

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES LEROY RUMBLEY,

Defendant-Appellant.

UNPUBLISHED

February 8, 2005

No. 250588

Oakland Circuit Court

LC No. 02-187281-FH

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of attempted unlawful driving away of an automobile (“attempted UDAA”), MCL 750.92; MCL 750.413, and three counts of receiving and concealing stolen property with a value of \$200 or more but less than \$1,000, MCL 750.535(4)(a). Defendant was sentenced as a habitual offender, MCL 769.12, to concurrent prison terms of three to fifteen years for each of these convictions. Defendant appeals as of right. We affirm.

Defendant first argues that his trial counsel provided ineffective assistance by stipulating that the prosecution could impeach defendant with a prior conviction for attempted UDAA. We disagree. To obtain relief on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel’s performance was so deficient that counsel did not perform as the counsel guaranteed by the Sixth Amendment and (2) a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Even assuming that trial counsel performed deficiently by stipulating to admission of the prior conviction at issue, there is no reasonable probability that this affected the verdict in light of the overwhelming evidence of defendant’s guilt. Indeed, it is apparent that any error in trial counsel’s stipulation to admitting this conviction was harmless beyond a reasonable doubt. Richard Cash’s testimony made clear that the relevant vehicles were broken into and were in some manner started without use of an ignition key. The victims’ testimony, together with that of Officer Gagnon, revealed that property belonging to the victims was stolen from Cash’s vehicle and found in the car in which defendant was located. Also, it is evident that defendant matched a description provided to the police by Tyrone Teart as being one of the two men in the area of the vehicles that were broken into. Officer Gagnon’s testimony that no other people were in the area makes clear the overwhelming nature of the evidence of defendant’s involvement in

breaking into the vehicles. Further, defendant's version of events in his testimony cannot realistically be viewed as consistent with property stolen from Cash's vehicle having been found in the trunk of the car in which defendant was a passenger. According to defendant's testimony, he was in the car at all relevant times, and he provided no indication of anyone placing any items in the trunk of the car. In addition, Sergeant O'Hala's testimony indicating that defendant tried to kick incriminating items under the car's seat so as to conceal them and that defendant provided a false name constitutes evidence of consciousness of guilt. There is simply no reasonable possibility that the jury would have credited defendant's implausible version of events in light of the overwhelming evidence of guilt even if evidence of his prior attempted UDAA conviction had not been introduced.

Defendant also argues that he was denied his constitutional right to due process by the prosecutor asking him on cross-examination whether he had admitted committing the offenses at a previous time. He further contends that trial counsel provided ineffective assistance by failing to move for a mistrial based on this matter. The prosecution acknowledges that the question, which evidently referred to defendant having previously pleaded no contest to the charges before being allowed to withdraw that plea, was improper. But the prosecution contends that any error was harmless due to the overwhelming evidence of guilt.

We agree that any error was harmless beyond a reasonable doubt. Because this admitted impropriety occurred during the presentation of the case to the jury and may be quantitatively assessed in the context of the other evidence presented at trial, any possible constitutional error with regard to this trial was nonstructural and, thus, does not warrant relief if it was harmless beyond a reasonable doubt. See *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000) (nonstructural error subject to harmless beyond a reasonable doubt test); *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994) (discussing such trial error as not constituting structural error). Because of the overwhelming evidence of defendant's guilt, any error with regard to the prosecutor's question was harmless beyond a reasonable doubt.

Further, defendant's argument that trial counsel provided ineffective assistance by failing to move for a mistrial based on the prosecutor's question is not properly presented for review because it is not within the scope of the questions presented. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Regardless, defendant has not overcome the strong presumption that trial counsel's failure to move for a mistrial based on this matter constituted sound trial strategy. *Carbin, supra* at 600. By objecting to the question without moving for a mistrial, trial counsel preserved the matter for appellate review while still allowing defendant a chance, however remote given the overwhelming evidence of guilt, of acquittal at the original trial. This could reasonably be viewed as having been more advantageous to defendant than attempting to terminate the trial.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello