

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 25, 2012

V

No. 306754
Bay Circuit Court
LC No. 06-011173-FC

WILLIAM HAROLD JANISKEE,

Defendant-Appellant.

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of unarmed robbery, MCL 750.530,¹ and one count of assault with intent to do great bodily harm less than murder, MCL 750.84 (assault GBH). He was sentenced as a habitual offender (second offense), MCL 769.10, to concurrent prison terms of 88 to 270 months' imprisonment for unarmed robbery, and 88 to 180 months' imprisonment for assault GBH. Defendant appeals by right, and we affirm.

I. FACTS

On the morning of her assault, the victim was speaking on the telephone with her daughter when defendant rang the rear doorbell to her home. The victim stayed on the telephone with her daughter until she knew who was at the door. She recognized defendant as a former next door neighbor and let him into her home because he told her he needed to call a wrecker to tow his vehicle. At one point, while her back was turned, defendant grabbed her arm and stated, "Virginia, don't fight me." The victim remembered struggling with defendant, who had his hands around her throat until she passed out. She testified that the next thing she could recall was waking up on the floor. While the victim acknowledged that she could not immediately recall defendant's name or identify him in a photographic lineup, she reported to the police that she was sure defendant was the perpetrator.

¹ Defendant was originally charged with armed robbery, but the jury found defendant guilty of the lesser included offense of unarmed robbery.

Following the attack, several items were discovered missing from the victim's home, including \$100 from her purse and coins from her jewelry box, a variety of alcoholic products, and her keys. Her daughters also noticed that one of the victim's new frying pans had a large dent in the middle of the pan. The police testified that they collected the telephone book and frying pan as evidence, but recovered no fingerprints from the evidence. The frying pan was tested for DNA evidence, and defendant could not be ruled out as match to the partial DNA recovered from the handle of the frying pan.

Defendant testified that at the time of the attack he was visiting the Saginaw unemployment benefits office to inquire about why he had not received a check since April 2005. Defendant claimed that he received a check at the Saginaw office that day for \$149. However, the state unemployment claims manager testified that defendant had not applied for unemployment benefits since April 2005. He further testified that, unlike their main office in Detroit, local offices do not have the capacity to directly issue checks.

II. ADMISSIBILITY OF DNA REPORT

Defendant first argues that the trial court violated his constitutional right to confront the witnesses against him when the court permitted the prosecutor to admit a DNA report as evidence. This report was prepared by an out-of-state analyst from Bode Laboratories, and the actual author of the report did not testify at trial. Instead, an analyst from the Michigan State Police Forensic Science Laboratory testified that, based on the report, defendant could be neither confirmed nor excluded as a match to the DNA found on the handle of the frying pan. The analyst reported that one out of every 100 African-Americans will be a match to the DNA found on the handle of the frying pan, and acknowledged that approximately 2.6 million people in America could fit the DNA profile. Defendant is an African-American. The victim was excluded as a match.

The record unambiguously establishes that defendant's counsel stipulated to the use of this evidence. Accordingly, the issue has been affirmatively waived. See *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011); *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

III. IMPEACHMENT EVIDENCE

Defendant next argues that, in violation of MRE 609, the trial court erred by permitting the prosecutor to cross-examine defendant regarding a 1987 assault and battery conviction and a 1989 larceny conviction.

Defendant was born on June 28, 1967. On direct examination, defendant testified that he was convicted of driving while impaired in 1996 and 2006. He also indicated that when he was between the ages of 11 and 16, he was convicted of "some assault and batteries." He also stated "there's some assault and batteries when I was a little older than 18." On cross-examination, defendant was asked about the 1987 assault and battery conviction, to which he responded, "Yes. I said that." When asked whether he was convicted of larceny over \$100 in 1989, he responded that he did not remember it, although his "lawyer had said something about that."

In *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985), our Supreme Court explained the intersection between MRE 609 and false testimony provided by the defendant at trial:

It remains within the trial court's discretion to admit at any time during the course of a trial evidence of prior convictions, notwithstanding a ruling to exclude such evidence under MRE 609, if it is being offered for some proper purpose other than to impeach a defendant's credibility in general. For instance, evidence of prior convictions is always admissible to show perjured testimony of the defendant regarding the existence or nature of prior convictions. . . .

Pursuant to *Taylor*, when defendant implied that other than for “some assault and batteries when I was a little older than 18” he had no other adult convictions, he opened the door to questioning about the 1989 larceny conviction (defendant was 22 years old). Indeed, in acknowledging that his lawyer had “said something about” the larceny conviction, defendant’s failure to mention it on direct examination evidences an intent to deceive. Thus, no error occurred, plain or otherwise, with respect to this evidence.

Regarding the 1987 assault and battery conviction, it seems clear that it could not have been inquired on under either *Taylor* or MRE 609. It cannot be justified on the basis that defendant misled the jury on direct examination because he specifically stated that he had “some assault and batteries when I was a little older than 18.” Moreover, MRE 609(a) only permits a party to impeach a witness by his or her prior criminal convictions if, after “the evidence has been elicited from the witness or established by public record during cross-examination,” the crime (1) was a misdemeanor or felony and contained an element of falsity or dishonesty, or (2) was a felony and contained an element of theft. MRE 609(a)(1), (2). MRE 609(c) prohibits the use of this evidence if ten years have lapsed since the date the witness was released from confinement relative to that conviction. The 1989 larceny conviction was outside the ten-year period.

It is true that MRE 404(a) and MRE 405(a) permits a prosecutor to present character evidence, with specific instances of conduct, to rebut a pertinent character trait raised by the accused to prove “action in conformity” to the character trait on a specific occasion. *People v Lukity*, 460 Mich 484, 497-498; 596 NW2d 607 (1999). However, this evidence becomes admissible once the accused places his or her character trait in issue by raising it during direct examination. *People v Roper*, 286 Mich App 77, 95-96; 777 NW2d 483 (2009). Defendant’s acknowledgment on direct examination of several prior convictions did not place his character in issue. Further, the prosecutor did not seek to admit the conviction under MRE 404(b) when it filed its notice of intent to admit other acts evidence.

Regardless, any error was insufficient to justify reversal because it did not prejudice defendant for the same reason that it is not admissible under *Taylor*—defendant himself noted that he had convictions of assault and battery as an adult. When a defendant “opened the door” to cross-examination of his prior criminal convictions, he cannot be heard to complain about the prosecutor’s cross-examination. *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). A brief reiteration, especially where defendant acknowledged that he had already testified to the fact of the conviction, did not affect the outcome of the proceedings.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant finally argues that his convictions should be reversed because he received constitutionally deficient representation at trial from his counsel, such that it violated his Sixth Amendment guarantee to counsel. We disagree. A claim of ineffective assistance of counsel is “a mixed question of fact and constitutional law.” *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). This Court reviews the trial court’s factual findings for clear error, while any constitutional determinations are reviewed de novo. *Id.*

Although defendant is guaranteed the right to counsel under both the US Constitution, US Const, Am VI, and Michigan Constitution, Const 1963, art 1, § 20, defendant bears a high burden in proving that his trial counsel was so deficient as to functionally deprive defendant of his right to effective counsel at trial. *People v Meissner*, 294 Mich App 438, 458; 812 NW2d 37 (2011). The United States Supreme Court has set forth a two-prong test to determine whether counsel was ineffective in a given case. First, defendant must prove that his trial counsel failed to meet an objective standard of reasonableness based on “prevailing professional norms.” *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, defendant must establish prejudice, which is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

Defendant argues that his trial counsel’s decision to stipulate to the use of the DNA report constituted ineffective assistance because the report was clearly inadmissible and extremely damaging to defendant’s case. However, “[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy . . . as is a decision concerning what evidence to highlight during closing argument.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant’s counsel stipulated to this evidence before trial and argued from it during opening arguments. Trial counsel also elicited from the state police analyst that, based on the report, at least 2.6 million other people in the country would be a potential match to the DNA found on the handle of the frying pan. In context, it is clear that defendant’s counsel believed that he could support defendant’s claim of misidentification by highlighting the apparent statistical weakness of the report. Defendant offers no other argument, other than the inadmissibility of the evidence, to overcome the presumption that his trial counsel exercised trial strategy in relying on this evidence. Accordingly, defendant failed to prove that stipulating to this evidence was objectively unreasonable.

Defendant also argues that his counsel was ineffective for failing to object during cross-examination to the prosecutor’s questioning regarding his prior criminal convictions, and for “opening the door” by inquiring about them during direct examination. As noted above, there was no error with respect to questioning defendant about his 1989 larceny conviction. Counsel cannot be deemed ineffective for failing to raise a meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). With respect to the 1987 assault and battery conviction, defendant cannot establish the requisite prejudice for the same reason noted above. Additionally, defense counsel’s introduction of prior criminal convictions is “a trial strategy often followed by

defense attorneys who believe it less damaging to present this information to the jury before the prosecution does so in cross-examination.” *People v Clyburn*, 55 Mich App 454, 457; 222 NW2d 775 (1974).² Moreover, “[o]ur Supreme Court has recognized that ‘there are times when it is better not to object and draw attention to an improper comment.’” *Horn*, 279 Mich App at 40 (citation omitted).

As for opening the door to questions about his criminal history, it appears, in context, that defendant’s counsel asked defendant about his prior convictions in order to create the inference that defendant had no history of stealing and no recent history of violence, which would make defendant appear less likely to be the perpetrator of the robbery and assault GBH. Defendant failed to establish that his counsel’s actions fell below an objective standard of reasonableness.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro

² In the present case, the prosecutor filed a motion to admit MRE 404(b) evidence, alleging that defendant, in 1990, broke into the home of an elderly individual, in an area defendant was familiar with, and assaulted the lone victim while committing a robbery in the home. The prosecutor alleged that this evidence demonstrated defendant’s common scheme or plan to assault and rob elderly victims who lived alone. At the start of trial, the prosecutor noted that his victim was deceased and unavailable. However, the prosecutor asked the trial court to withhold any decision contingent on the evidence produced at trial. In light of the prosecutor’s failure to withdraw this issue, the decision to admit the prior convictions by the defense during cross examination constituted trial strategy under the circumstances.