STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY VERNELL ADKINS, JR.,

Defendant-Appellant.

UNPUBLISHED
June 14, 1996

No. 172921
LC No. 93-007956-FC

Before: Neff, P.J., and Jansen and G. C. Steeh, III,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison on the assault conviction, and to a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals his convictions and sentences as of right. We affirm in part and remand for proceedings consistent with this opinion.

I

Defendant first argues that error occurred by the trial court's failure to instruct the jury to question the testimony of Titus Akins, an alleged accomplice. We find no error requiring reversal.

A

First, defendant acknowledges that the instruction was not requested below, but claims that the court must sua sponte instruct the jury when an accomplice testifies. A trial court only has such a duty, however, where the case amounts to a credibility contest between defendant's version of the events and that of the accomplice. *People v Jensen*, 162 Mich App 171, 188; 412 NW2d 681 (1987). Here, no such credibility contest was involved. Ila Eychas testified that she observed defendant shoot the victim. The weapon used in the shooting of the victim was found in defendant's car with his palm print on the

* Circuit judge, sitting on the Court of Appeals by assignment.

stock of the rifle. Further, defendant wrote several incriminating letters to Akins while both of them were incarcerated. Accordingly, sufficient other evidence existed so that the trial court was under no duty to give the accomplice instruction sua sponte.

B

Defendant argues that even if the trial court did not err in failing to give the instruction, his attorney's failure to properly request the instruction constituted ineffective assistance of counsel. We disagree. As the prosecutor argued to the jury in closing argument, even without Akins' testimony, the case against defendant was strong. Accordingly, because defendant failed to demonstrate that his case was prejudiced by his counsel's alleged error, this claim must also fail. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

II

Defendant next argues that the trial court erred in disallowing evidence of Akins' probationary status on the night the crime in question was perpetrated. No error requiring reversal occurred.

In *Davis v Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974), the U.S. Supreme Court determined that evidence of a juvenile's probationary status may be properly admitted. The purpose behind the Supreme Court's ruling was to allow the jury to consider the witness' bias; i.e. that the witness' testimony is designed to point the finger of blame at the defendant in order to escape punishment himself. Here, however, defendant's trial counsel effectively demonstrated Akins' bias by eliciting his testimony that he was worried he could be charged with the crime, that he was with defendant when the crime occurred, and that two witnesses, including the victim, originally believed Akins committed the crime. Accordingly, any error in the trial court's ruling was harmless beyond a reasonable doubt.

III

Defendant next argues that the trial court erred in failing to suppress the rifle found in his automobile because the warrant used to search the car was defective. We find no error in the trial court's ruling.

This Court will not reverse the denial of a motion to suppress evidence unless the trial court's decision was clearly erroneous. *People v Nelson*, 443 Mich 626, 631, n 7; 505 NW2d 266 (1993). In reviewing a magistrate's conclusion that probable cause existed, the reviewing court must pay deference to the magistrate's determination and read the underlying affidavit in a common sense and realistic manner. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995). This deference requires the reviewing court to ask only whether a reasonably cautious person could have concluded that a substantial basis for finding probable cause existed. *Id.*

Here, we find sufficient facts were contained within the affidavit to support a finding of probable cause. Defendant owned the car and it was located at one of the residences in which defendant lived. Defendant was observed just prior to being arrested sitting in the car. Further, defendant jogged or ran away from the car after noticing he was being watched by the police officers. On this evidence we are not left with the definite and firm conviction that the trial court made a mistake in upholding the search warrant.

Also, we do not find that the warrant contained intentionally false or misleading information. The officers testified at the hearing that defendant fled the car as a result of their presence. Therefore, defendant has failed to prove that the officers intentionally omitted any information. *People v Chandler,* 211 Mich App 604, 613; 536 NW2d 799 (1995). Further, this testimony demonstrates that it was not a material omission to fail to mention in the warrant that the officers were not in uniform.

IV

Defendant's next appellate claim is that the trial court erred in failing to redact certain portions of the threatening letters defendant sent Akins when both men were incarcerated. We find no error.

The decision to admit or deny evidence is within the sound discretion of the trial court. *People v Taylor,* 195 Mich App 57, 60; 489 NW2d 99 (1992). The decision on a close question is not normally an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289-290; 531 NW2d 659 (1995).

On our review of the letters, we cannot say that the trial court abused its discretion in failing to redact the offensive portions. First, some of the letters would be nonsensical if all of the offensive words were extracted. Second, we cannot conclude that the statements that defendant offered Akins drugs, weapons and money were more prejudicial than probative. Those statements indicated the extent to which defendant would go to coerce Akins into lying. Although the trial court reached its ruling on different bases than those discussed above, we will not overturn a proper result reached for the wrong reason. See *In re Condemnation of Private Property*, 211 Mich App 688, 692; 536 NW2d 598 (1995).

V

Defendant next argues that the trial court erroneously allowed into the record collateral evidence that his father threatened one of the witnesses in this case. We agree with defendant that the evidence was irrelevant. However, we conclude reversal is not required. The case against defendant was strong. We conclude that the omission of the complained of testimony would not have altered the outcome in this case. MCR 2.613(A). Defendant is entitled to a fair trial, not a perfect one. *People v Mosko,* 441 Mich 496, 502; 495 NW2d 534 (1992).

VI

Defendant's next assertion is that the prosecutor improperly elicited testimony that defendant refused to allow a search of his trunk, and then improperly used that testimony in its closing argument. We conclude that reversal is not required as a result of this error.

The prosecutor elicited from defendant on cross-examination that he refused the police officer's request to search his automobile because he knew that a weapon was in the trunk. The prosecutor then referred to this testimony in its closing argument, to lead the jury to the inference that defendant did not want the police to search the vehicle because the weapon used in the shooting was in the trunk.

That this testimony was improperly elicited cannot be gainsaid; assertion of a constitutional right is not a crime, or evidence of a crime. *People v Stephens*, 133 Mich App 294; 349 NW2d 162 (1984). The prosecutor claims that the admission of the evidence was harmless beyond a reasonable doubt. In order to succeed in this argument, the prosecutor must demonstrate, and we must determine, that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *People v Anderson*, 446 Mich 392, 402; 521 NW2d 538 (1995).

Here, we conclude that this standard has been met. Ballistics evidence demonstrated that the weapon found in defendant's trunk was the weapon used in the shooting. Further, the search of the vehicle demonstrated that the weapon used in the shooting was controlled by defendant, and that the weapon had his palm print on it. This evidence linked the weapon to defendant even without his statement. Accordingly, the improper questioning of defendant, and the prosecutor's comment on defendant's testimony were harmless beyond a reasonable doubt.

VII

Defendant's final two appellate arguments relate to his sentence. We find defendant's sentence to be proportionate, but remand to allow the trial court to correct the scoring of PRV 4, and determine if resentencing is required.

A

Defendant first argues that the trial court erred in scoring ten points for prior record variable 4. We agree.

The two convictions in question are defendant's juvenile conviction for assault and battery, a ninety-day misdemeanor, MCL 750.81(1); MSA 28.276(1), and second-degree retail fraud, a ninety-three-day misdemeanor, MCL 750.356d(1); MSA 28.588(4)(1). The court, relying on instruction C to PRV 4, included both of these offenses in its scoring, concluding that they were similar to low severity juvenile adjudications, but fell outside of the crime groups covered by PRV 4.

The trial court's error with regard to the assault and battery conviction is clear. It fell within the crime groups covered by the guidelines, but was not one of the enumerated assaults that should have been included in PRV 4. See instruction B to PRV 4, Michigan Sentencing Guidelines, 2d ed, p2 4.

We conclude that the trial court erred with regard to the retail fraud conviction as well. That conviction is most properly considered a larceny, and also is not one of the crimes listed in instruction B to PRV 4.

B

Finally, defendant argues that his sentence of life imprisonment violates the principle of proportionality. Specifically, defendant argues that the trial court erred in only considering defendant's past criminal history which was adequately considered by the guidelines. We disagree.

During sentencing, the court made clear that it was aware of the dictates of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Although the court did state at length that it felt defendant's prior criminal history was not adequately considered by the guidelines, the court also relied on the seriousness of the offense -- defendant could have been convicted of first-degree murder had the victim died – and the psychological profiles done on defendant, which indicated he was not amenable to rehabilitation. On the basis of this record, we cannot conclude that the court abused its discretion in sentencing defendant.

Defendant's convictions are affirmed. This matter is remanded for the purpose of allowing the trial court to correct defendant's PSIR, and determine at that time whether resentencing is required. *People v Polus* 197 Mich App 197, 201-202; 495 NW2d 402 (1992).

Affirmed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ George C. Steeh