STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KARL CORNELIUS COTTON, JR.,

Defendant-Appellee.

UNPUBLISHED
December 19, 2013

No. 311956
Kent Circuit Court
LC No. 11-010322-FC

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of perjury, MCL 767A.9(1)(b). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 16 to 40 years' imprisonment. Because we conclude that there was sufficient evidence to prove defendant guilty of perjury beyond a reasonable doubt and because defendant was not denied due process by the confidentiality requirement of MCL 767A.2(5) , we affirm.

Defendant's conviction arises from testimony he gave pursuant to a prosecutor's investigative subpoena. Detective Brandyn Heugel became interested in defendant during her investigation of a shooting death that occurred on March 5, 2011. Detective Heugel discovered that defendant was on parole and further discovered that defendant appeared to be linked to the telephone number 269-519-7137 (7137) because the number was identified as belonging to defendant in the Law Enforcement Information Network (LEIN). The 7137 number was tied to a Boost Mobile, pay-as-you-go account and was activated on December 22, 2010. The 7137 number remained active until March 8, 2011. Another number tied to defendant, 269-519-7464 (7464), was activated on March 6, 2011, one day after the fatal shooting.

Eventually, Heugel requested an investigative subpoena, which was granted and authorized in March 2011. The district court judge that granted the prosecutor's investigative subpoena for defendant also found that the prosecution had shown good cause to waive the seven-day process requirement found in MCL 767A.4(2). The District Court Judge did not indicate what evidence of good cause was provided. The subpoena was served on defendant on June 30, 2011, and the investigative subpoena interview was commenced on the same day pursuant to the trial court's waiver of the seven-day service period included in the subpoena's authorization. Defendant was placed under oath and questioned about whether the 7137 number

was his telephone number. Defendant stated several times that the 7137 number did not belong to him. He also stated that his only number was the 7464 number.

Contrary to defendant's testimony during the investigative subpoena interview, at trial the telephone records for the 7137 number revealed that the most common contacts were defendant's father, best friend, girlfriend, and sister; two voicemails left for the 7137 were left by defendant's girlfriend, some others were left to "K.C.," which was an admitted alias of defendant, and another was from the Michigan Department of Corrections regarding defendant's parole. Moreover, defendant's parole officer testified that defendant personally informed her in January 2011 that his telephone number was 269-519-7137, and subsequently she made contact with defendant using that number. His parole officer further testified that in early April 2011, defendant informed her that he had a new telephone number, and gave her the 7464 number. Finally, while in jail following his arrest after the investigative subpoena interview, defendant made telephone calls to the same people that were contacted previously from the 7137 number.

Before his perjury trial, defendant moved the trial court to dismiss the case against him, arguing the prosecution had not shown good cause to waive the seven-day service requirement. The trial court denied that motion, stating that the power to waive the seven-day service requirement was within the discretion of the district court judge. Further, relevant to an issue on appeal, the investigative subpoena transcript was admitted as evidence in the instant case and read into the record by an assistant prosecutor who was not placed under oath.

On appeal, defendant first argues that there was insufficient evidence to convict him of perjury under MCL 767A.9(1)(b). Specifically, defendant argues that his testimony was not false because the prosecution's evidence, at most, proves that defendant used the 7137 number. We disagree.

When considering the sufficiency of the evidence, "a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, "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). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

MCL 767A.9(1)(b) requires proof of four separate elements: (1) defendant was under oath, (2) the examination took place pursuant to the investigative subpoena statute, (3) defendant provided false testimony, and (4) defendant knew the testimony was false when he made it.

In this case, the prosecution's theory was that defendant falsely testified during questioning under oath pursuant to an investigative subpoena regarding his usage of a cell phone with the 7137 number. During questioning, defendant stated that other than one that he had a long time ago, the number for which he had forgotten, the only cell phone he has had is one with the 7464 number. He also denied having a cell phone with the 7137 number or giving the 7137 number to his parole officer as his contact number. However, his parole officer testified at trial

that defendant gave the 7137 number as his contact number. Further, the 7137 number was frequently used to contact defendant's father, girlfriend, best friend and sister, and voicemails to the number were left for defendant by his girlfriend, and defendant contacted the same people while in jail as were contacted previous to his arrest from the 7137 phone. This evidence and the reasonable inferences that can be made from it, if believed, sufficed to allow a rational trier of fact to conclude beyond a reasonable doubt that the 7137 cell phone number was used by defendant, and his answers to the contrary given under oath pursuant to the investigative subpoena, were false.

Finally, with regard to the fourth element, there was sufficient evidence to show that defendant knowingly lied. The prosecution provided circumstantial evidence that defendant was lying about the number to avoid association with the shooting death that Heugel was investigating. Defendant deactivated the 7137 number three days after the shooting death, and activated the 7464 number just one day after the shooting death. From this evidence a rational jury could draw a reasonable inference that defendant knew the 7137 number belonged to him, and deactivated it to disassociate himself from the shooting death. Then, he lied at the investigative subpoena interview to stay out of trouble. *Nowack*, 462 Mich at 400. Therefore, there was sufficient evidence for a reasonable jury to find the elements of MCL 767A.9(1)(b) were proven beyond a reasonable doubt. See *Wolfe*, 440 Mich at 515.

Next, defendant argues that his inability to view the petition for the investigative subpoena, because it is confidential pursuant to MCL 767A.2(5), to determine whether good cause was properly shown to waive the service requirement of MCL 767A.4(2)[1] denied his right to due process. We disagree.

Because defendant failed to raise this argument in the trial court we review this issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764.

MCL 767A.2(5) states in relevant part: "An application under this section is confidential and shall not be available for public inspection or copying or divulged to any person except as otherwise provided in this chapter."

When engaging in statutory construction, this Court's "paramount task is to discern and give effect to the Legislature's intent as manifest in the plain, unambiguous language of its statutes." *People v Houston*, 473 Mich 399, 403; 702 NW2d 530 (2005).

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[1] MCL 767A.4(2) provides:

> The court rules that apply to service of process in civil actions apply to service of investigative subpoenas under this chapter. However, an investigative subpoena shall be served not less than 7 days before the date set for the taking of testimony or examination of records, documents, or physical evidence unless the judge who issued the authorization for that investigative subpoena has shortened that period of time for good cause shown.

This Court has considered almost identical language in MCL 767A.8,[2] and found it to require the materials and information listed by the statute to remain confidential. *Truel v City of Dearborn*, 291 Mich App 125, 132-133; 804 NW2d 744 (2010). Thus, we conclude that the same unambiguous language of MCL 767A.2(5) requires the petition to remain confidential.

Defendant specifically argues that this confidentiality requirement infringed upon his due process rights, because the petition may have contained information important to his defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272 (2008) (quotation and citation omitted). The defendant's right to present evidence in his defense, however, is not absolute. *Id*. at 250.

In *People v Stanaway*, 446 Mich 643, 676-677; 521 NW2d 557 (1994), our Supreme Court held that in circumstances such as these, in camera review of the privileged or confidential information fulfilled a defendant's right to due process. MCR 6.201(C)(2) now reflects that decision, stating, "[i]f a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records." The Court in *Stanaway*, 446 Mich at 676-677, held that the avenue provided to defendant to review the evidence was sufficient to fulfill due process standards. Therefore, defendant's claim in this case is without merit because defendant could have pursued review of the confidential petition. See *People v Buie*, 491 Mich 294, 311-313; 817 NW2d 33 (2012) (recognizing that any claim to error is waived on appeal when a defendant fails to raise objections at a time when the trial court has an opportunity to correct the alleged error because a defendant may not "harbor error as an appellate parachute").

Defendant also requests that this Court use its power under MCR 7.216(A)(7)[3] to order the petition released for review. We refuse to do so because any information in the petition could not offer defendant relief. Even if the petition violated the service requirements under MCL 767A.4(2), the transcript of the investigative subpoena would still be admissible because the exclusionary rule is not the proper remedy in such cases. *People v Gadomski*, 274 Mich App 174, 182-183; 731 NW2d 466 (2007). Further, even if the petition revealed constitutional errors, defendant's conviction must still stand because "deprivation of a defendant's constitutional

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[2] MCL 767A.8 provides in relevant part:

> Petitions for immunity, orders of immunity, transcripts of testimony delivered to witnesses pursuant to grants of immunity, and records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under this chapter are confidential and shall not be available for public inspection or copying or divulged to any person except as otherwise provided in this chapter.

[3] MCR 7.216(A)(7) provides that this Court may "enter any judgment or order or grant further or different relief as the case may require."

rights does not create a license to commit perjury." *People v Jeske*, 128 Mich App 596, 601; 341 NW2d 778 (1983), overruled on other grounds by *People v Lively*, 470 Mich 248, 252; 680 NW2d 878 (2004). Therefore, we decline to order examination of the petition.

Finally, defendant raises two additional arguments in a Standard 4 Brief. First, defendant argues that he was denied the right to confront the prosecutor who read the investigative subpoena interview transcript into the record during his trial because the assistant prosecutor that read the transcript into the record was not sworn.

Because this issue is unpreserved, it is reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764.

Defendant is correct that "[t]he right of confrontation insures that the witness testifies under oath at trial . . . ." *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001) (quotation and citation omitted). Further, MRE 603 and MCL 600.1432(1) provide that all witnesses must be sworn in before testifying. However, we conclude that an individual simply reading a transcript into evidence is not a witness as contemplated by MRE 603 and MCL 600.1432(1) and the Confrontation Clause because the person is not giving evidence about an event that they were present at and observed. See Black's Law Dictionary (9th ed) (defining "witness" as "[o]ne who sees, knows, or vouches for something"). Thus, the reasoning behind requiring an oath, to "impress upon the oath taker the importance of providing accurate information," is not present under these circumstances. *People v Ramos*, 430 Mich 544, 548; 424 NW2d 509 (1988). Further, our Supreme Court has implicitly agreed that an oath is not necessary in similar circumstances. See *People v Chilton*, 394 Mich 34, 38; 228 NW2d 210 (1975) (affirming a case where a trial judge read transcript into the record). Additionally, defendant cannot show that the reading of the testimony into evidence without an oath having been administered affected his substantial rights because the transcript itself was admitted as evidence. Because there was no plain error, defendant's argument fails under plain error review. *Carines*, 460 Mich at 764.

Defendant also argues in his Standard 4 Brief that the prosecutor's reading of the transcript was inadmissible hearsay. However, because that issue was not raised in defendant's statement of questions presented, we need not consider it. *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011). Regardless, we find that defendant's claim has no merit because the statements made by defendant during the investigative subpoena interview constitute admissions by a party-opponent, and are thus not hearsay under to MRE 801(d)(2).

Finally, defendant argues that defense counsel rendered ineffective assistance of counsel. In order to prove ineffective assistance of counsel, "defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant first alleges that defense counsel was ineffective for failing to object to the prosecuting attorney's "testimony," i.e., his act of reading the transcript from the investigative subpoena into the record. However, as discussed *supra*, we find no error with the prosecuting attorney's reading of the transcript; thus, any objection would have been unsuccessful.

"[C]ounsel does not render ineffective assistance by failing to raise futile objections." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant also alleges defense counsel was ineffective for failing to impeach a witness. Defendant alleges that Detective Heugel stated, during the preliminary examination, that she had never spoken with defendant. Then, during trial, evidence was presented that she had spoken to defendant at the investigative subpoena. However, we find that this argument has no merit because the preliminary examination transcript reflects that the detective testified that she had not spoken to defendant *before* the investigative subpoena. Therefore, because the testimony given at trial was not inconsistent with the preliminary examination testimony, defendant has failed to demonstrate that defense counsel's failure to impeach the witness fell below an objective standard of reasonableness or that the failure to impeach the witness affected the outcome of the proceedings. *Frazier*, 478 Mich at 243.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher