S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL THOMAS,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 251011
Wayne Circuit Court
LC No. 03-002559-01

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of 60 to 140 months on the robbery conviction and 60 to 240 months on the concealed weapon conviction. Additionally, he received the mandatory consecutive two-year term on the felony-firearm conviction. He now appeals and we affirm his conviction, but remand for entry of a new judgment of sentence.

The victim testified that he was walking towards his home in the City of Detroit when he heard the sound of the door of a minivan sliding open behind him. He turned and saw a person come out of the minivan. The victim then turned back and continued his walk home. Defendant then came up behind the victim and demanded his wallet. Although the victim testified that he did not know if defendant was holding a gun when he got out of the minivan, the victim did see a gun in his hand when he made the demand for the victim's wallet. After the victim surrendered his wallet, defendant started backing up towards the minivan. The victim hid behind a tree and did not see defendant make his escape, but the victim testified that he heard the minivan's door slide close and the van leave and defendant was no longer in the area when the victim came out from behind the tree.

Detroit Police Officer Carol Harris testified that she took the robbery report from the victim. A few minutes thereafter, they received a report that a minivan matching the description of the suspect's vehicle was seen a few blocks away, stopped in the middle of the street with its doors open. Upon investigation, the officers determined that the license plate on the minivan did not match the vehicle. It was also determined that the vehicle had been reported stolen.

The investigating officer, Investigator Mark Young, testified that the plate on the minivan was registered to a vehicle owned by defendant's grandmother, Ruby Zachary.

Defendant first argues that he is entitled to a new trial because his convictions are against the great weight of the evidence. We disagree. Defendant failed to preserve this issue for appellate review by making a motion for new trial in the trial court. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). Accordingly, we review the issue for plain error. In *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), the Michigan Supreme Court, relying on the decision in *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), described the plain error rule as follows:

> The *Olano* Court emphasized that a constitutional right may be forfeited by a party's failure to timely assert that right. *Id.,* p 731. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.*, pp 731-734. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*, p 734. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*., pp 736-737.

Carines, supra at 774, applies this rule to both constitutional and non-constitutional errors.

Defendant argues that the overwhelming evidence was that the crime was committed by James Jones, who was with defendant at the time of his arrest, rather than by defendant. Defendant bases his argument on the fact that footprints left at the scene are consistent with the footwear worn by Jones rather than by defendant. This argument, however, overlooks the fact that the victim identified defendant, not Jones, as the robber. Further, it does not take into account the possibility that Jones was also involved and had gotten out of the minivan at some point during the crime; the victim did not have the minivan in sight at all times during the crime. For that matter, it is even possible that the footprints belong to a third person not involved in the crime who happened to have the same footwear as Jones; it was never affirmatively established that the footprints definitely belonged to the robber himself. In short, the verdict was not against the great weight of the evidence, and, therefore, defendant has not demonstrated that error has occurred.

Defendant next argues that there was insufficient evidence that defendant carried the weapon concealed in order to support the CCW conviction. We disagree. We review a claim of insufficiency of the evidence by looking at the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002).

The victim could not testify with certainty that defendant did not have the gun in his hand when he first saw him, but the victim did not recall seeing a gun in defendant's hand until defendant demanded the wallet. While a reasonable juror could conclude that defendant did not have the gun concealed on his person, it is also reasonable for the jury to conclude that defendant

did have it concealed on his person at the time he got out of the minivan and the victim first observed him and did recall seeing a gun. We will defer to the judgment of the jury on this point.

Next, defendant argues that he was denied a fair trial because the investigating officer volunteered inadmissible evidence during his testimony. For the most part, these evidentiary issues were not preserved for review by a timely objection in the trial court. At best, defendant offered limited objections that might be considered to be applicable in part.[1] See *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Those that were not preserved, we review under the plain error rule.

Defendant complains that Officer Young volunteered information that defendant had been involved in an earlier, unrelated robbery. The first such instance occurred at the beginning of the prosecutor's direct examination of Officer Young, with the following exchange:

> Q And did you get involved in this case on January 20th, 2003?
>
> A Actually, yes.
>
> Q All Right.
>
> Actually what? What were you going to tell us?
>
> A Actually, I became involved a little bit earlier through some other circumstances.
>
> Q All right.
>
> Were you looking for particular people regarding armed robbery on that date?
>
> A Yes, yes.

Apparently, the officer's involvement "a little bit earlier" came as the result of an investigation into an earlier armed robbery. But that comes from defendant's representations in his brief, not from the clear implications of the officer's testimony in this case. From the officer's testimony alone, it is speculative at best what he meant by having become involved "a little bit earlier" and it hardly constitutes the level of prejudice necessary to establish an entitlement to reversal under the plain error rule.

Defendant next points to the officer linking defendant to the minivan by testifying that the minivan had been improperly plated with a plate registered to defendant's grandmother.

[1] We say that there were limited objections that might be applicable because, while defendant did make some objections in this area, they did not necessarily apply to the precise portion of Officer Young's testimony that defendant now challenges.

Defendant did object on the basis that a proper foundation had not been laid. The prosecutor indicated that she was about to lay the foundation and that she "didn't expect that answer." The prosecutor then proceeded to lay the foundation for the fact that the Vehicle Identification Number did not match the license plate, that the plate was registered to Ruby Zachary, and that the officer heard Ruby Zachary claim to be defendant's grandmother. While it may establish that Officer Young did volunteer information, ultimately defendant cannot show prejudice because the foundation was ultimately laid.[2]

Defendant then points to Officer Young testifying to someone darting around the corner and Young giving chase as an example of Young continuing "to give answers to questions he wished had been asked rather than answer the actual questions . . . ." But Young was asked "where is the next place you go after that?" And apparently chasing the individual who darted out was the next place the officer went. Moreover, while the discussion may have been off point, we fail to see how it prejudiced defendant in any manner.

Defendant's next example of Officer Young volunteering information is when defense counsel on cross-examination asked Young whether there was a reference to a defendant on the preliminary complaint report and the officer responded by stating (and restating) that Jones was also a defendant in this case. When viewed in context, we cannot say that the officer was actually volunteering information. Defense counsel was attempting to link up the footprints with Jones, rather than defendant. But the questioning got sidetracked by Young's tendency to use the term "defendant" and "suspect" interchangeably. This lead to defense counsel attempting to clarify that the preliminary complaint report did not refer to "a defendant" and Young repeating that Jones was a "defendant" in this case (apparently meaning, "suspect").[3] In any event, we again fail to see any prejudice to defendant. Indeed, if anything, it supported defendant's theory that someone else was involved in the crime.

Defendant's final point in this area is the following exchange between the prosecutor on redirect examination and Officer Young:

> Q When you say you made an investigative conclusion that it was James Jones can you explain why you made that conclusion?"
>
> A Some things that transpired before Mr. Williams was robbed.

Defendant argues that Officer Young was again trying to imply that defendant was involved in another robbery. First, if anything, the officer's answer was guarded so as not to interject

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[2] Defendant also claims that Officer Young falsely testified that he encountered a lady who claimed to be defendant's grandmother. Defendant's interpretation is incorrect. Defendant points to the fact that Young later testified that he overheard someone else ask Zachary. That is not inconsistent with his earlier testimony as his earlier testimony was that he had contact with a person who claimed to be defendant's grandmother, not that she told Young that she was defendant's grandmother.

[3] Defendant points to other portions of Officer Young's testimony as well, but which leads to the same conclusion.

prejudicial information. If the officer was trying to interject inadmissible information into his answers, he would have said, "Because of a prior robbery" instead of "Some things that transpired before" in response to the question. Second, even if the officer's vague comment can be read as implying an earlier robbery, it implies Jones' involvement, not defendant's.

In sum, we are not persuaded that there was any prejudice to defendant from the testimony to which he now complains. Therefore, to the extent that the issues were not preserved for appellate review, he has failed to establish prejudice under the plain error rule. To the extent that any portion of this issue was preserved by an objection, any error was harmless. *Carines, supra.*

Defendant's next argument is that he was denied a fair trial because of improper comments during the prosecutor's closing argument as well as during voir dire. We disagree. Defendant acknowledges that he did not object to any of the prosecutor's arguments. Accordingly, we review this issue for plain error. *Carines, supra*.

First, defendant claims that the prosecutor argued a fact not in evidence regarding what the plate number was on the plate registered to the minivan. Specifically, the prosecutor argued that the original plate on the minivan said "cutie pie" and suggested that the plates were changed because a regular plate number would be more difficult for a victim to describe than a vanity plate that read "cutie pie." While the argument is improper in that there was no evidence regarding the plate number registered to the minivan, we fail to see any prejudice to the defendant. The incriminating fact was that a plate registered to defendant's grandmother was found on the van, not why the original plate was removed.

Second, defendant complains of the prosecutor asking during the jury voir dire whether any member of the venire would have a problem finding defendant guilty based solely upon the victim's testimony identifying defendant as the robber. The prosecutor then followed up with various questions of veniremen regarding what they would want to hear to convince them that the identification was reliable. The prosecutor then reminded the jury of that discussion in her closing argument. Defendant points to no authority to establish that this was error, much less that it was prejudicial. The one case upon which defendant relies is not only unpublished, but not on point as it dealt with a prosecutor who used a juror's remarks during voir dire to buttress the credibility of the victim's behavior in that case.

Third, defendant argues that the prosecutor improperly denigrated defense counsel in closing argument by characterizing the defense as "blowing smoke" and "dog and pony shows," and stating that "there's been so much smoke blown in this courtroom I am surprised we all didn't need gas mask now." In rebuttal, the prosecutor again made reference to "smoke screens" and referred to defendant's argument as "poppycock." Defendant also complains that the prosecutor suggested that the jury should be offended by defense counsel's argument and implied that defendant was wasting their time by defending the case. Defendant also argues that the following portions of the prosecutor's argument was improper:

> I don't want anybody here to think just because somebody is screaming what they say to you that it puts any more meaning to what they're saying in the substance of what they're saying because that's just not the case.

> I don't know during jury voir dire I didn't hear anybody raise their had [sic] and say they were hard of hearing.
>
> So just because somebody is screaming at you doesn't mean that there's anymore substance to what they're saying.
>
> * * *
>
> The other thing and the last thing is there's old saying amongst lawyers if you got the law you pound the law and if you've got the facts you pound the facts.
>
> If you don't have anything you pound the table. That what he's got there [sic].

While the prosecutor's argument may have been colorful, we do not see that it constituted plain error. A prosecutor is not required to present an argument in the blandest possible way. We see nothing wrong with the use of the terms "poppycock," "smoke screen" or "dog and pony shows." The prosecutor was merely suggesting that the defendant's argument was not believable.

While there may be some substance to the complaint about the prosecutor suggesting that the jury should be offended by defense counsel's argument, defendant fails to put the comment in context. The prosecutor did not argue that the jury should be offended in general by defense counsel's argument. Rather, the prosecutor specifically suggested that the jury should be offended by defense counsel attacking the victim by calling the victim "special." Specifically, defense counsel said that the victim is "an outstanding young man I'm sure he was scared to death but he looked special to me. Did he to you?" The prosecutor responded in rebuttal by stating:

> And furthermore, I hope each and everyone of you were offended when he claims, when the defense claims he's not attacking [the victim] but he gets up here and calls him special and I'll leave that alone.
>
> Does that make him any less believable? He's attacking him for that and that's improper. And I hope everyone of you were offended by that.
>
> There was nothing up here through [the victim] to indicate that he didn't know what he was talking about. And that should be very, very, offensive to you calling him special.

The prosecutor was properly responding to defense counsel's argument and we are not persuaded that it was error.

In sum, with the exception of the license plate issue, we are not persuaded that error occurred. And in every case, we are not persuaded that defendant was unduly prejudiced by the arguments, even if improper.

Finally, defendant argues that he was denied the effective assistance of counsel by counsel's failure to object to these various comments. The standard for ineffective assistance of

counsel was set forth by the Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

> 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 the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. 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. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* 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. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In each instance that defendant argues that counsel should have objected, we have either concluded that there was no error or that defendant was not prejudiced by the comment, or both. If there was not error, there was no need for an objection. In those instances where there was no prejudice, defendant is unable to establish his claim of ineffective assistance of counsel.

Defendant's final argument on appeal is that he is entitled to an amendment of the judgment of sentence because it does not accurately reflect the sentence imposed on the CCW conviction. The sentencing transcript reflects that the judge imposed a sentence of forty to sixty months on the CCW conviction. The judgment of sentence, however, states a sentence of 60 to 240 months. The prosecutor has confessed error and, therefore, we order that the judgment of sentence be amended to reflect a sentence of forty to sixty months on the CCW conviction.

We order that the judgment of sentence be amended to reflect a sentence of forty to sixty months for the CCW conviction. We remand the matter to the trial court for that limited purpose. In all other respects, defendant's convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White