STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD L. JOHNSON, a/k/a CHARLES DERRICK JONES,

Defendant-Appellant.

UNPUBLISHED
August 6, 1996

No. 173143
LC No. 93-123592 FH

Before: White, P.J., and Fitzgerald, and E.M. Thomas,*JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of unlawfully driving away an automobile, MCL 750.413; MSA 28.645. We affirm.

On February 23, 1993, around 2:00 or 2:30 p.m., Cynthia Anne Woods left work at Silverman's restaurant in Farmington Hills, walked to her car, started it, and then realized she had left her purse in the restaurant. She left the car running and the doors unlocked and ran in the restaurant to retrieve her purse. Woods testified she was in the restaurant one or two minutes. As she left the restaurant, she saw a black male driving her car away. The car stopped halfway through the parking lot, where another black male got in, and then continued away. She could not specifically identify the driver, but noticed he was wearing a tan coat and a light colored hood. The passenger was wearing a dark green coat. She had given no one permission to drive her car.

Gary Jaber, a cook at Silverman's, testified that a black male came in the restaurant, asked for change, and then went to the gas station next door to make a phone call at an outdoor phone. Jaber testified that when Woods came back in the restaurant to get her purse, a black male got in her car, drove a short distance, picked up a second black male, and left. The driver was wearing a dark jacket and blue jeans.

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

A patron at Silverman's, Lynne Hubrecht, testified she observed two black males come in the restaurant and get change, and observed Woods' car being driven away by a black male. She described the two males' clothing as Woods had -- one wore a tan coat and the other a green coat -- and identified defendant as the driver the car. She also testified that the other man had an overbite.

Robert Boone, a service manager and mechanic at a gas station in Southfield, testified that on February 23, 1993, he was attempting to drive a car into a service bay when two black males pulled up in a black late-model Ford Escort, parked the car, exited the vehicle and quickly walked behind the service station and away. Boone testified that keys were left in the ignition and the engine was running. Boone called the police. He identified defendant as the driver of the Ford Escort. Boone testified that he misspoke at the preliminary examination when he first testified that defendant was the passenger, and then corrected himself. He testified he was sure defendant was the driver.

Southfield police officer David McCormick testified that on February 23, 1993, around 2:30 or 3:00 p.m., he received a dispatch that a black Ford Escort had just been stolen from Farmington Hills and was headed towards Southfield. The two subjects were described and the license plate provided. About four minutes after the initial dispatch, a second dispatch informed McCormick that two black males had just abandoned a black Escort at a gas station in Southfield, and had run behind the building. McCormick drove to the station and noticed two men that matched the descriptions he had received walking down a nearby street. When McCormick stopped them and asked their names, one gave a false name and the other gave a social security number that corresponded to a different name than he had given the officer. One was wearing a dark green coat and the other a tan coat, the latter had on multiple layers of clothes and his coat was reversible, the alternate side being green. McCormick identified defendant as one of the men he had stopped on February 23, 1993. He was later recalled to the stand and testified that he had had Boone come to where he was detaining the two males, and that Boone identified defendant as the driver of the Escort abandoned at the station where he worked.

Woods, Jaber and Boone testified that the driver was taller than the passenger, although Woods on cross-examination testified she did not see the driver standing. Jaber, Hubrecht and Boone testified that the driver was lighter complected than the passenger. McCormick's testimony established that defendant was the taller and lighter complected of the two men arrested.

After being convicted by the jury, defendant moved for a new trial on the basis of prosecutorial misconduct or, in the alternative, for resentencing. His motion for new trial was denied, but resentencing was granted; the latter is not at issue here.

On appeal, defendant asserts that the prosecutor improperly argued to the jury that defendant gave a false name at the time of his arrest, made disparaging remarks about defense counsel during closing arguments, failed to produce exculpatory evidence, and argued to the jury facts not in evidence. Defendant asserts the cumulative effect of these improprieties deprived him of a fair trial.

Appellate review of allegedly improper remarks by a prosecutor is precluded if the defendant fails to timely and specifically object, unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue will result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). In the present case, defense counsel only objected to the prosecutor's remark that defense counsel was getting paid for his services.

The test of prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267 n 7; 531 NW2d 659 (1995). We conclude that the prosecutor's comments to the jury during closing arguments did not deny defendant a fair trial, and that to the extent defendant's claims are unpreserved, any error did not result in manifest injustice.

Defendant first argues that the prosecutor committed reversible error by arguing to the jury that defendant was guilty because he gave a false name to the police when he was arrested. At trial, the prosecutor asked officer McCormick:

> Q. Okay. So, the darker skinned, black male did, in fact, give you a false name?
>
> A. Yes, he did,
>
> Q. What about the other guy?
>
> A. The other guy identified himself as Charles Derek Jones
>
> Q. And did you later find out that that was, in fact, a false name?
>
> A. Lather through dispatch, while I was using his social security number, it was revealed that that social security number went to a Ronald Lee Johnson.

Defense counsel did not object during this colloquy. McCormick then identified defendant as the person who had identified himself as Charles Derek Jones, but had given a social security number belonging to Ronald Lee Johnson.

During closing argument, the prosecutor stated, "I submit to you that two individuals who would lie to the police about their identities [sic] would abandon a recently stolen car would also know that it may be time to switch their clothing and that's exactly what they did." Later, the prosecutor in her rebuttal argument stated, "If you are sitting here where Mr. Jones or Mr. Johnson or whatever or whoever he is today would you be -- would want to be convicted at all? Someone who changes their name, changes their clothing and steals a car probably would answer that question no.[1]

We first observe that defendant failed to preserve the issue by objection at trial. Further, we conclude that defendant was not deprived of a fair trial by the prosecutor's comments. The prosecutor's comment that defendant had lied about his identity was adequately supported by evidence presented at

trial. Officer McCormick testified at trial that defendant identified himself as Charles Derek Jones, but gave a social security number belonging to Ronald Lee Johnson. Thus there was record support for the assertion that defendant gave the police false information regarding his identity.

Further, defendant did not testify at trial, the word "alias" was never used before the jury, and the prosecutor did not imply that defendant was involved in other criminal conduct by referring to his giving a false name to the police.

In opening statement and throughout the one day trial, the prosecutor referred to defendant as "the defendant," with four exceptions. The first was during direct examination of the complainant when the prosecutor, to establish that the complainant had not given anyone permission to drive her car, asked her whether she knew Ronald Lee Johnson or Charles D. Jones. The complainant answered no to each question. We consider these questions innocuous. The second time was during defense counsel's cross-examination of Officer McCormick, when some of the clothes defendant and the other man involved in the incident allegedly wore and some photographs were being admitted into evidence. The prosecutor interjected in response to defense counsel's referring to defendant as "Mr. Jones:"

> MS. NIELSEN [prosecutor]: Your Honor, I would ask that both of these be admitted—
>
> THE COURT: Any objection, Mr. –
>
> MR. CATALDO: [defense counsel] The only thing I would say, your Honor, is obviously we have two different bags, two different clothing. I just want to be sure that the—the record reflects and if the jurors ask for this stuff that, you know, the stuff for Mr. Jones is kept as Mr. Jones that—when he was arrested, that not—we not mix these things around so that we forget what came out of what bag and who was wearing what. That's my only major concern. I have no objection---
>
> THE COURT: Is it a problem right now?
>
> MR. CATALDO: --to all of it coming in.
>
> MS. NIELSEN: I don't believe so.
>
> THE COURT: We have---we have how many items out of which bag?
>
> MR. CATALDO: We only have three items out of---I believe the green coat comes from Mr. Jones' bag, the two multi-colored documents come from Mr. Shelton's bag. So, if that's all that's coming out then---then I've obviously wasted sixty seconds.

* * *

> MS. NIELSEN: Your Honor, if---if I may, for the record, this particular Defendant was arrested and, as far as the People are concerned, is Mr. Johnson. I didn't want the jury to be confused. He may call himself Mr. Jones, but he's been arrested under the name of Johnson, Ronald Lee Johnson.

In closing argument, the prosecutor referred to defendant as "the defendant," with the exception of two sentences:

> What you're here to decide is only one question, is the Defendant, whether you call him Mr. Johnson or Mr. Jones, guilty of driving away Cynthia Wood's vehicle.

The fourth reference to defendant's names was in the prosecutor's rebuttal:

> If you were sitting where Mr. Jones or Mr. Johnson or whatever or whoever he is today would you be—would want to be convicted at all? Someone who changes their name, changes their clothing and steals a car probably would answer that question no.

We do not believe that the prosecutor's four references to defendant's two names warrant reversal or remand, given that defendant had identified himself to the police with one name, and had given a social security number matching another name. Defendant cites one case, *People v Albert Thompson*, 101 Mich App 609; 300 NW2d 645 (1980), for the proposition that the mention of an alias has been found highly prejudicial to a criminal defendant. *Thompson* is distinguishable from the instant case. In *Thompson*, the prosecutor was allowed, over defense objection, to question the defendant regarding his use of aliases. The *Thompson* court disapproved the notion that use of an alias is highly probative of a witness's credibility, although it declined to reverse because the questions were few and not highly inflammatory, and the evidence of the defendant's guilt was overwhelming. *Id*. at 613-614. We do not believe the prosecutor's references to defendant using two names mandates reversal under *Thompson*. Defendant did not testify in this case. The jury was not told that defendant had served time in Ohio under the name of Johnson. The prosecutor did not seek to introduce any evidence of prior misconduct. Rather, Officer McCormick testified that at the time of arrest defendant identified himself by one name, and provided a social security number that matched another name. Any error was harmless and does not warrant reversal because the comments were few and were not highly inflammatory. *Thompson*, *supra*.

Defendant next argues that the prosecutor argued facts not in evidence in closing argument when she commented "that all prosecution witnesses identified Defendant as the driver of the car; and that Defendant and another person switched clothes."

A prosecutor may not argue facts not in evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Defendant's argument misstates the prosecutor's arguments and is without merit. During closing argument, the prosecutor stated, "Every witness to this crime, from Cynthia Wood

[sic] to the gas station . . . attendant, Mr. Boone, to Lynn Hubrecht to Mr. [sic] McCormick, to Officer Mann, all indicated that the driver of the car was the Defendant." The prosecutor further argued that defendant and his accomplice had "switch[ed] their clothing." Both of these comments were adequately supported by the evidence presented in this case. Several witnesses testified that defendant, the taller, lighter complected man in a tan coat drove the vehicle away, and that the passenger was a darker complected man in a green coat. When the two were arrested, defendant, the taller, lighter complected man, was wearing a green coat. It was for the jury to decide whether the witnesses were mistaken, or the two men had switched clothing. The prosecutor could properly argue for the desired inference.

Defendant next argues that the prosecutor improperly commented during closing argument that defendant's attorney is the person "who's paid to defend him." Defendant objected to this statement. While we conclude that the prosecutor's comment was improper, we are satisfied that it did not deprive defendant of a fair trial. Similarly the prosecutor's comment that "the defense intends to muddy the waters," did not deprive defendant of a fair trial. The prosecutor's remark was in reference to the only defense witness, detective Tim Swanson, who was asked questions only as to whether the other person involved in the incident was charged. The prosecutor's remark that the defense was muddying the waters was in response to this testimony, and was not improper, in context.

Defendant next argues that his conviction should be reversed because the "prosecutor may have omitted exculpatory evidence, i.e., an office not called at trial was assigned to take fingerprints from the stolen vehicle." The prosecution has an affirmative duty to disclose all evidence of which it has knowledge bearing on the charged offense. *People v Williams*, 129 Mich App 362, 367; 341 NW2d 143 (1983); rev'd on other grds 422 Mich 381 (1985). The duty arises, however, only when the prosecutor has knowledge of the exculpatory material. *People v Sizemore*, 69 Mich App 672, 675-676; 245 NW2d 159 (1976).

There was no evidence presented at trial that fingerprints were taken from the stolen vehicle. Officer Clifford E. Mann testified that he was "instructed by Sergeant Butler to inform him that when I had the vehicle impounded for safe keeping as a recovered stolen vehicle, towed to the garage to have him process it for any prints that he may find," Defense counsel asked Mann if he knew if any fingerprints were taken from the vehicle. Mann responded, "I relayed that information to specialist Griffin and what he did after, I'm not sure, sir. I went back on the road."

Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 474 NW2d 873 (1992). Defendant has not shown that fingerprints were in fact taken from the stolen vehicle or that if fingerprints were taken, the results would tend to exculpate defendant. Defendant simply argues that the prosecutor may have omitted exculpatory evidence and has thus failed to satisfy his burden of proof.

II

Defendant next argues that he was denied a fair trial due to ineffective assistance of counsel. He asserts that the trial court, at the hearing on his motion for new trial, "implied that some of the errors appellate counsel attributed to prosecutorial misconduct could also be ineffective assistance of counsel." Defendant argues that counsel's allowing the appearance that defendant used a false name, and counsel's failure to call Griffin to establish that defendant's fingerprints were not found or to argue that such evidence was missing, were highly prejudicial errors where his conviction rested entirely on identification, particularly given the inconsistency of the testimony.

Because defendant failed to move for a new trial or seek an evidentiary hearing on the issue of effective assistance of counsel, appellate review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy, and must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Stanaway*, 446 Mich at 688-689.

Defendant contends that he did not use an alias when arrested, i.e., that Jones, the name he gave police when arrested, is, in fact, his real name, and that the jury was left with the impression that he used an alias because counsel failed to bring a motion to amend the case caption to correct the name and failed otherwise to address the issue before trial.

Defendant further states that "trial counsel appeared confused by the facts during his opening statement," and cites the following statement by trial counsel during opening statement to support this argument:

> As for Mr. Jones, you'll hear information, as the testimony comes out, that a false name was given at the time of arrest by not only Mr. Jones but the person that he was with. So, that will be information that will go to the case itself and I—we'll get to that in just a couple of minutes.

Defendant fails to acknowledge trial counsel's remarks immediately preceding these statements:

> Good morning, ladies and gentlemen of the jury. . . I represent the Defendant in this case, Mr. Jones. The case is entitled People vs. Johnson, but as the testimony will come out, Mr. Johnson's name, as I pointed out to the Court in previous situations, is really Mr. Jones.

Trial counsel was not confused about the fact that defendant's real name is Jones. He repeatedly referred to defendant as Mr. Jones throughout trial. Indeed, defendant's appellate brief argues that trial counsel brought up at the preliminary examination that defendant's name is Charles D. Jones and made an offer of proof to that effect:

> . . . For the record, William Cataldo appearing on behalf of the Defendant whose real name is Charles Derek Jones. There was a time when he was incarcerated and that was the name used in Ohio. He does have a birth certificate and other identification to show that he actually is Charles Derek Jones and we wished to point that out to the court.
>
> Now, I would ask if I could approach the bench to hand in my appearance and receive a copy of the complaint.

Counsel did admit during closing argument that he had been under the mistaken impression that defendant actually gave the name Johnson to Officer McCormick. In fact, he had given the name Jones and a social security number that brought up the name Johnson. We conclude that this misunderstanding had no effect on the trial. We also note that while trial counsel might have moved to amend the caption to preclude any reference to the use of another name, the case did not revolve around defendant's use of a false name or social security number, but rather the credibility of the witnesses' testimony regarding their observations. There was considerable evidence that defendant was the driver. Further, there was overwhelming evidence against both men. The fact that only defendant, who was believed to be the driver, was charged is irrelevant. The second man was observed to get into the car as it was driving away from the restaurant. This is not a situation where the passenger's involvement in the unauthorized driving away of the car is unknown.

Defendant next argues that fingerprints taken by an officer not called at trial would have been exculpatory, or that defense counsel could have argued that such evidence was missing.

As discussed above, there was no evidence at trial that fingerprints were actually taken from the car and defendant points to no such evidence. Defendant is therefore unable to show that there was evidence tending to exculpate him, and that defendant was prejudiced by trial counsel's failure to compel the officer's attendance.

Defendant also argues that trial counsel could have objected to officer Griffin's absence at trial, could have argued that the absence of fingerprint evidence was favorable to defendant, and could have requested CJI2d 5.12, which permits the jury to infer that a missing witness' testimony would have been unfavorable to the prosecution's case. Although we agree that these were all options trial counsel could have attempted to pursue, defendant has not shown prejudice. In light

of the evidence pointing to defendant's guilt, trial counsel's failure to pursue these tactics would likely not have affected the outcome.

Affirmed.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Edward M. Thomas

[1] This argument was in fair response to defense counsel's statement in closing argument:

> Ask yourselves when you're deliberating, if you were sitting in Mr. Jones' seat, would you want to be convicted by this type of information.