STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 29, 2013
v	No. 310323 Oakland Circuit Court
JOSHUA DEMARKO MIDDLEBROOKS, Defendant-Appellant.	LC No. 2011-238635-FH

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). He was sentenced as a second-offense habitual offender, MCL 769.10, to 5 to 30 years' imprisonment. We affirm.

I. FACTUAL BACKGROUND

At approximately 11:45 a.m. on June 2, 2011, William Dewaele and his wife left their home in Southfield, Michigan, to go shopping. The doors and windows of the home were locked. When they returned at approximately 2:00 p.m., they discovered that someone had broken into their house. Dewaele found a broken decanter on the floor and discovered that his Colt .45 automatic weapon, a laptop computer, coins, and his wife's jewelry box were missing. He also noticed that a window in the master bedroom had been broken.

A Southfield police specialist, whose responsibilities included handling crimes scenes, pictures, fingerprinting, and evidence, arrived at the home. The specialist lifted a set of latent fingerprints on the inside of the broken window. A lab scientist for the Michigan State Police testified that she ran the prints through the computer system, Automated Fingerprint Identification System (AFIS), which produced defendant as a possible match. The MSP lab scientist then conducted a manual comparison of the latent prints from the window to defendant's known fingerprint card and found that all five latent prints were a match for defendant's right hand.

Southfield Police Officer Adam Wilson testified that in July 2011, he participated in a booking of defendant, which included using a digital fingerprinting system to produce a card upon which defendant's fingerprints were printed. Wilson did not testify regarding the nature of the booking. Wilson testified that after he fingerprinted defendant, defendant signed the

fingerprint card, and Wilson submitted the card to his supervisor. Defendant's fingerprint card was admitted into evidence.

Defendant was convicted of first-degree home invasion and sentenced to 5 to 30 years' imprisonment. Defendant now appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

On appeal, defendant contends that he was denied the effective assistance of counsel because his counsel failed to object to the testimony of Officer Wilson regarding fingerprinting defendant for an unrelated crime. Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial 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 Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Because defendant failed to raise an ineffective assistance of counsel claim in a motion for a new trial or a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973), review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

B. Analysis

In order to prevail on a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984)*; People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . . ." *Strickland*, 466 US at 687. The Court has held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Defendant invokes MRE 404(b)(1) as the basis for establishing that the disputed testimony was inadmissible and that his counsel should have objected accordingly. MRE 404(b)(1) prohibits "[e]vidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime, but permits such evidence for other purposes, including "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material[.]" See *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In order for evidence of other crimes, acts, or wrongs to be admissible under MRE 404(b)(1), the evidence: (1) must be offered for a proper purpose under MRE 404(b), (2) must be relevant under MRE 402, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice under MRE 403. *Id*.; *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993).

Here, Officer Wilson's testimony that he booked and fingerprinted defendant was offered for a proper purpose under MRE 404(b), because it was proof of identity. Rather than proof of

character or propensity, the testimony verified that the prints on the fingerprint card were defendant's, which provided a foundation for the fingerprint card to be admitted as evidence. Furthermore, this testimony was relevant because it substantiated that the fingerprints in AFIS, which matched the latent fingerprints at the crime scene, were indeed defendant's. See *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008), quoting MRE 401 (relevant evidence is any evidence "'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"). This is especially true considering the threshold for determining whether evidence is relevant is minimal. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

Lastly, defendant has not demonstrated that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. See *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488, 492 (2002) ("it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403."). Not only was Officer Wilson's testimony brief, it was not even clear that he was referring to booking procedures for an unrelated offense. The crime in the instant case occurred in June 2011, and Officer Wilson testified about booking defendant in July 2011.[1] Officer Wilson did not provide any details regarding the reason he was booking defendant. Thus, there is no indication that the jury would have drawn any adverse conclusions from this testimony because it was not apparent that Officer Wilson was referring to an unrelated crime.[2]

Moreover, defendant has not overcome the "strong presumption that counsel's assistance constituted sound trial strategy." *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). A defense attorney may properly refrain from objecting to brief questions when an objection could emphasize the testimony in the minds of the jurors and where no further reference was made to the testimony. See, e.g., *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995); *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212, 220 (2008); *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). Here, trial counsel could have reasonably refrained from objecting to the testimony in order to avoid emphasizing that defendant had been "booked." No subsequent reference was made to the booking or the charge. Consequently, defendant has failed to overcome the strong presumption that trial counsel's actions constituted sound trial strategy under the circumstances.

Lastly, defendant has failed to demonstrate the second prong of ineffective assistance of counsel, namely, that the outcome of the trial would have been different but for counsel's alleged errors. The MSP lab scientist testified that according to AFIS and her expert opinion, all five latent prints found in the Dewaele's home matched defendant's *known* prints. Based on this

[1] Thus, the instant case is distinguishable from *People v McCartney*, 46 Mich App 691, 692; 208 NW2d 547 (1973), where the officer testified about taking the defendant's fingerprints in 1969 when the charged crime did not occur until years later in 1971.

[2] Because defendant failed to demonstrate that this testimony was improper, any objection would have been futile and counsel is not ineffective for failing to raise a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

testimony alone, the jury was informed that defendant had known fingerprints on file. Thus, there is no reasonable probability that, but for trial counsel's failure to object to Officer Wilson's limited testimony, the result of the proceeding would have been different. Accordingly, defendant cannot establish a claim of ineffective assistance of counsel.[3]

III. CONCLUSION

Because defendant was not denied the effective assistance of counsel, a new trial is not warranted. We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Michael J. Riordan

[3] While defendant also invokes MRE 609 as a basis to exclude this evidence, that rule applies to criminal convictions. The disputed evidence in this case merely related to a booking procedure, not evidence of an actual conviction.