

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 19, 2014

v

CORDALE JAMESON GOLDEN,

Defendant-Appellant.

No. 312542
Wayne Circuit Court
LC No. 12-003725-FC

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right his jury-based conviction of armed robbery, MCL 750.529. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 10 to 15 years' imprisonment. We affirm both the conviction and the sentence.

Defendant's conviction arose out of an altercation with the complainant that began at a gas station. The complainant testified that she and two colleagues had stopped at the gas station, and that she had planned to go into the station to buy cigarettes. As she walked toward the station, a man called her over to a tan car parked by the gas pumps. Defendant was seated in the passenger seat of the tan car. He pointed a gun at the complainant and told her to get into the car. The complainant got into the tan car, and the car drove away. The complainant's colleagues followed in their car, because they were unsure of complainant's reason for entering the tan car.

While the complainant was riding in the tan car, defendant demanded all of her cash, amounting to approximately \$500. Once defendant had taken the money, the driver of the tan car slowed down. The complainant jumped out of the tan car and got into her colleagues' car. They subsequently flagged down a police car and reported that the complainant had been robbed.

Later, two police officers on routine patrol observed a tan car run a stop sign. The officers activated their police lights and followed the tan car, which then picked up speed, turned, and picked up speed again. The officers eventually stopped the tan car, and the driver ran from the car. The officers retained defendant. Upon searching defendant, the officers found approximately \$400 in cash. The officers did not find a gun in the car.

Defendant first argues that he is entitled to be resentenced under the adjusted sentencing guidelines range of 51 to 170 months, which reflected the corrected prior record variable (PRV) 5 score from five points to two points. We disagree.

Pursuant to MCL 777.55(1), the trial court originally assessed five points against defendant under PRV 5, MCL 777.55(1)(d). However, defendant filed a motion for resentencing on the ground that he should have been assessed only two points under MCL 777.55(1)(e). The trial court agreed with defendant's argument and adjusted defendant's PRV 5 score to reflect two points, instead of five points. The court noted that this change would decrease defendant's guidelines range from 81 to 270 months, to 51 to 170 months. The court denied defendant's motion for resentencing and stated, "Allowing for the modified scoring of PRV 5 and change in the guidelines of 50 to 170 months, his sentence of ten to fifteen years as a fourth habitual offender is within the guidelines and *does not merit resentencing.*" (Emphasis added.)

Defendant now argues that he is entitled to be resentenced based on the adjusted guidelines range. Defendant does not dispute the trial court's finding that his minimum sentence of 10 years, as a fourth habitual offender, falls within the adjusted guidelines range of 51 to 170 months. However, resentencing is not required "where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006), citing *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003). In the instant case, defendant's sentence is within the new guidelines range of 51 to 170 months, which reflected the adjusted PRV 5 score. Additionally, the trial court made it clear that the same sentence—10 to 15 years as a fourth habitual offender—would have still been imposed if the original guidelines had been set at 51 to 170 months. Thus, the trial court did not err, and defendant is not entitled to resentencing.

Next, defendant argues that the trial court abused its discretion by including the jury instruction regarding evidence of defendant's flight from the police. We disagree.

This Court reviews a claim of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), remanded in part on other grounds by 467 Mich 888 (2002). However, the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

Defendant argues that the trial court erred by including this instruction because there was a lack of evidence that defendant attempted to flee from the police. "It is well established in Michigan law that evidence of flight is admissible." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Flight evidence is probative to "indicate consciousness of guilt." *Id.* Flight can include actions such as "fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Id.* Pursuant to M Crim JI 4.4, the model jury instruction for flight, the trial court instructed the jury:

Now, there's been some evidence that the Defendant tried to runaway [sic] and talking about in the course of the police chase and the car stops and all those kind of things, and you can decide whether or not the Defendant was trying to runaway [sic], that's your call, when the police was [sic] trying to stop the car. That evidence does not prove guilt. A person may run or hide for innocent reasons

such as panic, mistake or fear. However, a person may also run or hide because of consciousness of guilt. You must decide whether the evidence was true, and if true, whether it shows that the Defendant had a guilty state of mind.

Contrary to defendant's argument, the trial court did not abuse its discretion by determining that the facts of the case warranted a jury instruction for flight. *Dobek*, 274 Mich App at 82. In overruling defendant's objection on this particular jury instruction, the court noted that the evidence presented at trial indicated that defendant was a passenger in the tan car that fled police. Moreover, the driver of the tan car stopped the vehicle at one point, before pulling over and running, and defendant likely could have left the vehicle at that point. The trial court can still instruct the jury on flight even though defendant was a passenger and not the driver, in a vehicle that fled from police. The court properly included this instruction because the court did not instruct the jury that defendant definitively fled the police, but instead stated that the flight evidence was not evidence of defendant's guilt for the charged offenses, and the jury still had to determine whether defendant actually fled from the police. Therefore, the instruction was properly given.

Lastly, defendant argues that his trial counsel was ineffective for advising defendant not to testify, based on incorrect information that defendant had prior convictions of theft or dishonesty. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's "findings of fact are reviewed for clear error . . .," and questions of "constitutional law are reviewed by this Court de novo." *Id.* "A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs only when the trial court chooses an outcome falling outside the principled range of outcomes." *Id.* (internal citations omitted).

Both the United States and Michigan Constitutions provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To adequately prove a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Smith v Spisak*, 558 US 139, 150; 130 S Ct 676; 175 L Ed 2d 595 (2010). See also *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Moreover, "[b]ecause the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). In evaluating an ineffective assistance of counsel claim, this Court "will not substitute its judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

Defendant argues that his trial counsel was ineffective because he advised defendant not to testify based on information that defendant had a prior conviction involving theft or dishonesty. Trial counsel has a duty to conduct a reasonable investigation, and a failure to do so can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Despite defendant's contention to the contrary, his trial counsel did conduct an investigation into defendant's previous convictions. Defendant's trial counsel testified at the evidentiary hearing that he checked his office's "I Chat" system and was able to retrieve defendant's criminal record—which did not include any convictions involving theft or dishonesty. However, trial counsel was aware that the "I Chat" system was not always accurate, so he verified the information with defendant. Defendant advised trial counsel that he thought he had two other convictions, "RCSP Motor Vehicle, or an UDAA," one of which involved theft or dishonesty.

Defendant cannot show that his counsel's performance fell below an objective standard of reasonableness, *Trakhtenberg*, 493 Mich 38 at 51, because trial counsel reasonably relied on the information defendant provided when advising defendant not to testify. In part, trial counsel advised defendant not to testify in order to avoid the prosecution eliciting information on those convictions during cross-examination. Counsel's performance was not objectively unreasonable. Additionally, counsel's advice to defendant not to testify on his own behalf has a presumption of a sound trial strategy that defendant has failed to overcome. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). This Court has established that it will not substitute its judgment for trial counsel regarding trial strategy. *Unger*, 278 Mich App at 242-243. Trial counsel properly informed defendant of his right to testify on his own behalf and ensured, on the record, that defendant knew that the ultimate decision to testify rested on defendant himself. Finally, trial counsel also testified that he would have advised defendant not to testify regardless of any prior convictions involving dishonesty or theft.

Even if trial counsel's conduct had been objectively unreasonable, defendant has not shown that the result of his proceedings would have been different. *Trakhtenberg*, 493 Mich at 51. Defendant may have decided not to testify regardless of any prior convictions, based on his role in the incident. Moreover, the prosecution had already presented significant testimony implicating defendant. The complainant identified defendant as the individual who robbed her while pointing a weapon at her. Moreover, according to one of the testifying police officers, defendant was in the passenger seat of the tan car when the car eventually pulled over. Due to this evidence, defendant cannot prove that the result of his proceedings would have been different. Defendant has not demonstrated that his trial counsel was ineffective and has not demonstrated that the outcome of his trial would have been different but for counsel's performance. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey