

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 16, 2013

v

SHAWN DEONTAYE GARDNER,
Defendant-Appellant.

No. 303997
Genesee Circuit Court
LC No. 10-027585-FC

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317,¹ felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 80 to 120 years for the second-degree murder conviction and 5 to 10 years for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals by right. We reverse and remand for a new trial.

Defendant's convictions arise from the August 16, 2009, shooting death of Lennon Johnson. The prosecution presented evidence that defendant and Ricco Holmes pursued Johnson in a car chase through the streets of Flint, during which defendant shot at Johnson with an assault rifle. Johnson died from a gunshot wound to the head. Pursuant to a plea agreement, Holmes pleaded guilty to second-degree murder and felony-firearm, and testified against defendant at trial. Holmes claimed that he drove the vehicle as defendant shot at Johnson.

The defense theory at trial was that Holmes and other witnesses were not credible, and that most of the prosecution witnesses were motivated to fabricate their testimony to receive favorable consideration in their own pending criminal matters. The defense alleged that Holmes had a motive to kill Johnson because Johnson was scaring patrons at a club where Holmes was

¹ Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a). The jury found him guilty of the lesser offense of second-degree murder.

promoting parties. A defense witness, Cedric Earley, testified that Holmes admitted to him that he shot Johnson.

We begin by addressing defendant's argument that defense counsel was ineffective for failing to object to polygraph evidence that was intended to discredit Earley's testimony. Although defendant did not raise this ineffective assistance of counsel claim in the trial court, we may review the issue from the available record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Cedric Earley, a defense witness, testified that he was serving time in prison for a homicide and had talked to Holmes while both were in the county jail. According to Earley, Holmes admitted that he was the person who shot Johnson. On cross-examination, the prosecutor asked Earley how many times he had lied to the officer in charge, Sergeant Michael Angus. Earley denied lying to Angus. In rebuttal, the prosecutor recalled Sergeant Angus and the following exchange occurred:

Q. You heard the testimony of Cedric Earley; is that correct?

A. Yes.

Q. Cedric Earley ever lie to you about his case?

A. Yes.

Q. Did he in fact take a polygraph?

A. Ah, due to a change in the story he was sent to, ah, the Genesee County Sheriff's Department for a, ah, a polygraph; um, with David Dwyer. Ah, during the polygraph, ah, alled -- ah, David Dwyer talked about the results; but I do know that at the completion of the polygraph he came back with the, ah, original story that he had talked to me.

Q. So he admitted he had lied?

A. Lied about --

Q. To you?

A. -- yes.

Defense counsel did not object to this testimony or request a mistrial. Instead, he attempted to show on cross-examination that the officer disingenuously described conflicting statements from a prosecution witness as inconsistent statements, but characterized conflicting statements from a defense witness as lies. Although a defense attorney's strategy decisions will ordinarily not establish ineffective assistance of counsel, we conclude that there was no valid strategy in failing to object to the prosecutor's improper injection of polygraph evidence to discredit Earley's testimony.

It is well established that polygraph evidence is not admissible at trial. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). To determine whether a defendant was prejudiced by an improper reference to polygraph evidence, this Court considers the following factors:

- (1) whether defendant objected to and/or sought a cautionary instruction;
- (2) whether the reference was inadvertent;
- (3) whether there were repeated references;
- (4) whether the reference was an attempt to bolster a witness's credibility; and
- (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*People v McGhee*, 268 Mich App 600, 631; 709 NW2d 595 (2005) (quotations and citations omitted).]

Here, there was no objection or request for a cautionary instruction, but this failure serves as the basis for the claim of ineffective assistance. The second factor favors defendant because it is clear that the reference was intentional. The prosecutor directly asked her own witness whether Earley took a polygraph. The issue was not raised inadvertently by the witness. Regarding the third factor, although there was only a single question asking about a polygraph test, because defense counsel failed to object, Angus was permitted to give a lengthy answer linking the changes in Earley's story to the polygraph, and used the polygraph to explain the basis for Angus's characterization of Earley's statements as a lie. Further, Angus was called in rebuttal, just before the jury began deliberations, so the timing of the question and response were fresh in the minds of the jurors when they began deliberations. The fourth factor favors defendant because the prosecutor's questioning reflects a calculated attempt to use Earley's submission to a polygraph to discredit Earley's testimony and to bolster Angus's testimony that Earley was lying. The fifth factor also favors defendant because, although the results of Earley's polygraph examination were not expressly stated, they were revealed indirectly because the context of the testimony conveyed that Angus had concluded from the polygraph results that Earley had lied.

After considering the above factors, we conclude that defense counsel's failure to object to the improper polygraph evidence, or to request a mistrial, fell below an objective standard of reasonableness. *Pickens*, 446 Mich at 338. Further, defendant was prejudiced because the clearly improper question and response supported a mistrial. See *People v Terry*, 489 Mich 907;

796 NW2d 469 (2011).² The outcome of this case was contingent on a credibility contest amongst the witnesses, most of whom were facing their own criminal charges and admitted having an interest in testifying to obtain favorable consideration in their own criminal matters. Earley's testimony, if believed, would have directly refuted the testimony of Holmes, the prosecution's principal witness, that defendant was responsible for shooting the victim. Considering the many credibility issues that the jury was required to resolve, there is a reasonable probability that the result of the trial may have been affected by the prosecutor's intentional interjection of Earley's polygraph examination to bolster the credibility of the officer in charge and to discredit Earley's account. Accordingly, defendant has satisfied the test for ineffective assistance of counsel. *Johnnie Johnson, Jr*, 451 Mich at 124.

In light of our decision, it is unnecessary to address defendant's claim that the trial court erred in denying his request, on the first day of trial, for appointment of new counsel. It is also unnecessary to address defendant's pro se argument that the trial court erred by failing to provide him with a set of trial transcripts where he was represented by appellate counsel and a set of transcripts had already been furnished to appellate counsel. However, we briefly address defendant's claims of evidentiary error in the event these issues may arise on remand.

We find no merit to defendant's unpreserved argument that evidence of his post-offense threats should have been excluded. A witness testified that shortly after the shooting, defendant threatened him with a gun and warned him not to say anything about defendant's involvement in the shooting. Although defendant argues that this evidence was inadmissible under MRE 404(b)(1) (prohibiting evidence of other bad acts "to prove the character of a person in order to show action in conformity therewith"), the evidence was not subject to MRE 404(b)(1) because it was admissible as part of the res gestae of the offense. *People v Malone*, 287 Mich App 648, 661-662; 792 NW2d 7 (2010). "A defendant's threat against a witness is generally admissible." *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). The conduct may establish consciousness of guilt. *Id.*

Lastly, contrary to what defendant argues, the trial court did not foreclose defendant from offering evidence that Morgan was a "professional witness." Rather, it only sustained the prosecutor's objection because defendant had not established a foundation to show that Morgan

² Although this ruling was rendered in an order, not an opinion, a peremptory order of the Supreme Court is binding precedent when the rationale can be understood. *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).

had actually testified in other cases in exchange for consideration. Under the circumstances, the trial court did not abuse its discretion in sustaining the prosecutor's objection. *People v Roper*, 286 Mich App 77, 90-91; 777 NW2d 483 (2009).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood