

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL HOLMAN,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 236868

Kent Circuit Court

LC No. 00-001091-FC

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. The jury acquitted defendant of the charge of assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to prison terms of eighteen to fifty years for the armed robbery conviction, two to ten years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. The sentences were set to be served consecutively to each other. Defendant appeals as of right. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

I. Facts

Richard and Kathy DeHaan are siblings who worked at a business known as Boston Square Lock and Key. Kathy DeHaan testified that shortly after lunch on January 11, 2000, defendant entered the store, pointed a gun at her, and demanded that she give him the money from the cash register. When defendant asked for more money, Richard DeHaan came out of the back room with his own gun and told defendant to "hold it." Richard DeHaan testified that defendant ran out of the store but then pointed the gun at them through the front store window. At this point, Richard DeHaan fired his weapon at defendant and began chasing him down the street. Richard DeHaan testified that defendant escaped in a light blue Dodge Dynasty. He claimed that he heard defendant discharge his weapon during the chase.

Kathy DeHaan telephoned the police when her brother ran after defendant. The police discovered a vehicle matching the description given by Richard DeHaan in an alley near defendant's home. While setting a perimeter around the vehicle, Officer Phillip Werkema noticed defendant walking away from the area. He testified that defendant matched the height and weight of the description given of the suspect. When Officer Werkema attempted to

approach defendant, he claimed that defendant evaded him by quickly walking between houses. After hearing Officer Werkema's description of defendant over the radio, Officer Kristen Rogers observed defendant come out from between two homes and asked him to stop. She testified that she explained to defendant that he matched the description of a suspected robber in the area and that she was going to detain him. Officer Rogers then placed defendant in handcuffs. She observed that defendant appeared out of breath and nervous but did not discover any weapons on his person. Defendant was not wearing the same clothes that had been described by the DeHaans. The police ultimately sought medical attention for defendant when they discovered he was bleeding from a bullet wound in his shoulder.

Kathy and Richard DeHaan were brought separately to the area where defendant was being detained for a show-up. Only Richard DeHaan was able to identify defendant as the robber at that time. Kathy DeHaan identified defendant as the robber when she testified at trial. She stated that she was now positive of her identification because she heard him speak at the preliminary hearing.

Defendant's mother testified that on the day of the robbery defendant came home shortly after lunch, changed his clothes, and left again. Defendant denied any involvement with the robbery. When questioned by the police at the hospital, defendant claimed that he was shot at a local party store. At trial, however, defendant claimed that his brother shot him accidentally at their home. He testified that he was walking to a friend's house to get a ride to the hospital when he was arrested. Defendant alleged that he lied to the police because he was trying to protect his brother. The prosecution then confronted defendant with a letter, addressed to defendant's brother, that was confiscated from defendant in jail. At the bottom of the letter, defendant wrote: "Study. Keep reading it over. If necessary, add your own details, but it should be straight." Defendant testified that he wrote this letter so that his brother would not commit perjury.

II. Prosecutorial Misconduct

Defendant initially argues that the prosecutor committed misconduct by eliciting testimony that defendant gave false information to the police and used a stolen vehicle. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.¹ Because defendant failed to object to this alleged misconduct, our review is limited to plain error affecting his substantial rights.² "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."³

Detective Gregory Griffin testified that defendant provided a false name, address, and other identifying information to police after his arrest. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of

¹ *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

² *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

³ *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

the action more probable or less probable than it would be without the evidence.”⁴ Testimony that defendant lied to the police about his identity was relevant to show consciousness of guilt.⁵ A prosecutor’s good-faith effort to admit evidence does not constitute prosecutorial misconduct.⁶

Defendant has also failed to show that the prosecutor improperly introduced other bad acts evidence in violation of MRE 404(b). In his appellate brief, defendant specifically references Officer Carole Stahl’s testimony that the vehicle allegedly used in the armed robbery was reported stolen. Officer Stahl explained at trial that she became involved in the armed robbery investigation, which was outside her normal patrol area, because the vehicle’s description matched that of a vehicle recently reported stolen. This testimony was relevant because it explained the circumstances surrounding her discovery of the vehicle.⁷ Further, we do not believe that this evidence was so unfairly prejudicial that it caused the jury to convict defendant on an improper or emotional basis.⁸ We note that the prosecution never suggested that defendant either stole the vehicle or knew that it was stolen.

III. Jury Instructions

Defendant alleges that his federal and state constitutional rights were violated by the trial court’s improper reasonable doubt instruction. This Court generally reviews claims of instructional error de novo.⁹ But given defendant’s failure to preserve this argument below, our review is again limited to plain error affecting his substantial rights.¹⁰

It is the trial court’s duty to clearly present the case to the jury and instruct them on the applicable law.¹¹ There is, however, no requirement that a trial court utilize the standard criminal jury instructions.¹² Defendant claims that the reasonable doubt instructions in this case require reversal because they indicated that conviction of the charged crime was appropriate if the jury was “firmly convinced” of defendant’s guilt and did not believe there was a “realistic possibility” that he was innocent. This Court recently rejected a similar claim that jury instructions equating proof of guilt beyond a reasonable doubt with proof that “firmly

⁴ MRE 401.

⁵ See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996) (holding that a defendant’s threat against a witness is generally admissible because it can show consciousness of guilt).

⁶ *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

⁷ See *Sholl*, *supra* at 741.

⁸ *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995); see also MRE 403.

⁹ *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

¹⁰ *Carines*, *supra* at 763-764.

¹¹ *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

¹² *People v Stephan*, 241 Mich App 482, 495, n 10; 616 NW2d 188 (2000).

convinced” the jury of the defendant’s guilt without a “real possibility” of innocence was erroneous.¹³ As such, we find no error in the instant reasonable doubt instruction.

Defendant also contends that the trial court erroneously instructed the jury to consider the “background” of a witness. This instruction, defendant asserts, allowed the jury to treat police officers as more credible witnesses and to consider a person’s economic and social status. The following are the instructions that the trial court provided to the jury:

We had some witnesses here who were police officers. You need to know that a police officer isn’t entitled to any extra credibility by virtue of the uniform, the badge and the title. But neither is a police officer’s credibility to be automatically diminished in your eyes because he or she is a police officer.

I’m not telling you to ignore the fact that a witness is a police officer. I’m not telling you to ignore every—any witness’ background. Background can often help you understand where the person is coming from, what they mean, why they said what they did, why they saw what they did, whatever.

So, background is important, but you don’t by virtue of a person’s background, be it a police officer or something else, treat the person as automatically more credible or automatically less credible. Background is a consideration, but all witnesses are to be treated the same. And if you give a person’s background due weight, you’re treating everyone the same.

I mean we all have different backgrounds, but treating our backgrounds as relevant is then treating us all the same.

Although the trial court’s remarks about a person’s “background” are arguably vague, in light of the court’s express remarks cautioning the jury that a police officer is not entitled to “extra credibility,” defendant has failed to show plain error affecting his substantial rights.¹⁴ We further note that the trial court’s references to “background” were not directed at a person’s economic or social status.

IV. Assault With a Dangerous Weapon Charge

Defendant also argues that the trial court erred in submitting the assault with a dangerous weapon charge to the jury. This claim is moot because defendant was ultimately acquitted of this offense.¹⁵

¹³ *People v Bowman*, 254 Mich App 142, 148-151; 656 NW2d 835 (2002).

¹⁴ *Carines*, *supra* at 763-764.

¹⁵ See *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

V. Sentencing

Defendant next challenges his sentence of eighteen to fifty years' imprisonment for armed robbery as a third habitual offender. We find no error. Although defendant's sentence is within the recommended statutory sentencing guidelines range, he claims that it is disproportionate considering the circumstances surrounding the crime and his background. Because the instant offense was committed after January 1, 1999, MCL 769.34(10) requires this Court to affirm defendant's sentence in the absence of a scoring error or the use of inaccurate information.

To this end, defendant asserts that the trial court erroneously scored ten points for offense variable nineteen (OV 19). A trial court's scoring of a guidelines variable will be upheld on appeal if there is any supporting evidence.¹⁶ Ten points is properly assessed under OV 19 if a defendant "interfered with or attempted to interfere with the administration of justice."¹⁷ In this case, the trial court determined that ten points was appropriate because defendant gave a false name to the police. And a review of the record supports this finding. A detective with the police department testified that defendant provided him with a false name. Defendant also acknowledged giving the police false information on direct examination.

To the extent defendant argues that a person cannot interfere with the "administration of justice" until after an actual court arraignment, we disagree. This contention appears to be rooted in the theory that interference with the "administration of justice" refers only to conduct directly aimed at interfering directly with the courts. We consider it obvious that, despite their markedly different roles, both the courts and the police function as part of the overall criminal justice system. It is clear to this Court that the investigation of crimes is central to the administration of justice. We are not persuaded by defendant's claim that *People v Deline*¹⁸ requires a different result. In *Deline*, we determined that the defendant was not interfering with the administration of justice when he simply switched positions in a car and refused a blood-alcohol test.¹⁹ The present facts are distinguishable because defendant affirmatively lied to the police. For these reasons, we find that the trial court properly scored defendant ten points under OV 19.

Defendant's argument that the phrase "administration of justice" is unconstitutionally void for vagueness is likewise without merit. The constitutionality of a statute is a question of law that we review de novo. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). But as defendant failed to present this issue to the trial court, our review is for plain error affecting his substantial rights.²⁰ Because defendant makes no argument that the statute

¹⁶ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

¹⁷ MCL 777.49. Although MCL 777.49 was amended after the incident underlying this case, the pertinent statutory language remained the same.

¹⁸ *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002).

¹⁹ *Id.* at 596-598.

²⁰ *Carines, supra* at 763-764.

implicates First Amendment freedoms, we review his challenge in light of the facts at issue.²¹ In this context, a statute may be unconstitutionally vague if it: (1) does not provide fair notice of the conduct prescribed or (2) is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to decide whether the law has been violated.²² We believe that it is readily apparent that providing a false name to the police in the course of a criminal investigation would be understood by a reasonable person to be conduct that constitutes an attempt to interfere with the administration of justice.

For the reasons stated in *People v Hegwood*,²³ we also reject defendant's contention that MCL 769.34(10) is unconstitutional. As the Supreme Court in *Hegwood* explained, "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature."²⁴ We further note that these guidelines merely limit the circumstances in which a defendant's sentence may be challenged and do not abolish the right to appeal. In light of this analysis, we find no substantive or procedural due process violation.

VI. Illegal Arrest

Defendant next argues that his arrest was not supported by probable cause and that any evidence gathered as a result should have been excluded at trial. Because defendant did not raise this issue below, our review is for plain error affecting his substantial rights.²⁵ Defendant claims that his statements to the police were improperly admitted. We find no error requiring reversal. These statements could have properly been used to impeach defendant's trial testimony regarding the nature of his wounds.²⁶ We further note that both the DeHaans were able to identify defendant at trial. On this record, defendant has failed to demonstrate plain error affecting his substantial rights.

VII. Ineffective Assistance of Counsel

Defendant ultimately contends that he is entitled to a new trial because of his trial counsel's failure to object to the errors raised on appeal. Because defendant did not move for a

²¹ *People v Beam*, 244 Mich App 103, 106; 624 NW2d 764 (2000).

²² *Id.* at 105.

²³ *People v Hegwood*, 465 Mich 432, 436-440; 636 NW2d 127 (2001); see also Const 1963, art 4, § 45.

²⁴ *Hegwood*, *supra* at 436.

²⁵ *Carines*, *supra* at 763-764.

²⁶ See *United States v Havens*, 446 US 620, 627-628; 100 S Ct 1912; 64 L Ed 2d 559 (1980).

*Ginther*²⁷ hearing, our review is limited to the existing record.²⁸ An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant's substantial rights.²⁹

As previously held in this opinion, defendant has failed to show any error that affected his substantial rights. An ineffective assistance of counsel claim requires a defendant to show that his counsel's performance prejudiced him to the extent that but for counsel's error there was a reasonable probability that the result of the proceedings would have been different.³⁰ Defendant has not met this burden or overcome the presumption that his counsel's actions were sound trial strategy.³¹

VIII. Judgment of Sentence

Although not addressed by the parties, we conclude that this case should be remanded to the trial court to correct a plain clerical error in the judgment of sentence. The judgment of sentence states that defendant's sentences are to be served consecutively. But at the sentencing hearing, the trial court held that defendant's sentences for armed robbery and felon in possession of a firearm were to run concurrently, and that his felony-firearm sentence was to be served consecutively only to the armed robbery charge.³² The judgment of sentence should be corrected to reflect the trial court's sentencing decision.

We affirm defendant's convictions but remand for correction of the clerical error in the judgment of sentence. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald

I concur in result only.

/s/ Kirsten Frank Kelly

²⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

²⁸ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

²⁹ *Carines, supra* at 763-764.

³⁰ *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

³¹ See *id.* at 599-600; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

³² See *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999).