

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 18, 2013

v

DIOR DICKERSON,

No. 309326
Wayne Circuit Court
LC No. 11-003147-FC

Defendant-Appellant.

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant Dior Dickerson appeals as of right his convictions for armed robbery, MCL 750.529; assault with intent to do great bodily harm less than murder, MCL 750.84; felonious assault, MCL 750.82; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. After a jury trial, the trial court sentenced defendant to 15 to 25 years' imprisonment for his armed robbery conviction, 6 to 10 years' imprisonment for his assault with intent to do great bodily harm less than murder conviction, two to four years' imprisonment for his felonious assault conviction, and two years' imprisonment for his felony-firearm conviction. We affirm defendant's convictions, but remand for the ministerial correction of his PSIR.

Near the end of February 2011, Mario Sagona, the victim, contacted defendant, whom he knew only as "City," with regard to purchasing medical marijuana. Defendant had informed Sagona that his cousin was a caregiver for medical marijuana patients. Sagona was dissatisfied with his caregiver and wanted to purchase marijuana from defendant's cousin through defendant. Defendant and Sagona made plans to meet on March 2, 2011, at Cherry Hill Apartments in Inkster. Defendant informed Sagona that he was bringing his cousin. Sagona arrived at the apartments, parked under a carport, and saw two men approaching his vehicle. Sagona recognized defendant and assumed the other person was defendant's cousin. Defendant sat in the front passenger seat of Sagona's vehicle and Kevin Corley, the individual with defendant, sat in the back seat behind Sagona. After a short conversation, Sagona turned to face Corley. Sagona then heard a gun "rack back," turned, and saw that defendant was pointing a gun at his chest. Defendant demanded that Sagona give him the money. Sagona denied having any money and defendant shot Sagona through his right kneecap. Defendant again demanded the money and Sagona told him that it was in the vehicle's glovebox. Defendant took Sagona's money and the keys to the vehicle and left with Corley. Sagona telephoned 911 and emergency personnel arrived on the scene. Sagona informed officers that someone named "City" shot him. After

Sagona was released from the hospital, he found defendant's and Corley's photographs on Facebook and identified them as the two individuals involved in the incident. Sagona also found photographs on defendant's Facebook page under the caption "City Boy Dior."

Defendant's case was consolidated with Corley's for trial and Corley was charged with armed robbery, MCL 750.529; unarmed robbery, MCL 750.530; and larceny from a person, MCL 750.357, under an aiding and abetting theory. At trial, defendant argued that he was not at the crime scene and that Sagona was mistaken about his identity. Defendant testified that he was in an altercation with Sagona a few weeks before the incident, suggesting that Sagona had motive to lie. Corley did not testify at trial, but called a witness who testified that she drove both defendant and Corley to the apartment complex and waited in her car for Corley to return. The witness testified that she believed that defendant was going to the apartment complex to sell marijuana and that she would receive \$10 for gas money from the proceeds of the sale. The witness testified that when Corley returned, he looked "stunned." Corley was acquitted of all charges.

Before trial, the court held a motion hearing with regard to the defendants' request for severance of the trials. The trial court denied this motion stating, "I'm not satisfied that there's been a showing by an affidavit defining the inconsistencies between the defenses. . . ." Defendant renewed his motion for severance on the first day of trial after finding out about Corley's witness. Defendant's counsel stated that he believed that Corley's witness would testify that she drove defendant to the crime scene and that this would be contradictory to defendant's theory of the case because defendant was planning to argue that he was not at the crime scene. The trial court agreed to let defendant's counsel interview the witness before she took the stand, but again denied defendant's motion for severance. The trial court also appointed counsel for Corley's witness and the prosecutor granted the witness immunity for anything she might testify to at trial.

On appeal, defendant first argues that the trial court abused its discretion in denying his motion for severance. We disagree. This Court reviews a trial court's decision regarding severing the trials of multiple defendants for an abuse of discretion. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994). "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. Absent such a showing, or any indication that the requisite prejudice actually occurred at trial, this Court will affirm a trial court's decision denying a motion for severance. *Id.* at 346-347. Although "a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused, the standard for severance is not lessened in this situation." *Id.* at 347. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id.* at 349. The tension between defenses offered at trial must be "so great that a jury would have to believe one defendant at the expense of the other." *Id.*

Here, defendant has not shown that he suffered substantial prejudice. "[A] fair trial does not include the right to exclude relevant and competent evidence." *Id.* at 362 (quotation marks and citation omitted). Because Corley's witness had relevant and competent testimony

concerning the case, her testimony would have been admissible in both trials if the trials were separated. Moreover, defendant and Corley did not offer mutually exclusive defenses as defined by *Hana*. Defendant asserted that he was not at the crime scene and that his identity was mistaken, either willfully or accidentally, by Sagona. Corley presented evidence, through a witness, that supported that he was at the scene, but did not aid or abet in the crime. The jury could believe that defendant's identity was mistaken and that codefendant was at the scene and did not aid or abet in the crime, or the jury could believe that both defendant and Corley were lying and that defendant was at the scene and codefendant aided and abetted in the crime. The jury was not forced to believe one defendant at the expense of another. *Id.* at 349-350. Therefore, the trial court did not abuse its discretion when it denied defendant's motion to sever.

Next, defendant argues that the prosecutor's comments with regard to Sagona's credibility during closing argument constituted misconduct. We disagree. "We generally review de novo allegations of prosecutorial misconduct." *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, because this issue is unpreserved, "our review is actually for plain error that affected his substantial rights." *Id.* "Generally, [p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness. *Id.* at 276. Nevertheless, a prosecutor may argue the evidence and "may argue from the facts that a witness should be believed." *People v McGhee*, 268 Mich App 600, 630; 707 NW2d 595 (2005). Additionally, "the prosecutor's comments must be considered in light of defense counsel's comments." *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001)

During closing arguments, both defendant's counsel and Corley's counsel argued the credibility and trustworthiness of Sagona. Defendant's counsel asked if Sagona was "as trustworthy as he seems," and stated that there was a possibility that Sagona was a "liar." Corley's counsel argued that Sagona "exaggerated" or "puffed up" the incident. During rebuttal, after reiterating some of defense counsel's arguments with regard to Sagona's credibility, including acknowledging the fact that Sagona was attempting to purchase marijuana when he was shot, the prosecutor stated:

What did [Sagona] say? He said, "You told me to testify honestly. That no matter if its bad or not, just to tell the truth." And that's what he did. He admitted that he was going there to buy some marijuana that was not legitimate and it wasn't allowed.

Considering the prosecutor's comments in light of defense counsel's comments, it is clear that the comment was a response to arguments made by both defendant's counsel and Corley's counsel and was not improper bolstering. Moreover, Sagona testified that he was told to testify honestly. A prosecutor may argue from the evidence that a witness is credible, *McGhee*, 268 Mich App at 630, and "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). We find no error requiring reversal with regard to the prosecutor's challenged comments during closing argument.

Next, defendant argues that his trial counsel was ineffective for failing to cross-examine Corley's witness about her immunity agreement and for failing to object to the prosecutor's improper vouching for Sagona's credibility. "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," while constitutional questions are reviewed de novo. *Id.* Where, as here, no *Ginther*¹ hearing was held, review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To prevail on an ineffective assistance of counsel claim, "defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). With regard to prejudice, defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Here, even assuming that the failure to raise the issue of the immunity agreement was unreasonable, defendant has failed to show that he was prejudiced by any alleged error. The evidence of defendant's guilt presented at trial was substantial. "In light of the overwhelming evidence of guilt, there is no reasonable probability that, but for any of the alleged deficiencies by trial counsel, the result of the trial would have been different." *People v Ramsdell*, 230 Mich App 386, 407; 585 NW2d 1 (1998). Additionally, with regard to defendant's assertion that his counsel was ineffective for failing to object to the prosecutor's comment, because we find that the comment was not improper, defendant cannot demonstrate that his counsel's performance in failing to object was unreasonable. See *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Next, defendant argues that the cumulative effect of the above alleged errors denied him a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003) (citation omitted). Here, because we find no merit with regard to any of defendant's alleged errors, defendant cannot show that their cumulative effect denied him a fair trial. *Knapp*, 244 Mich App at 388.

Defendant's final argument is with regard to alleged inaccurate information contained in his Presentence Investigation Report (PSIR). Defendant was convicted of unarmed robbery, MCL 750.530, and larceny from a person, MCL 750.357, in addition to the convictions previously noted. Although the trial court vacated these convictions at the sentencing hearing, they still appear under the "current convictions" sections of defendant's PSIR. Defendant argues that he is entitled to have these convictions stricken from the PSIR. We agree.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

MCL 7771.14(6) states,

At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

“[U]se of the term ‘shall’ rather than ‘may’ indicates mandatory rather than discretionary action.” *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). Accordingly, “[w]hen a sentencing court states that it will disregard information in a presentence report challenged as inaccurate, the defendant is entitled to have the information stricken from the report.” *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). See also *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003) (“If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections.”).

Here, although the trial court agreed that the offenses of unarmed robbery and larceny from a person would be vacated, they still appear under the “current convictions” sections of defendant’s PSIR. The information contained in the PSIR is, thus, inaccurate. Accordingly, defendant is entitled to have the vacated convictions stricken from the PSIR.

Affirmed, but remanded for the ministerial correction of the PSIR in accordance with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ Kurtis T. Wilder

/s/ Donald S. Owens