

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LUKE LAVIN,

Defendant-Appellant.

UNPUBLISHED

January 5, 2010

No. 289879

Wayne Circuit Court

LC No. 08-009775-FH

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of breaking and entering a building with intent to commit larceny, MCL 750.110, and malicious destruction of property less than \$200, MCL 750.377a(1)(d). He was sentenced as a fourth habitual offender, MCL 769.12, to 6 to 20 years in prison for the breaking-and-entering conviction, and to one day in jail for the malicious-destruction-of-property conviction. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant's convictions arose from his forced entry into the building of his employer. The incident was recorded on videotape. The identity of the perpetrator, including the person's race, was difficult to discern from the recording because of the darkness of the tape. However, one of the owners believed that the person depicted in the videotape was defendant because of his movements. The office manager also thought that the perpetrator was defendant because of his height, stockiness through the shoulder area, movements, and mannerisms. The videotape showed the perpetrator touching areas of the scene and reaching into a file cabinet. A sample package of furniture cleaner was inside the cabinet. Two fingerprints from the package matched defendant's fingerprints. The office manager testified that the package had been in the top drawer of the locked file cabinet, which had not been accessible to employees since she began working for the business in April 2005. The office manager could not recall when defendant was first employed, but knew that "he hired after I did."

On appeal, defendant argues that he was denied his right to a fair trial because the prosecutor and the trial court elicited as "prior bad acts evidence" the fact that the police officer had access to defendant's fingerprints to compare to those lifted from the scene.

The prosecutor elicited from Officer Wanbaugh that he had fingerprints from defendant to compare to those from the scene. Later, the trial court posed questions to the witness, beginning with two questions from the jury.

THE COURT: These questions have been asked of you by ladies and gentlemen of the jury. Is everyone's fingerprints on file?

THE WITNESS: No.

THE COURT: How did you come up with the defendant as a match?

THE WITNESS: I was given his name, a copy of his driver's license and his social security card by the owners at the Quality Tool.

THE COURT: Okay. After he was arrested on April 30th, 2008, there were also fingerprints taken of him, correct?

THE WITNESS: That's correct, you Honor.

THE COURT: All right. And the fingerprints which you lifted off of the Pledge package—

THE WITNESS: (Interposing) Yes.

THE COURT: Was a match with one of those fingerprints that you had been provided as part of the arrest package of the defendant?

THE WITNESS: No, your Honor. They were from two—

THE COURT: (Interposing) Stop. Ladies and gentleman, return to the jury room.

After the jury was excused, the witness explained that the fingerprint card he used for the comparison was from a previous arrest. The trial court evidently misread the date of the fingerprint card that had been shown. The court advised counsel that it intended to instruct the jury to disregard the last question, and defense counsel thanked the court. The jury returned, and the court instructed it to disregard the last question.

Defendant contends that the jury likely inferred from the evidence that his fingerprints were on file that he had prior contacts with law enforcement, and therefore was a "bad person—a person who was guilty of the instant case simply because he had prior police contacts." Defendant contends that the evidence was inadmissible under MRE 404(b) and MRE 403.

Because defense counsel did not object, we review this issue for plain error pursuant to *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999):

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally

requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant's innocence.” [Citations omitted.]

Contrary to defendant’s contention, no evidence of any prior bad acts was presented. The prosecutor merely elicited that the fingerprint expert had defendant’s prints for comparison. Although the court’s final question may have resulted in testimony about prior law enforcement contact had it been answered, the court interrupted the witness before any answer was given or any damage occurred. The court’s inquiry was not plain error. Moreover, the court instructed the jury to disregard the question, and in its final instructions, informed the jury that the court’s and the lawyers’ questions are not evidence. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, defendant has not shown outcome-determinative plain error under *Carines*, *supra* at 763.

Defendant also argues that trial counsel was ineffective for failing to object when the prosecutor elicited evidence that the police had defendant’s fingerprints on file, and for failing to move for a mistrial after the trial court’s inquiry. Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court’s review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish ineffective assistance of counsel, a defendant must show that his counsel’s representation “fell below an objective standard of reasonableness” and 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). A defendant must also demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at 302-303.

Counsel was not ineffective for failing to object to the prosecutor’s question because it was not improper. The prosecutor merely elicited evidence that the officer had compared defendant’s fingerprints with the fingerprints collected at the scene. As explained earlier, the court stopped the witness before any additional responses were given that may have prejudiced defendant. Nor was counsel ineffective for failing to request a mistrial after the trial court’s inquiry. After the trial court recognized the potential prejudice regarding the source of defendant’s fingerprints, the court fashioned an appropriate remedy, i.e., an instruction to disregard the question. Because “a mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way,” *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988), we are convinced that the trial court would have denied a mistrial had counsel requested one. Counsel was not ineffective for failing to make a futile or meritless motion. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Brian K. Zahra