exculpatory connection to a material fact.

We conclude that this newly discovered evidence—the information referenced in the affidavits of Robinson and Ray and Ray's testimony at the evidentiary hearing—lacked the necessary exculpatory connection. Neither affidavit indicated that Plaga was referring to the instant home invasion in any of the alleged comments he made. And at the evidentiary hearing, Ray testified that he could not say whether Plaga was referring to the instant home invasion. We note that Plaga had testified about Plaga himself entering through a window and letting defendant inside, while Robinson and Ray had overheard Plaga state that Deardorff entered through a window and let Plaga inside, reasonably suggesting the possibility that Plaga was indeed speaking of a different home invasion when he was in jail. Further, neither affiant averred that Plaga stated that defendant was not involved in the instant home invasion, and Ray never testified that Plaga had denied defendant's involvement. And neither affiant averred that Plaga disclosed a plan to lie at defendant's trial regarding defendant's involvement in the crime.

The newly discovered evidence does indicate that Plaga may have lied about Deardorff's level of involvement in some home invasions (which may or may not have included the instant one), but the jury was made aware of this at trial through Plaga's own admissions that he had misrepresented her involvement. In short, the newly discovered evidence in no way undermined the inculpatory nature of Plaga's testimony. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied his right to effective assistance of counsel when trial counsel opened the door on direct examination to cross-examination about his prior convictions. Because defendant did not move for an evidentiary hearing to explore his claim of ineffective assistance of counsel, our review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009). We review de novo the constitutional question whether defendant was denied his Sixth Amendment right to effective assistance of counsel; however, underlying factual findings made by the court are reviewed for clear error. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the well-established principles applicable to an ineffective assistance claim:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test. First, the defendant must show that counsel's performance was deficient.[1] This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and internal quotation marks omitted.]

Defendant conceded that he had previously been convicted of a drug felony, which served as the predicate felony for the felon-in-possession charge, and which also formed the basis for defendant's claim that upon seeing firearms in Plaga's garage before the crime occurred, he left the house because, as a convicted felon, he could not legally be around those

[1] Establishing deficient performance requires a showing that counsel's "representation fell below an objective standard of reasonableness[.]" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

weapons. On direct examination by defense counsel, defendant responded, "No," when asked whether he had any other convictions. Defendant then attempted to clarify that he had a misdemeanor drug conviction, and defense counsel stated that he was not interested in misdemeanors. The prosecutor immediately jumped in claiming that the door was now open on all of defendant's prior convictions. Defendant had prior misdemeanor convictions for receiving and concealing stolen property and entering without permission, and the parties do not dispute that these convictions were not otherwise admissible under MRE 609 (impeachment by prior conviction). Defense counsel then had defendant acknowledge "other convictions," aside from the felony drug conviction. On cross-examination, the prosecutor elicited testimony concerning the specific misdemeanor convictions for receiving and concealing stolen property and entering without permission.

It is apparent that defense counsel intended to elicit testimony regarding whether defendant had any other *felony* convictions and simply misspoke. After conceding that he had other convictions, thereby correcting defendant's initial response, we question whether it was even proper for the trial court to then allow the prosecution to inquire about the particular misdemeanors at issue on the basis that the door had been opened on the matter. We find it difficult to assess counsel's aberrant mistake as an "error[] so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment." *Carbin*, 463 Mich at 600.

In any event, defendant cannot establish the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* Defendant's credibility and version of events was impeached by the testimony of several witnesses, including Plaga and Deardorff. Moreover, Bingley testified that defendant was present at Plaga's home in February when he, Bingley, purchased guns from Plaga. Further, an officer who questioned defendant after his arrest testified that despite the fact that defendant told him that he did not go up north until March 17, 2010, after the commission of the crime, the officer's investigation revealed that defendant had filled a prescription up north in late November 2009. False exculpatory statements made by a defendant may be considered as evidence of guilt. See *Seals*, 285 Mich App at 5-6. Reversal is unwarranted.

III. PROSECUTORIAL MISCONDUCT

Defendant also raises five claims of prosecutorial misconduct. Because defendant did not raise specific objections to these instances and contemporaneously request curative instructions, our review is for plain error affecting substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Under this test, "'[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id.*, quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Further, we will not find error requiring reversal unless a timely curative instruction could not have cured the prejudice caused by the prosecutor's comments. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To the extent defendant raises related claims of ineffective assistance of counsel, our review is limited to errors apparent on the record. *Seals*, 285 Mich App at 19-20.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Generally,

this Court views prosecutorial comments on a case-by-case basis, in context, and in light of the defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

A. Employing an Unjust Tactic

Defendant first argues that the prosecutor employed an unjust tactic when he ordered the arrest of witness Mary Vann, which occurred right outside the courtroom. Defendant asserts that the commotion caused by her arrest, which was audible to the jurors, violated his due process rights. Although a defendant's due process rights are implicated when a prosecutor employs an unfair tactic to gain an advantage, see *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935) (indicating that a prosecutor has a duty to "refrain from improper methods calculated to produce a wrongful conviction"),[2] the record does not support defendant's position that the prosecutor acted in such a manner. As defendant admits, nothing in the record indicated that the prosecutor ordered officers to arrest Vann immediately outside the courtroom or knew that the officers would do so. And even if the prosecutor had ordered that Vann be arrested once she left court, or had knowledge of the officers' intentions to do so, there would have been no reason to predict that Vann would have acted in the disruptive manner that she did. Vann's reaction was simply outside the prosecutor's control.[3] Because there is no evidence of misconduct on behalf of the prosecutor with respect to Vann's arrest, this claim fails.

B. Failure to Correct Perjured Testimony

Defendant next argues that the prosecutor failed to correct Plaga's perjured testimony. A "prosecutor may not knowingly use false testimony to obtain a conviction." *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). Accordingly, "a prosecutor has a duty to correct false evidence" that is related to the facts of the case or to a witness's credibility. *Id.* However, reversal is not automatically required when a conviction is obtained through the knowing use of perjured testimony. Rather, a new trial is required only if there is a reasonable likelihood that the false testimony affected the judgment of the jury. *People v Wiese*, 425 Mich 448, 454-456; 389 NW2d 866 (1986).

Defendant points to multiple indicia on the record that Plaga falsely testified, but none of these establish that the prosecutor knowingly failed to correct perjured testimony. Defendant's first two points—that Plaga admitted during trial that he was willing to lie to keep Deardorff "out of this" and that Plaga's testimony conflicted with other testimony—did not impute to the prosecutor knowledge of false testimony, nor did it even establish the existence of false testimony. Simply because Plaga admitted he had lied in the past and because his testimony conflicted with the testimony of other witnesses did not mean the prosecutor was required to find

[2] We note that *Berger* was overruled on other grounds in *Stirone v United States*, 361 US 212; 80 S Ct 270; 4 L Ed 2d 252 (1960).

[3] Moreover, we can only speculate regarding the jury's understanding of and response to the commotion, or whether it even knew that Vann was involved. Thus, the requisite prejudice cannot be established under the plain-error test. *Unger*, 278 Mich App at 235.

Plaga's trial testimony suspect. See *Lester*, 232 Mich App at 278-279 ("assuming that the prosecutor was or should have been aware of the discrepancy, defendant cites no authority for the proposition that the prosecution must disbelieve its own witness when testimony from another witness contradicts her").

Likewise, the inconsistencies between Plaga's preliminary examination testimony and his trial testimony did not establish that the prosecutor knowingly used false testimony. While it is true that some of the details Plaga testified to regarding Deardorff's involvement differed from his preliminary examination testimony, there is no indication that the prosecutor sought to conceal these inconsistencies or otherwise attempted to hide these contradictions from defendant. See *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Indeed, defense counsel vigorously cross-examined Plaga on those very same contradictions.

Finally, the dismissal of charges against Vann does not inform the inquiry whether the prosecutor knew Plaga perjured himself at defendant's trial, assuming actual perjury. It is simply unknown on this record why the charges were dropped.

C. Vouching for Witness Credibility

Defendant also argues that the prosecutor improperly bolstered the credibility of the officer who questioned defendant after his arrest. Again, the officer testified that defendant told him that he did not go up north until March 17, 2010, after the commission of the crime. A "prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness's credibility . . . [but the] prosecutor must refrain from commenting on his or her personal knowledge or belief regarding the truthfulness of the . . . witnesses." *People v Bennett*, 290 Mich App 465, 478; 802 NW2d 627 (2010) (internal quotation marks and citations omitted).

The allegedly offensive portion of the prosecutor's argument occurred during rebuttal closing argument, when the prosecutor stated:

> I'm—I'm sorry that [defense counsel] feels the way he does about [the officer]. I happened to have a lot of respect for the man. I think he didn't write down March 17th, what year. He wrote down what he heard. He had a minimal part in that, and then [another officer] took it over.

When read in light of defendant's closing argument, it is clear that the prosecutor was responding to defense counsel's statement that he found the officer "to be totally unprofessional." Assuming that the prosecutor's comments were improper, defendant has failed to establish that the brief remarks were prejudicial or that defendant is actually innocent or that the assumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. We additionally note that the trial court instructed the jurors that witness credibility determinations were for them and them alone to make, sufficiently dispelling any possible prejudice. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Reversal is unwarranted.

Alternatively, defendant argues that counsel rendered ineffective performance for failing to object. However, given the failure to show the requisite prejudice, the argument fails. *Unger*, 278 Mich App at 235.

D. Misstating the Evidence

Defendant next argues that the prosecutor misstated his past convictions when the prosecutor stated the following during rebuttal closing argument:

> Now, I can tell you right now that, yes, Mr. Plaga is a thief and he's a liar and he's done a lot of bad stuff. He's a gang member. But let's not forget: Mr. Beaver was a member of a gang. Mr. Beaver lied on that stand when he said he didn't have any other convictions, and then we pointed 'em out. Yes, he does. *Breaking and entering convictions*, drug convictions; lots of 'em. So not the most honest guy sitting up there either. [Emphasis added.]

The parties agree that nothing in the record supports the prosecutor's statement that defendant had past breaking and entering convictions.

This error, however, was not outcome determinative. For one thing, there was evidence that defendant had the misdemeanor convictions for entering without permission and receiving and concealing stolen property, which are not that distant from breaking and entering. Also, had defendant requested a curative instruction, it would have alleviated any prejudicial effect and, in such instances, the error does not require reversal. *Stanaway*, 446 Mich at 687. And even without such a specific instruction, the trial court's general instructions that it is the jury's "job and nobody else's" to decide the facts of the case and that the attorneys' arguments are not evidence was sufficient to cure any prejudice stemming from the prosecutor's misstatement. Jurors are presumed to follow their instructions. See *Unger*, 278 Mich App at 235.

We also reject defendant's related ineffective assistance of counsel claim because he cannot overcome the presumption that counsel's decision not to object was a matter of trial strategy. See *Carbin*, 463 Mich at 600. Indeed, had defense counsel objected, he may have simply highlighted the exact nature of defendant's prior similar misdemeanor convictions. Further, the trial court instructions, which told the jury that they were the sole judges of the witnesses' credibility and that the attorneys' arguments were not evidence, sufficiently dispelled any prejudicial effect. *Long*, 246 Mich App at 588.

E. Eliciting Improper Testimony

Defendant next alleges that the prosecutor improperly elicited testimony regarding defendant's past gang affiliation. According to defendant, the gang affiliation testimony was irrelevant, highly prejudicial, and offered solely for the purpose of demonstrating that defendant was a violent person. We disagree. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence," even when the evidence is of marginal relevance. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, the prosecutor offered the evidence of defendant's gang membership to demonstrate how the involved individuals knew each other and to bolster Plaga's credibility. Regarding the latter, as the prosecutor notes, Plaga testified that both his gang and defendant's gang would be "after him" in prison for his decision to testify, which would tend to bolster Plaga's credibility, i.e., that he testified as he did despite fearing potential retaliation. Consistently with this theory, the trial court provided CJI2d 3.6(f),

pertaining to threats that may affect a witness's credibility. Accordingly, there is no indication that the prosecutor offered this evidence in bad-faith.

In arguing to the contrary, defendant fails to provide adequate explanation dispelling the relevancy of the gang affiliation testimony. Instead, defendant summarily asserts that this case is unlike *Blackmon v Booker*, 696 F3d 536 (CA 6, 2012), where gang membership evidence was relevant to show why witnesses recanted and made the defendant's presence at the crime more probable. This argument fails to recognize that there is a connection between defendant's past gang membership and his conduct for reasons cited by the prosecutor. That the same factors that made gang affiliation relevant in *Blackmon* are not at issue here is immaterial, as defendant simply misses the finer points of the prosecutor's theory.

We also reject defendant's alternative argument that counsel performed ineffectively for failing to object to this testimony. First, the evidence was relevant and admissible for the above-reasons and counsel cannot perform deficiently for failing to raise a meritless objection. See *Unger*, 278 Mich App at 256. Moreover, defendant cannot overcome the presumption of sound trial strategy. Counsel may have viewed the evidence of gang affiliation as more favorable to defendant than harmful as the jury could easily have discredited Plaga's testimony as a result of his gang affiliation.

Finally, we reject defendant's assertion that the cumulative impact of the prosecutor's alleged misconduct deprived him of a fair trial. Defendant is not entitled to a new trial.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello