

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY GERALD LAGINESS,

Defendant-Appellant.

UNPUBLISHED

January 24, 2013

No. 306965

Wayne Circuit Court

LC No. 11-005613-FH

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of acceptance of a bribe by a public official, MCL 750.118. He was sentenced to a prison term of 17 months to 10 years. Following his conviction, on the basis of ineffective assistance of counsel, defendant moved for a new trial and/or for an evidentiary hearing, which the trial court denied. He now appeals by right his conviction and sentence. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

The criminal conduct in this case, acceptance of a bribe by a public official, occurred between September 1, 2006 and January 1, 2007, during which time defendant was a member of the River Rouge City Council. For several weeks in the fall of 2006, the City Council was involved in the process of choosing a new healthcare provider for city employees and retirees. Several different companies were bidding on the contract and making presentations to the mayor and the City Council as part of the bidding process. The prosecution alleged that defendant accepted a \$5,000 bribe from Adam Korejsza, a representative of one of the companies, in exchange for his vote to award that vendor the contract.

At trial, Korejsza testified that he paid defendant \$5,000 to vote in favor of awarding the contract to his company. According to Korejsza, he approached defendant after one of the city council meetings and asked him what it was going to take for him to change his vote, and defendant responded with “five grand or five racks or something like that,” which Korejsza took to mean \$5,000. Korejsza testified that just a few days later, and before the city council vote, he met defendant behind a bar near River Rouge city hall and gave him \$5,000 cash in an envelope.

Defendant, who had previously been adamantly opposed to awarding the contract to Korejsza’s company, ultimately voted to do just that. Defendant testified that he changed his

mind based on advice from several people, including city attorneys. Following a two-day trial, defendant was convicted by a jury.

I. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant asserts that he was denied his constitutional right to effective assistance of counsel at trial. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law; the court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

When a defendant's claim of ineffective assistance of counsel is based on facts not on the record, he may ask for a hearing to create his record for appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). A trial court's decision to deny an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008).

A. Failure to Unseal Korejsza's Plea Agreement.

One of defendant's primary arguments is that trial counsel made a significant error in failing to move to unseal Korejsza's plea agreement. While defendant contends that it was error for trial counsel not to file a motion to unseal Korejsza's plea agreement, he concedes that his trial counsel was aware of at least some of the terms of the plea agreement. The argument therefore advanced by defendant on this issue is that his trial counsel should have moved to unseal the plea agreement so that counsel would know the "parameters and extent of Korejsza's cooperation, as well as the numerous considerations he may have been getting for it." The State contends that it disclosed the terms of Korejsza's plea agreement to defendant's trial counsel. Certainly, the trial record bears out the fact that trial counsel had knowledge of a plea agreement as defendant's trial counsel used the plea agreement to impeach Korejsza's testimony at some length. During cross-examination, trial counsel also questioned Korejsza about the parameters of the plea agreement. Additionally, from the trial record we can glean that defendant's trial counsel was aware that Korejsza had received concurrent sentences of five years for some of the counts to which he pled guilty. Hence, the issue presented is not whether defendant's trial counsel was unaware of a plea agreement. Rather, the issue presented is whether trial counsel's failure to move to unseal the *entire* plea agreement constituted ineffective assistance of counsel.

As previously stated, the State contends that the trial prosecutor shared the entire contents of Korejsza's plea agreement with defendant's trial counsel.¹ Defendant has provided no

¹ That portion of the plea agreement that was sealed is described in the transcripts and by the parties as Exhibit A. According to the State, even those provisions contained in Exhibit A were

evidence to the contrary. Thus, we find it difficult to hold that trial counsel's failure to unseal a record from which there is evidence he already knew the contents of constituted ineffective assistance of counsel.² However, even if we were to assume that trial counsel did not know all that was contained in Korejsza's plea agreement, and by extension thereof was ineffective, and that trial counsel should have made a motion to unseal the entire plea agreement, and that motion would have been successful, we must find that trial counsel's failures constituted prejudice to defendant.

Here, defendant argues that trial counsel's failure to move to unseal the entire contents of Korejsza's plea agreement prejudiced him because: "It is not clear how many sins the key witness washed away pursuant to that sealed plea agreement." However, the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). In this trial, the jury heard Korejsza admit having approximately 13 felony convictions, including at least three for embezzlement, two for failure to file income tax with intent to defraud, and one for false pretenses. Trial counsel also impeached Korejsza regarding the terms of his plea agreement without moving to have the agreement unsealed. Hence, we cannot find that the alleged error ascribed by defendant to his trial counsel deprived him of a substantial defense. Nor can we find that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008), or that the result that did occur was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Ultimately, review of the record clearly reveals that the jury was aware that Korejsza was testifying pursuant to a plea agreement, that he was currently incarcerated as a result of his plea agreement, and the jury knew of the sentence Korejsza was serving under the terms of the plea agreement and knew of his numerous prior felony convictions. The jury heard all of the above information about Korejsza and still deemed his testimony credible enough to support defendant's conviction.

Though defendant claims on appeal that the only evidence used to convict him was that of Korejsza, such an argument fails to take into consideration the additional evidence presented against him. Numerous witnesses testified that defendant had made known his intent to vote against Korejsza's bid, in part, based on an understanding that one of the rival bidders was somehow related to defendant's wife. In fact, defendant had taken to passing out flyers warning

disclosed to trial counsel. From the record, we glean that portions of the plea were sealed (Exhibit A), in an effort to protect the safety of Korejsza who alleged that he had been assaulted while in jail for his cooperation with law enforcement authorities.

² This difficulty is underscored by representations made by appellate counsel that the only additional allegations brought to this Court's attention by appellate counsel are that Korejsza was also cooperating with federal authorities. Though given great significance by appellate counsel, we cannot find that this fact was in any manner outcome determinative. See *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

members of the City Council and the public against accepting Korejsza's bid. But when it came time to vote, defendant made the motion to accept Korejsza's bid and voted in favor of his motion. In addition, the State produced volumes of bank statements and records demonstrating that at the time of the alleged bribe, over the course of just a few days in September 2006, Korejsza withdrew \$5,000 in cash. Korejsza testified that he gave defendant \$5,000 in cash. Additionally witnesses, including defendant, testified that he was experiencing financial difficulty at that time. Though he admitted to having financial difficulties, bank records clearly revealed that defendant made a \$1,300 cash deposit and when asked where the money came from stated that he could not recall. On this record, even assuming trial counsel's failure to move to unseal the entire plea agreement fell below a standard of reasonableness, we cannot find that but for this presumed error, there is either a reasonable probability that the result would have been different or that the result which did occur was fundamentally unfair or unreliable. *Davenport*, 280 Mich App at 468; *Lockett*, 295 Mich App at 187. Accordingly, we find that the trial court did not abuse its discretion by denying defendant's motion for an evidentiary hearing. *Unger*, 278 Mich App at 216-217.

B. Failure to Request Prior Statements of Witnesses.

Defendant also argues that his trial counsel's failure to request prior sworn statements and/or transcripts of several witnesses who had testified pursuant to an investigative subpoena constituted ineffective assistance of counsel. However, the record is devoid of any evidence to support such a claim. Rather, appellate counsel is claiming that since her client did not review the prior statements and/or transcripts, neither did trial counsel. The prosecutor clearly stated on the record that such statements were in fact provided to trial counsel; and the trial record reveals that several of the witnesses were using their investigative subpoena testimony.

Given the dearth of evidence offered by defendant on this issue, and considering the extent to which he requests that we engage in pure conjecture, we decline his offer to examine the issue as presented. To the extent defendant claims that counsel was ineffective for failing to secure prior statements, he has failed to meet his burden to actually demonstrate that this occurred. Even if we presume it true, defendant utterly fails to demonstrate how his trial counsel was deficient. Consequently, we assign no error and find that the trial court did not abuse its discretion in denying a *Ginther* hearing on these facts.³

C. Failure to Object to Hearsay and Prior Bad Acts Evidence.

Next, defendant argues that trial counsel's failure to object to prejudicial hearsay and other bad acts evidence contributed to defendant receiving ineffective assistance of counsel. Specifically, defendant asserts trial counsel should have objected to: Korejsza's testimony that he heard defendant had been bouncing checks; Mayor Bowdler's testimony that it was common

³ It is unclear whether appellate counsel even attempted to secure trial counsel's file on this matter prior to filing her request for a new trial. Had she done so, it should have been noted during the motion brought for a new trial.

knowledge that defendant was having money problems; Trooper Corriveau's testimony about defendant having once been a passenger in a car that was pulled over and found to contain marijuana; and the prosecutor's question regarding nepotism of the City Council. While it is true that trial counsel for defendant could have objected to any of these and likely prevailed, not objecting does not necessarily constitute error. Declining to raise objections can be sound trial strategy. *Unger*, 278 Mich App at 242, 253.

Defense counsel never disputed defendant's financial situation in this case, but instead attempted to use that financial hardship to defendant's advantage arguing: "Is my client having a difficult time financially? Yes, he was. And all of us have been through that, but did he put \$5,000 in his account? No, he did not." Defendant himself testified that he was struggling financially during the relevant time period of fall 2006. Based on the arguments of trial counsel, we find that his decision to refrain from objecting to the testimony of Korejsza and Mayor Bowdler regarding defendant's financial difficulties was a matter of sound trial strategy. Counsel chose not to dispute the fact that defendant was having financial difficulties and in fact defendant testified that that was the case. Therefore, objecting to the hearsay evidence offered by Korejsza and Mayor Bowdler on that topic would have been of little to no benefit. As stated by our Supreme Court in *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994):

As a Court far removed from the passion, dust, and grit of the courtroom, we must be especially careful not to second-guess or condemn with hindsight the decisions of defense counsel. A defense attorney must enjoy great discretion in the trying of a case--especially with regard to trial strategy and tactics . . . After all, the attorney witnessed or conducted voir dire, understood the credibility and demeanor of witnesses and his client, grappled with the evidence and testimony, and sensed the prosecutor's strategy. We only have the cold record. [Internal citations omitted.]

With regard to Trooper Corriveau's testimony about defendant having once been a passenger in a car that was pulled over and found to contain marijuana, and the prosecutor's question regarding nepotism of the City Council, we note that the absence of any objection by defense counsel in each of these instances was a matter of sound trial strategy.

Trial counsel's strategic choice not to object and therefore highlight for the jury the fact that defendant was in a car that was stopped with marijuana inside of it should not be presumed error simply because it was unsuccessful. The evidence of defendant's guilt, as previously stated, was overwhelming. The difficulties of explaining the presence of \$5,000 in defendant's account around the same date as the alleged bribe occurred made the case difficult for defense counsel, and contrary to defendant's assertions his trial counsel determined the best defense available and the best means for effectuating that defense. Merely because these strategies ultimately proved unsuccessful does not prove trial counsel ineffective. Therefore, based on the record presented to us, we cannot conclude in light of all the circumstances trial counsel's performance was "outside the wide range of professionally competent assistance." *Pickens*, 446 Mich at 330-331. Even assuming the failure to object was an error, however, defendant has made no showing that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Davenport*, 280 Mich App at 468.

In conclusion, we find that all of the errors allegedly made by trial counsel are either entirely unsupported by the record, or they were in fact conscious decisions made as part of a sound trial strategy. Even if we were to presume any or all of the errors to have occurred because trial counsel's performance fell below a standard of reasonableness, defendant has made no showing of any reasonable probability that, but for counsel's supposed errors, the result of the proceedings would have been different. *Id.* Moreover, defendant has failed to show that the trial court abused its discretion in denying his request for a *Ginther* hearing. *Unger*, 278 Mich App at 216-217. The purpose of a *Ginther* hearing is to allow a defendant to establish facts that assist him in making his ineffective assistance of counsel claims. *Ginther*, 390 Mich at 443-444. Here, defendant has failed to articulate any facts that must be established to further his ineffective assistance claims. Rather, as discussed above, all of defendant's claims of ineffective assistance can be addressed and decided on the existing record. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a *Ginther* hearing.

II. BRADY DISCLOSURES

The next issue raised by defendant on appeal is whether the prosecution failed to fully disclose the terms of Korejsza's plea agreement in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

As previously noted in this opinion, the trial prosecutor repeatedly asserted that she disclosed the terms of Korejsza's plea agreement to defendant's trial counsel. Defendant did not supply to the trial court or to this Court any evidence to the contrary. The prosecutor further stated that Korejsza's plea agreement was sealed by court order and that under that order she was prohibited from providing defense counsel with the written document. Court documents verify this statement. Still, the trial prosecutor asserted that she disclosed *all* the terms of Korejsza's plea agreement to defense counsel multiple times including at the preliminary examination, during a phone conversation, and again at the bench during trial.

Based on the record before us, to the extent permissible under the applicable court order, the prosecutor fully disclosed the terms of Korejsza's plea agreement to defendant. Defendant has made no showing that the prosecution suppressed such evidence, and there was no *Brady* violation as it is impossible to have a *Brady* violation where the only proffered evidence demonstrates that the prosecution actually divulged the information.

III. PROSECUTORIAL MISCONDUCT

The next argument put forth by defendant on appeal is that there was a pervasive pattern of prosecutorial misconduct that tainted the trial and denied defendant his right to a fair trial. Specifically, defendant contends that the prosecutor vouched for the credibility of the prosecution's primary witness, misstated facts, gave unsworn testimony, and made improper civic duty arguments.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Absent a contemporaneous objection and request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected the defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Defendant did not preserve this issue for appeal. Therefore, "[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." *Unger*, 278 Mich App 235.

In this case, in her opening statement, the prosecutor stated that this case was part of a new initiative by the attorney general's office against public corruption, that she and a detective had investigated the case, and that Korejsza was required to testify truthfully under a plea agreement he entered. Aside from the statement about the attorney general's new initiative, all of these statements were basic factual assertions that the prosecutor reasonably planned to prove at trial. Aside from the statement about the attorney general's new initiative, the statements were in fact supported by witness testimony. When the prosecutor argued in her closing argument that everything Korejsza told them turned out to be true, she was arguing from facts already in evidence that Korejsza was worthy of belief with respect to his testimony that he paid defendant a \$5,000 bribe.

At the hearing on defendant's motion for a new trial, the trial court ruled against defendant on the issue of prosecutorial misconduct and specifically with regard to any alleged civic duty arguments by the prosecutor at trial. In closing argument, the prosecutor asserted: "[S]omebody has to put a stop to that. Somebody has to say no more of that. No more doing business that way." The lower court reasonably concluded that those statements referenced specific behavior in River Rouge by the specific defendant in this case, and therefore did not constitute a civic duty argument.

"Generally, prosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal citations omitted). Such was the case here. Overall, there was no plain error at trial such that it resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings, *Unger*, 278 Mich App 235, and defendant has not proved prosecutorial misconduct occurred. The alleged incidences of misconduct that defendant relies upon were in fact all within the bounds of legally permissible prosecutorial advocacy techniques.

IV. SENTENCING

Finally, defendant argues that the trial court erred in departing upward from defendant's sentencing guidelines.

A trial court may only depart from the legislative sentencing guidelines recommended sentencing range if it has "substantial and compelling reasons to do so, and states those reasons on the record." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003), citing MCL 769.34(3). A trial court's reasons for departure must be objective and verifiable, and "a court may not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight." *Id.*

The existence of a particular factor supporting an upward departure involves a factual determination that we review for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Whether a trial court's stated reasons for departure were objective and verifiable is reviewed de novo as a matter of law. *Id.* We review a trial court's determination that the factors constituted substantial and compelling reasons for the departure as well as the extent of the court's departure for an abuse of discretion. *Id.* An upward departure is justified when the minimum sentence imposed is proportionate to the defendant's conduct and prior criminal history. *Id.* However, a trial court abuses its discretion when it imposes a minimum sentence that falls outside the range of principled outcomes. *Id.*; *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

In the present case, defendant's sentencing guidelines were 0 to 17 months. The trial court explained that substantial and compelling reasons to go beyond the guidelines could easily be found in the amount of defendant's disregard for the trust of the community. Subsequently, at the hearing on defendant's motion to correct an invalid sentence, the court again explained its upward departure further, emphasizing that defendant knew that he was putting his community in danger through his actions. The trial court also stated that defendant's actions had put a great number of retirees at risk, a number far greater than contemplated by the sentencing guidelines. Additionally, the trial court found that defendant was a public official who violated the public trust. All of the reasons utilized by the trial court were objective and verifiable and the court did not abuse its discretion in making an upward departure on that basis and it did not abuse its discretion with respect to the extent of the departure. See *Babcock*, 469 Mich at 257.

Affirmed.

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder

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STEPHENS, J. (*concurring*).

I concur in the result only.

/s/ Cynthia Diane Stephens