

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 25, 2009

v

KARMONE FORD,

No. 282805
Macomb Circuit Court
LC No. 2007-001373-FH

Defendant-Appellant.

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving or concealing a stolen motor vehicle, MCL 750.535(7), third-degree fleeing or eluding a police officer, MCL 257.602a(3), first-degree home invasion, MCL 750.110a(2), driving with a suspended license, 257.904(1), and assault and battery, MCL 750.81. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 7 to 25 years each for the stolen motor vehicle, fleeing or eluding, and home invasion convictions, and 93 days each for the suspended license and assault convictions. He appeals as of right. We affirm.

I. Basic Facts

On March 13, 2007, Elizabeth Maynard reported her 2002 Jeep Liberty stolen.¹ Maynard did not know defendant and he had no permission or reason to be driving her vehicle. On March 14, 2007, the police saw defendant driving the Jeep and attempted to effectuate a traffic stop. According to the police testimony, defendant “looked back,” ignored signals to stop, sped up, then stopped, exited the vehicle, and fled on foot. As officers were searching for defendant, Kristin Kelly stepped out of her door and asked for help. An officer heard a male voice behind Kelly directing her to be quiet and to close the door. Kelly was then pulled back inside and the door was closed. A friend of the Kelly family was in the driveway and observed Kelly open the

¹ Maynard testified that she suspected that her son was involved in the theft of her car keys and the vehicle because “he has problems.” She further testified that her son did not have permission to take the vehicle.

door and yell for help before the door “closed quickly.” Kelly testified that defendant entered her house, asked her to hide him, and walked through her house looking for a place to hide. After Kelly ran to the front door and yelled for help, defendant grabbed her from behind by her arms, pulled her back inside, threw her to the ground, and slammed the door. Defendant subsequently ran out the back door, and an officer saw him jump a fence and run. An officer testified that defendant again disregarded orders to stop, continued running, tried to jump another fence, but fell to the ground and was arrested. Officers explained that defendant was dirty and muddy, and had fresh cuts on his hand. Kelly had dirt and someone else’s blood on her clothes, and red marks, bruising, and scrapes on her arms. There were muddy footprints “going all the way across” Kelly’s kitchen, and dirt and blood on her back door.

In a statement to the police, defendant stated that he gave a girl nicknamed “Red” \$30 for the Jeep. Red told him that she had gotten it from a friend and “to get rid of it,” which defendant understood to mean that he should “make the car disappear.” Defendant stated that he figured the vehicle was stolen or was part of some sort of fraud. Defendant claimed that he fled from the police because his license was suspended and he had no money to get out of jail. He stated that he saw Kelly go inside her home and decided to follow her in to hide from the police. He denied assaulting Kelly, and indicated that he told her that he only wanted to hide there.

II. Preliminary Examination

Defendant argues that the trial court erred in denying his motion to remand for a preliminary examination because his waiver was involuntary. We disagree.

On the first day of trial, defendant moved to remand to the district court, arguing that his prior waiver of the preliminary examination was not knowingly and intelligently made. In objecting, the prosecution argued that the case had been pending for seven months, and that defendant had waived his opportunity for a preliminary examination and had signed a written waiver. In denying the motion, the circuit court agreed that the case has been “going on too long,” and noted that trial had been set and all parties were prepared to proceed with the trial.

Regardless of the reasons for the trial court’s denial, relief is precluded in light of the recognition in *People v Hall*, 435 Mich 599, 601-603, 613; 460 NW2d 520 (1990), that the harmless error test applies to the preliminary examination stage. If a defendant is fairly convicted at trial, any error in failing to conduct a preliminary examination does not warrant reversal where the defendant has not shown that the alleged error affected the trial. See *People v McGee*, 258 Mich App 683, 685, 697-698; 672 NW2d 191 (2003), citing *Hall, supra*. Defendant contends that the lack of a preliminary examination was damaging because “he was unable to challenge the sufficiency of the evidence for the bindover or to move to quash the information,” or to adequately challenge Kelly’s credibility. But because defendant’s convictions were based on proof beyond a reasonable doubt, there is no basis for concluding that the prosecutor could not have successfully established the lesser standard of probable cause at a preliminary

examination.² Further, we note that sufficient evidence was presented to sustain defendant's conviction of receiving or concealing a stolen vehicle (as discussed in part IV), and defendant does not argue on appeal that the prosecutor presented insufficient evidence at trial to sustain his other convictions. In sum, defendant has failed to state a cognizable claim for relief based on the trial court's failure to remand for a preliminary examination.

III. Admission of Photographs

Next, defendant argues that he was denied his right to due process because the prosecutor failed to timely provide discovery, contrary to the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We disagree. Because defendant failed to raise this claim below, this Court reviews his unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a due process right of access to certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about a defendant's guilt. *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998), citing *Brady, supra*. "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Lester, supra* at 281 (citation omitted). In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* at 281-282.

Defendant has not established a *Brady* violation. The record discloses that six photographs were admitted into evidence: (1) a photograph of the stolen vehicle; (2) a photograph of the vehicle's VIN number; (3) a photograph showing dirt and mud on Kelly's shirt; (4) a photograph showing blood and dirt or mud on Kelly's back door; (5) a photograph depicting bruising on Kelly's arm; and (6) a photograph of a muddy shoeprint in Kelly's home. The record shows that defense counsel had an opportunity to review the photographs at trial and did not object to their admission. Further, defendant does not explain how any of the

² In *People v Harlan*, 258 Mich App 137, 145; 669 NW2d 872 (2003), this Court explained:

The prosecutor is required to demonstrate at the preliminary examination that a crime has been committed and that there is probable cause to believe the defendant committed the crime. This probable cause standard is not a very demanding threshold. As our Supreme Court observed in [*People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997)], a magistrate may bind a defendant over for trial even "while personally entertaining some reservations" regarding his guilt. It is sufficient that the prosecutor presents some evidence with respect to each element of the offense charged, "or evidence from which the elements may be inferred." [Citations omitted.]

photographs were favorable to his defense. The photographs were consistent with the testimony of Kelly and two police officers, and supported the prosecution's case against defendant. Thus, this evidence was not favorable to defendant. Moreover, although defendant speculates that earlier receipt of the photographs may have affected the outcome of his case, he makes no specific claims regarding the *actual* effect. Consequently, defendant has failed to show a plain error affecting his substantial rights. *Carines, supra*.

Within this issue, defendant also argues that he was denied the effective assistance of counsel at trial. Because defendant failed to raise this issue in a motion for a new trial or request for an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

1. Failing to Object to the Admission of the Photographs

We reject defendant's claim that defense counsel was ineffective for failing to object to the admission of the six photographs. Because there is no basis for finding a *Brady* violation, defendant cannot establish a claim of ineffective assistance of counsel in this regard. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile objection).

2. Failing to Request an Adjournment

We also reject defendant's claim that defense counsel was ineffective for failing to move for an adjournment after the late receipt of the photographs. "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . ." MCL 768.2. A trial court's ruling on a motion for an adjournment is reviewed for an abuse of discretion. *Snider, supra* at 421. When deciding whether the trial court abused its discretion, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *Snider, supra*.

Here, defendant cannot demonstrate prejudice. He makes no specific claims of prejudice, and has failed to indicate what he would have done differently had the defense had additional time to review the photographs. There is simply nothing in the record to support defendant's assertion that defense counsel should have moved for an adjournment and, given the depictions in the photographs, there is no reasonable probability that the verdict would have been different had the defense had additional time. Consequently, defense counsel was not ineffective in this regard.

3. Failing to Impeach Kelly

Defendant further argues that defense counsel failed to use Kelly's police statement to impeach her at trial. However, defendant does not explain what conflicting, inconsistent, or helpful information was in the statement. Without any information regarding the exculpatory value of the statement, defendant cannot prove that defense counsel was ineffective in this regard. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted) (“[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position”).

Moreover, during cross-examination, defense counsel questioned Kelly about one part of her statement, i.e., whether she tried to fight defendant. Thus, defense counsel was aware of Kelly's statement, but apparently chose not to use it for impeachment purposes. Decisions about what questions to ask and what evidence to present are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In addition, the record discloses that defense counsel challenged Kelly's credibility. Defense counsel questioned Kelly regarding her recitation of the events, and attempted to highlight inconsistencies in her testimony. Furthermore, given the overwhelming weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted but for trial counsel's action. *Frazier, supra*. Therefore, defendant cannot establish a claim of ineffective assistance of counsel.

IV. Sufficiency of the Evidence

Defendant also argues that the evidence was insufficient to sustain his conviction for receiving or concealing a stolen vehicle. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Rather, “a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of receiving or concealing a stolen motor vehicle are that (1) the vehicle was stolen, (2) the defendant bought, received, possessed, concealed, or aided in the concealment of the vehicle, (3) that the vehicle is identified as the vehicle previously stolen, and (4) the defendant had knowledge of the stolen nature of the vehicle at some time during his wrongful course of conduct. MCL 750.535(7); *People v Allay*, 171 Mich App 602, 608; 430 NW2d 794 (1988). For an item to be considered stolen, it need only be taken without permission or right. *People v Pratt*, 254 Mich App 425, 428; 656 NW2d 866 (2002). Knowledge concerning the status of a stolen item encompasses not only actual knowledge, but constructive knowledge. *People v Wilbert*, 105 Mich App 631, 637; 307 NW2d 388 (1981). Because direct evidence of guilty knowledge is rarely available, it generally must be inferred from the surrounding circumstances. *People v Salata*, 79 Mich App 415, 421; 262 NW2d 844 (1977).

In this case, the owner of the Jeep Liberty testified that her vehicle was stolen from her home and she reported the theft to the police. Evidence showed that the police observed defendant driving the stolen vehicle the day after it was reported stolen. The owner did not know defendant, and he did not have permission to have her vehicle. There was evidence that the police tried to effectuate a traffic stop, but defendant ignored their orders, continued driving, eventually stopped, exited the vehicle, and fled on foot. After being arrested, defendant confessed to the police that he had paid someone \$30 for the car, and believed that it was stolen or involved in some kind of fraud. The jury could reasonably infer from defendant's statement that defendant drove the vehicle with at least constructive, if not actual, knowledge that it was stolen. Viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of receiving or concealing a stolen motor vehicle.

V. Sentencing Discretion

Defendant's last argument is that he is entitled to resentencing because the trial court did not recognize that it had discretion with respect to the habitual offender enhancement. We disagree. When imposing a maximum sentence that is discretionary because of the defendant's status as a repeat felony offender, the sentencing court is not required to state that it understands that it has sentencing discretion and is utilizing that discretion. *People v Knapp*, 244 Mich App 361, 388-389; 624 NW2d 227 (2001). On the contrary, it is well established that "absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *Id.* at 389.

MCL 769.12 is clear that, as it applies to this case, an increase of the authorized maximum term of imprisonment for subsequent offenders is discretionary. At the sentencing hearing, the parties had extensive discussions about defendant's circumstances, history, and possible maximum sentence, with input from the probation department. After the parties' arguments, the trial court exercised its discretion and sentenced defendant. The trial court is presumed to know the law, and there is no clear evidence that it was unaware of its discretion. Resentencing is not required.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Alton T. Davis