

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN EUGENE BANKS, JR.,

Defendant-Appellant.

UNPUBLISHED
September 18, 2008

No. 277797
Kent Circuit Court
LC No. 06-009074-FH

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant Alvin Banks, Jr., appeals as of right his jury conviction of second-degree home invasion.¹ The trial court sentenced Banks as a fourth habitual offender,² to 7 to 30 years' imprisonment. We affirm.

I. Basic Facts And Procedural History

Emily Wheeler testified that she left her apartment the morning of June 10, 2006, and when she returned the following evening, the apartment had been burglarized, and various items were missing. The perpetrator apparently broke the first floor kitchen window to enter the apartment. She further testified that a woman named Kathleen lived upstairs and that no one but her landlord had a key to her apartment.

Plaintiff moved, without objection, to qualify Officer William Wolz as an expert in fingerprint analysis. Officer Wolz testified that fingerprints matching those of Banks were found on the broken kitchen window, on both interior and exterior pieces of the broken Plexiglas, and that the prints were from fingers on both of Banks' hands.

Banks became a suspect after his fingerprints were recovered from the window. Detective Jamie Chianfoni interviewed Banks. Detective Chianfoni testified that when she met

¹ MCL 750.110(a)(3).

² MCL 769.12.

with Banks he was not in custody, and was free to leave, but that she read him his *Miranda*³ rights regardless. Banks admitted to Detective Chianfoni that he was at the apartment building, and said that he knew a “Jody” who lived upstairs. Detective Chianfoni further reported that Banks told her that he leaned against the window to urinate, and that his fingerprints would thus be found on the window. This statement surprised Detective Chianfoni because, although she had told Banks that his fingerprints were found at the crime scene she was investigating, she had not specifically told him they had been found on a window. When Detective Chianfoni asked Banks about the stolen property, he first responded that he did not have it, and then added that he “didn’t take anything.” Banks lived about a third of a mile from the apartment.

During voir dire, both attorneys discussed the concepts of the burden of proof, beyond a reasonable doubt, with the potential jury members. The prosecuting attorney also discussed the concept of circumstantial evidence and explained that cases are sometimes decided on circumstantial evidence. The jury found Banks guilty as charged.

II. Great Weight of the Evidence

A. Standard Of Review

We review a trial court’s decision on a motion for a new trial predicated on the great weight of the evidence for an abuse of discretion.⁴ An abuse of discretion occurs when the trial court chooses an outcome falling outside a “principled range of outcomes.”⁵

B. Analysis

The hurdle a judge must clear to overrule a jury verdict is among the highest in our law, and exercise of that prerogative must be strictly limited, with all presumptions running against doing so.⁶ “A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.”⁷ A trial court might disturb a jury verdict where testimony on which it depended is “patently incredible or defies physical realities,” or where “the witness’ testimony has been seriously impeached and the case marked by uncertainties and discrepancies.”⁸

In this case, the evidence suggesting Banks’ guilt was not so devoid of all probative value that the jury could not have reasonably believed it. Banks admitted to being at the apartment

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

⁴ *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998).

⁵ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

⁶ *People v Bart (On Remand)*, 220 Mich App 1, 13; 558 NW2d 449 (1996).

⁷ *Lemmon*, *supra* at 627.

⁸ *Id.* at 643-644 (internal quotation marks and citations omitted).

building without ever denying entering the apartment in question. Additionally, he lived only a third of a mile from the building. Most convincingly, Banks' fingerprints, from each hand, were found on both the interior and exterior of the broken pieces of the kitchen window, the invader's obvious entry point. In light of this evidence, we conclude that Banks has not shown that the trial court abused its discretion in denying his motion for new trial.

III. Prosecutorial Misconduct

A. Standard Of Review

Banks argues that the prosecuting attorney engaged in misconduct by improperly shifting the burden of proof to Banks. Because defense counsel did not object to the prosecuting attorney's remarks, the issue is unpreserved. Therefore, we consider Banks' claim under the plain-error rule.⁹ Reversal over an unpreserved issue is proper only where plain error resulted in the conviction of an innocent person, or it seriously affected the fairness, integrity, or public reputation of the proceedings.¹⁰

B. Shifting The Burden

More specifically, Banks argues that the prosecuting attorney shifted the burden of proof to the defense when arguing that Banks should logically have affirmatively stated that he never entered the burglarized apartment in his interview with Detective Chianfoni. We disagree with this interpretation of the prosecuting attorney's remarks.

When a defendant chooses to exercise his right to remain silent, that silence may not be used against him at trial.¹¹ However, where a defendant has not invoked the right to remain silent, a description of that defendant's behavior, including what that defendant does not say, to explain the circumstances and conduct of that defendant is not improper comment on post-arrest silence.¹²

Here, Banks did not invoke his right to remain silent when talking to Detective Chianfoni. After being advised that his fingerprints had been found at the building that was the scene of the breaking and entering under investigation, he admitted to being at the apartment building and to touching the window. The prosecuting attorney argued simply that, given that Banks had chosen not to remain silent in the matter, it would be logical to suppose that had he in fact never been inside the apartment, he would have affirmatively made that point to Detective Chianfoni. Once a defendant begins to talk, the prosecuting attorney is free to comment on what the defendant failed to mention or clarify. The prosecuting attorney did not engage in

⁹ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

¹⁰ *Id.*

¹¹ *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999).

¹² *Id.*

misconduct when highlighting that Banks' comments to Detective Chianfoni were not entirely consistent with his theory of innocence.

C. Voir Dire

Banks also takes issue with the prosecuting attorney's use of voir dire. After discussing circumstantial evidence and telling the jury that cases in the past, including one involving murder, had been decided on minimal circumstantial evidence, the prosecuting attorney asked the potential jurors, "Does anybody else have a problem convicting somebody of that if we present enough circumstantial evidence to convince you beyond a reasonable doubt that that person did it?" Banks argues that this commentary improperly minimized the government's burden of proof. We disagree.

MCR 6.412(c)(1) states that voir dire "should be conducted for the purpose of discovering grounds for challenges for cause and for gaining knowledge to facilitate an intelligent exercise of peremptory challenges." In this case, the prosecuting attorney mentioned the murder case as an example of one decided on circumstantial evidence to help identify any potential jurors who had a problem with that legally acceptable practice.¹³ This was a proper use of voir dire, not prosecutorial misconduct.

In any event, appellate relief for unpreserved claims of prosecutorial misconduct is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction.¹⁴ In this case, any prejudicial effect of the challenged comments could readily have been cured by a timely instruction. For these reasons, we reject this claim of error.

IV. Assistance of Counsel

A. Standard Of Review

Banks argues that he was denied effective assistance of counsel or, alternatively, that if the existing record is not sufficient to decide the matter, he is entitled to an evidentiary *Ginther*¹⁵ hearing to further develop the issue.

Generally, a *Ginther* hearing or motion for new trial must precede a claim of ineffective assistance of counsel.¹⁶ Defendant raised this issue in his motion for a new trial or *Ginther* hearing. Therefore, this issue is preserved. "Whether a person has been denied effective

¹³ See *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999) ("Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime.").

¹⁴ *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005).

¹⁵ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

¹⁶ *Id.*; *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

assistance of counsel is a mixed question of fact and constitutional law.”¹⁷ The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional rights.¹⁸ We review for clear error the trial court’s findings of fact, and we review de novo questions of constitutional law.¹⁹

B. Analysis

For a defendant to establish ineffective assistance of counsel, he must show that defense counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms.²⁰ The defendant must additionally show a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.²¹ The defendant must overcome a strong presumption that counsel’s tactics were matters of sound trial strategy.²²

Banks argues that his trial counsel was ineffective for failing to seek suppression of Banks’ statements to the police detective and for failing to object to the prosecuting attorney’s comments to the jury, as discussed above.

Concerning the statement to Detective Chianfoni, because Detective Chianfoni testified that Banks was not in custody at the time, but had been read the *Miranda* warnings, defense counsel likely had nothing to gain from seeking suppression of that statement. Banks’ protestations to the contrary are of little significance because they simply create a credibility contest between a neutral police officer and a defendant with an interest in upsetting his conviction. Banks thus fails to show that the trial court would likely have resolved that contest in his favor. “Counsel is not obligated to make futile objections.”²³

Concerning the allegations of prosecutorial misconduct, because we concluded above that the prosecuting attorney did not engage in prosecutorial misconduct, we conclude here that no claim of ineffective assistance can be predicated on the attendant lack of objections.²⁴ Further, even if defense counsel’s performance were lacking in these particulars, Banks has not shown that the outcome would have been different had defense counsel performed better. Instructions that the prosecution, not the defense, bore the burden of proof, in direct response to certain prosecutorial commentary, would have simply duplicated instructions provided generally in connection with the presumption of innocence and the prosecutor’s evidentiary burden. And, as

¹⁷ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

²¹ *Id.*

²² *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

²³ *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

²⁴ See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

noted above, there was a solid basis for concluding that Banks' statements to the police detective were admissible so that a motion for an evidentiary hearing on the question would likely not have kept that evidence from the jury.

We further conclude that the existing record is sufficient to evaluate Banks' claim of ineffective assistance, and thus that the trial court did not abuse its discretion in declining to convene a *Ginther* hearing to investigate the matter further.²⁵

Affirmed.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio

²⁵ See *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999).