

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY LEONARD HARRIS,

Defendant-Appellant.

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UNPUBLISHED

April 1, 2008

No. 277062

Bay Circuit Court

LC No. 06-010305-FH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of larceny from a person, MCL 750.357, arguing that defense counsel's failure to object to improper and inadmissible evidence at trial rendered counsel ineffective, and that a reasonable probability exists that the trial's outcome would have been different were it not for counsel's deficiency. We affirm.

At trial, complainant testified that shortly after leaving a residence with his friend, Lee Brown, he was checking the contents of his wallet when defendant approached, grabbed the wallet, and ran from the scene. Complainant and Brown identified defendant as the perpetrator, and a police officer testified that complainant selected defendant from a lineup.

At several points during his testimony, Brown opined that defendant was of bad character, was a violent person, and dealt in narcotics. Defense counsel did not object to this testimony.

The prosecutor elicited testimony from Woody Blakely, a defense witness, and defendant that each man had prior felony convictions. Defense counsel did not object to this testimony.

The jury convicted defendant as charged. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 34 to 120 months in prison, with credit for 181 days.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001) (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a

defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant failed to preserve the issue of ineffective assistance by moving for either a new trial or a *Ginther* hearing in the trial court. Therefore, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant argues that the evidence regarding his character was inadmissible under MRE 404(a), and that evidence of his and Blakely's prior records was inadmissible under MRE 609, and that counsel erred by failing to object to this evidence. Defendant contends that but for counsel's error, he would have been acquitted. We disagree.

Even assuming that the character evidence admitted via Brown's testimony and the evidence of defendant and Blakely's prior records elicited by the prosecutor was inadmissible and that defense counsel erred by failing to object, we conclude that defendant was not deprived of the effective assistance of counsel because counsel's deficient performance did not result in prejudice. This case was a credibility contest, and all the non-police witnesses had difficulty remembering events clearly, or had a motive to be less than truthful about what occurred on the evening in question. It is undisputed, though, that both complainant and Brown testified that defendant snatched complainant's wallet from complainant's hand, and that when Brown recovered the wallet, complainant's money was missing. Complainant was certain in his identification of defendant as the person who took his wallet, and maintained that he did not hesitate when he viewed a lineup and identified defendant as the person who took his wallet. A detective testified that complainant identified defendant as the perpetrator, and that complainant did not express uncertainty about his identification. The jury was entitled to believe this identification evidence. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Given the strong identification of defendant as the perpetrator by two eyewitnesses, and complainant's identification of defendant in a lineup, it is simply speculation to state that but for the admission of improper character and prior record evidence, it is reasonably probable that defendant would have been acquitted. *Carbin, supra*. Counsel's performance was deficient, at least in this aspect of the trial, but the result was not fundamentally unfair or unreliable. *Odom, supra*.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Donald S. Owens

/s/ Bill Schuette