

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 20, 2014

v

LAURA LYNNE DALE,
Defendant-Appellant.

No. 313411
Jackson Circuit Court
LC No. 12-004093-FH

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions for uttering and publishing, MCL 750.249, and forgery, MCL 750.248. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 3 to 20 years' imprisonment for each conviction. Because defendant was not denied the right to, or the effective assistance of, counsel, we affirm.

I. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that she was denied the effective assistance of counsel when her trial counsel failed to object to the use of her prior convictions as impeachment evidence. In order to preserve a claim of ineffective assistance of counsel for appellate review, a defendant must move either for a new trial or for an evidentiary hearing. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant failed to do either; therefore, our review "is limited to mistakes apparent on the appellate record." *Id.* Further, to the extent that this issue also involves whether evidence was improperly admitted, because there was no objection at the trial court, that portion of the issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.*

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the

defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

At trial, the prosecution, through defendant's testimony on cross-examination, offered into evidence the fact that defendant previously was convicted of "illegally using" a financial transaction device,¹ forgery, uttering and publishing, and conspiring to commit forgery. On appeal, defendant claims that defense counsel was ineffective for failing to object to the use of these convictions.

MRE 609(a) governs the admissibility of evidence of prior convictions being used to impeach a witness's credibility and provides the following:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

In her brief on appeal, defendant acknowledges that the prior crimes "likely contain an element of theft or dishonesty." Defendant nonetheless asserts that evidence of those past convictions were inadmissible under MRE 403. Under MRE 403, even relevant evidence is

¹ While the prosecutor stated that defendant had been convicted of "illegally using a financial transaction device," the specific conviction was for violating MCL 750.157v, which prohibits knowingly providing a *false statement* of identity for the purpose of procuring the issuance of a financial transaction device. To the extent that the prosecutor mischaracterized her conviction, any error was harmless.

inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

However, upon closer inspection, defendant's reliance on MRE 403 is misplaced. Here, defendant's prior convictions of making a false statement to procure a financial transaction device, uttering and publishing, forgery, and conspiring to commit forgery all contain elements of dishonesty or false statement. Thus, only MRE 609(a)(1) is implicated. Our Supreme Court has explained that if the prior conviction has as an element of false statement or dishonesty, thereby falling under MRE 609(a)(1), that conviction "is inherently more probative than prejudicial. Therefore, defendants who are so impeached may not claim that such impeachment violates MRE 403." *People v Allen*, 429 Mich 558, 594 n 16; 420 NW2d 499 (1988). The Court determined that "as a matter of law[,] prior convictions of crimes involving dishonesty or false statement are more probative than prejudicial," which makes it impossible for such convictions to have their probative value substantially outweighed by prejudice, as would be necessary for the convictions to be inadmissible under MRE 403. *Id.* Additionally, we note that MRE 609(a)(2)'s probative/prejudicial balancing test only comes into play if the crime contained an element of theft; no such balancing test is required if the crime contained an element of dishonesty or false statement, thereby falling under MRE 609(a)(1). *Allen*, 429 Mich at 605-606.

Therefore, because defendant's prior convictions all had elements of dishonesty or false statement, they were admissible under MRE 609(a)(1), and any objection based on MRE 403 would have been unsuccessful. It is well established that trial counsel is not ineffective for failing to raise a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next argues in her Standard 4 brief that she was denied the effective assistance of counsel when counsel allegedly failed to communicate a plea offer to her. "A claim of ineffective assistance of counsel may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer." *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012); see also *People v Williams*, 171 Mich App 234, 241; 429 NW2d 649 (1988).

In support of her argument, defendant solely relies on some letters that she improperly attached to her Standard 4 brief. Because our review is limited to the lower court record, we cannot consider those documents. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992). As such, defendant has failed to establish the necessary factual predicate for supporting her claim of ineffective assistance of counsel, and her claim fails. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Moreover, even if we were to consider these letters, they do not support defendant's position that she never was informed of any plea offer. The letter from her attorney clearly provides that he "discussed the offer of the plea bargain with [defendant] on several different occasions." At best, the attached documents support the position that defendant was never notified in writing of any plea offer, but that does not mean that defendant was not otherwise notified.

II. RIGHT TO COUNSEL

Defendant also argues in her Standard 4 brief that she was denied the right to hire her own attorney. We review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *Carines*, 750 Mich at 764.

The constitutional right to counsel encompasses the right of a defendant to choose her own retained counsel. *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *Aceval*, 282 Mich App at 386. An erroneous deprivation of a defendant's right to retained counsel of her choice is a structural error requiring reversal. *Gonzalez-Lopez*, 548 US at 148-149.

Defendant asserts that the trial court denied her request to retain her own attorney and, instead, forced her to use appointed counsel. However, our review of the lower court record shows that this is not what happened. At the May 4, 2012, pretrial conference, appointed counsel stated, "My client is asking the court to give her time to retain her own attorney. She's got – can't do it until she gets her income tax return back, which is going to take – what – six to eight weeks?" Defendant, herself, then confirmed that it would take "[a]bout eight weeks." The prosecutor suggested setting the trial for six to eight weeks into the future and if defendant was able to procure other counsel by then, then she would be allowed to substitute. The trial court agreed and stated that it was going to set a trial date eight weeks away and that it was "going to leave [appointed counsel] in the case until such point in time as I know you've got another lawyer." Thus, it is clear that the trial court granted defendant the specific relief she requested, i.e., that she be given eight weeks in order to retain her own attorney.² Accordingly, defendant cannot seek appellate relief based on the trial court doing what defendant requested. See *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Furthermore, from the record, it is apparent that defendant later never informed the trial court that she acquired the necessary funds and was ready to retain an attorney. As a result, the trial court never deprived defendant of her right to retain her own attorney.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

² Not only did the trial court initially set a trial date for July 2, 2012, at that May 4, 2012, pretrial conference, but the actual trial date eventually got pushed all the way back to August 13, 2012.