

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN JAY LAX,

Defendant-Appellant.

UNPUBLISHED

May 20, 2003

No. 236867

Kent Circuit Court

LC No. 00-011416-FH

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of two counts of resisting and obstructing a police officer, MCL 750.479, and domestic assault (second offense), MCL 750.81(3). The trial court sentenced defendant as a fourth-offense habitual offender to concurrent terms of 40 to 180 months in prison for the resisting and obstructing convictions and to time served for the domestic assault conviction. We affirm.

I. Facts

At approximately 6:00 a.m. on October 27, 2000, Pamela Soldan called the Grand Rapids Police Department to report a domestic assault. When Officers John Kraczon and Darren Geraghty arrived at Soldan's home, Soldan informed them that her boyfriend, defendant, physically assaulted her and that he had absconded from parole. When the officers attempted to place defendant under arrest, defendant refused to cooperate, attempted to flee, and physically fought with the officers.

II. Analysis

A. Motion for Mistrial

Defendant claims that the trial court erred by denying his motion for a mistrial. "[T]he proper standard of review for a trial court's decision to grant or deny a mistrial is abuse of discretion." *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* at 513-514.

Defendant moved for a mistrial after the prosecutor stated, during opening argument, that Officer Kraczon missed one month of work and Officer Geraghty missed four months of work because of the injuries they sustained during their struggle to arrest defendant. Defense counsel argued that the prosecutor's remarks amounted to an improper appeal to the sympathies of the jury.

While we agree with defendant that recovery time is not an element of the crime of resisting and obstructing, the trial court correctly denied defendant's motion for a mistrial on this basis. *People v Julkowski*, 124 Mich App 379, 383, 335 NW2d 47 (1983). The prosecutor's isolated remark did not constitute a deliberate appeal to the sympathies of the jury, it was not so inflammatory that it prejudiced defendant and the record does not reflect that the prosecutor made the remark for purposes of improperly swaying the jurors to decide the case on an improper basis. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Further, the severity of the officers' injuries became a critical issue during the trial to rebut defendant's claim that he never fought the officers during his arrest and that any resistance he used was in an attempt to defend himself from police brutality. Moreover, the trial court explicitly instructed the jurors that the lawyers' arguments are not evidence and that they should not allow sympathy or prejudice to influence their decision. Clearly, the prosecutor's comment did not prejudice defendant and did not warrant a mistrial.

B. Evidence of Parole Violation

Defendant contends that he was denied a fair trial because the trial court allowed Soldan, Officer Kraczon and Officer Geraghty to testify that defendant absconded from parole. Defendant concedes that this issue is not preserved for appeal because defense counsel failed to object to the disputed testimony during trial. If there is a failure to object, defendant "is only entitled to relief if he demonstrates plain error affecting his substantial rights, meaning that he was actually innocent or the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings'" *People v Knox*, ___ Mich App ___; ___ NW2d ___ (Issued April 8, 2003, Docket No. 226944), quoting *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). However, it is well-settled that the intentional relinquishment of a right constitutes a waiver of any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

The prosecutor raised the issue of defendant's parole violation before Soldan testified. The prosecutor stated his concern that Soldan would testify that she called the police at defendant's request because defendant wanted to return to jail for absconding from parole. The trial court ruled that it would admit the evidence to show intent.¹ During the discussion, defense counsel specifically stated that she would not challenge the evidence and thereby waived any error in its admission. *Carter, supra*.²

¹ See MRE 404(b).

² Were we to conclude that defendant properly preserved this issue, we would nonetheless reject defendant's argument. As noted, the trial court specifically admitted the evidence because it was offered for a proper purpose, to show intent. MRE 404(b)(1). Defendant does not challenge the trial court's decision to admit the evidence on this basis. Moreover, the trial court considered the prejudicial impact of evidence regarding defendant's absconder status by noting that, while
(continued...)

However, defendant also contends that defense counsel's failure to object to the evidence constituted ineffective assistance of counsel. "Because defendant failed to move for a new trial or request a *Ginther*³ hearing below, our review of this issue is limited to mistakes apparent on the appellate record." *People v Davis*, 250 Mich App 357, 368, 649 NW2d 94 (2002). As this Court explained in *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001):

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688, 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

We hold that defense counsel's decision not to challenge the evidence and to rely on it during trial was a matter of trial strategy. Throughout trial, defense counsel sought to establish that defendant intended to turn himself in for failing to report to his parole officer. Defendant specifically testified that, notwithstanding his admitted assault of Soldan, he planned to turn himself over to the Grand Rapids Police department around the time of the incident. Similarly, Soldan testified that, because defendant could not keep a job and because he felt guilty about his failure to report to his parole officer, defendant asked Soldan to call the police so the police could take him into custody. Defense counsel relied on this evidence to establish that defendant did not intend to fight his arrest or to flee from the police. Clearly, this was a matter of trial strategy and "[t]his Court will not second-guess counsel regarding matters of trial strategy . . . with the benefit of hindsight." *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (2000).

C. Evidence of Prior Crimes

Defendant asserts that he was denied a fair trial because the prosecutor questioned defendant about his prior criminal history. Again, this issue is not fully preserved for appeal because defendant failed to object to most of the disputed evidence and we review those claims for plain error. *Knox, supra*.

During trial, defendant maintained that he fully intended to cooperate with the police, but the police officers beat him because, before he would talk to them, defendant asked to finish

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relevant, it could "cut both ways" -- by supporting the prosecutor's theory that defendant intended to fight his arrest or by supporting defendant's theory that defendant wished to turn himself over to police. Under these facts, the relevance of the evidence was not "substantially outweighed by the danger of unfair prejudice" MRE 403.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

smoking his cigarette. During his cross-examination of defendant, the prosecutor elicited testimony that, during the prior ten years, defendant was convicted of retail fraud, receiving and concealing stolen property, and uttering and publishing. Defendant does not contend that evidence of these crimes was inadmissible under MRE 609.⁴ Rather, defendant maintains that the evidence was irrelevant and that any arguable relevance is substantially outweighed by the danger of unfair prejudice under MRE 403.⁵ After the prosecutor asked about defendant's prior convictions, the following exchange occurred:

Q. So you've dealt with the police on numerous occasions, correct?

A. Yes.

Q. You've been arrested by the police on numerous occasions?

A. Yes.

Q. Is that a fair statement?

A. Yes, it is.

Q. This is the first time that you have ever fought with the police, is that what you're saying?

A. No.

We hold that the prosecutor's questions regarding defendant's prior convictions were not unduly prejudicial under MRE 403. In addition to their impeachment value, the relevance of the crimes was made clear by the prosecutor's follow-up question regarding defendant's numerous police contacts. As the trial court noted, the evidence showed that defendant knew about arrest procedures and he knew what behavior constituted a refusal to cooperate. Thus, the evidence tended to rebut defendant's claim that he innocently and peacefully asked the officers to wait while he finished his cigarette. Further, the relevance of the evidence of his prior crimes was not

⁴ As this Court explained in *People v Parcha*, 227 Mich App 236, 241-242; 575 NW2d 316 (1998), in considering the admissibility of evidence of prior convictions:

As interpreted, Rule 609 requires that the prior conviction first be examined to determine whether the conviction contained an element of dishonesty or false statement. *People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988). If so, the evidence is automatically admissible. *Id.* at 593-594. If not, the court must determine whether the conviction contained an element of theft. *Id.* at 605. If so, the court must then examine the conviction to see if the crime was punishable by more than one year in prison, and, if the witness is a criminal defendant, whether the probative value of the evidence outweighs its prejudicial effect. *Id.* at 605-606.

⁵ To the extent defendant asserts that his prior convictions were inadmissible under MRE 404(b), it is clear that the prosecutor offered them to impeach defendant under MRE 609.

“*substantially* outweighed by the danger of unfair prejudice” MRE 403; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002) (emphasis added).

However, defendant also claims that, under MRE 404(b), the prosecutor improperly asked him about prior instances of fighting with police. This issue is preserved because defense counsel objected to the prosecutor’s question while the jury was in recess. However, the record reflects that defense counsel agreed that the trial court should instruct the jury that, while defendant was previously charged with resisting and obstructing a police officer and damage to property, he was found not guilty of the resisting and obstructing charge, but guilty of the property damage charge.⁶ While we find that defense counsel’s agreement to this remedy waived any claim of error under *Carter, supra*, defendant argues that defense counsel’s handling of the issue also constituted ineffective assistance of counsel. Again, because defendant failed to move for a *Ginther* hearing or new trial, “our review of this issue is limited to mistakes apparent on the appellate record.” *Davis, supra* at 357.

Defendant contends that the “curative” instruction compounded the prejudice to defendant and introduced another of defendant’s criminal convictions that had no relevance and was unduly prejudicial. The record shows that it was a matter of trial strategy for defense counsel to agree to counteract the reference to prior police fighting through the corrective instruction. Indeed, it was reasonable for defense counsel to emphasize to the jurors that, while defendant may have been involved in a prior police fight, he was never convicted of resisting and obstructing a police officer. Though defense counsel could have made a different strategic decision, such as opting for no instruction to avoid highlighting the prejudicial evidence for the jury, it is well-settled that “[t]his Court will not second-guess counsel regarding matters of trial strategy and, ‘even if defense counsel was ultimately mistaken, this Court will not assess counsel’s competence with the benefit of hindsight.’ ” *Knapp, supra* at 386 n 7, quoting *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

We note, however, that we find no logical or strategic reason for defense counsel to agree that the corrective instruction should refer to defendant’s prior conviction for damage to property. Evidence of this crime was not introduced at trial and we agree with defendant that the instruction unnecessarily alerted the jury to an additional, inadmissible conviction. However, we cannot conclude that, absent this error, “there was a reasonable probability that the result of the proceeding would have been different.” *Knox, supra* at 385, quoting *Stanaway, supra* at 687-688. Because of the number of prior convictions that were properly admitted into evidence, and the ample evidence of defendant’s guilt in this case, the brief, but erroneous reference to defendant’s property damage conviction did not deprive defendant of a fair trial.

IV. Prosecutorial Misconduct

⁶ We note that, read in context, in asking whether defendant claims this is the first time he ever fought with police, it is far from clear that the prosecutor was attempting to elicit defendant’s acknowledgement of a prior incident of resisting arrest. Indeed, regardless whether defendant fought with police in the past, the prosecutor could have merely been attempting to undermine defendant’s version of events by further emphasizing his experience with police.

Defendant also contends he was denied a fair trial because the prosecutor made improper closing arguments. Defendant concedes that this claim is not preserved for appeal because defense counsel failed to make “a timely, contemporaneous objection and request for a curative instruction.” *People v Callon*, ___ Mich App ___; ___ NW2d ___ (Issued April 15, 2003, Docket No. 234421). Accordingly, we review the allegedly improper statements under the plain error doctrine. *People v Schultz*, 246 Mich App 695, 709; 635 NW2d 491 (2001).

For the reasons discussed in our prior analysis, we reject defendant’s argument that, during closing arguments, the prosecutor improperly relied on evidence of defendant’s parole violation and his admissible prior convictions. “Prosecutors are permitted to argue the evidence and make reasonable inferences in order to support their case theory.” *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995).⁷

We also reject defendant’s claim that the prosecutor improperly vouched for the truthfulness of a witness by stating, “Quite frankly, it comes down to who you believe, a convicted criminal or the police.” While a prosecutor may not place the prestige of the police behind his argument that a defendant is guilty, here, the prosecutor did not imply that the officers had special knowledge such that the jury should base its verdict on the expertise of law enforcement. *People v Rodriguez*, 251 Mich App 10, 31, 650 NW2d 96 (2002); *People v Lucas*, 138 Mich App 212, 221; 360 NW2d 162 (1985). Clearly, a “prosecutor may comment upon [his] own witness’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt or innocence turns on which witness is to be believed.” *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992), citing *People v Calloway*, 169 Mich App 810, 821; 427 NW2d 194 (1988), vacated on the grounds 432 Mich 904 (1989). Further, it is well-settled that a prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1998). We hold that the prosecutor did nothing more than ask the jury, in considering the conflicting versions of events, to consider the credibility of the witnesses based on evidence admitted at trial.⁸

We agree with defendant, however, that it was error for the prosecutor to make the following argument to the jury:

He has admitted that he has fought with the police before. That’s consistent with what he was doing this time. What he did this time was resist the officers.

⁷ We further note that defense counsel, not the prosecutor, elicited evidence of defendant’s conviction for uttering and publishing during her cross examination of Soldan. Defendant did not move to strike this evidence or otherwise claim that it was inadmissible. Accordingly, the prosecutor’s reference to the evidence in his closing argument was not improper.

⁸ Because we find no error in these remarks, we reject defendant’s argument that defense counsel was ineffective for failing to object. “Counsel is not ineffective for failing to make a futile objection.” *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989).

As discussed above, we do not reach the issue whether evidence of defendant's prior fighting with police was properly admitted under MRE 404(b) because defense counsel waived the issue by agreeing to the remedy offered by the trial court, a curative jury instruction. However, under MRE 404(b), it was improper for the prosecutor to argue to the jury that defendant acted in conformity with his prior bad act. This constituted plain error. Nonetheless, defendant failed to establish that this error affected his substantial rights. Defendant is clearly not "actually innocent" and the error was not so serious as to "affect the fairness, integrity or public reputation of judicial proceedings." *Carines, supra* at 761. Accordingly, defendant is not entitled to relief on this issue.⁹

Affirmed.

/s/ Henry William Saad

/s/ Patrick M. Meter

/s/ Donald S. Owens

⁹ We also conclude that defense counsel's failure to object to the argument did not amount to ineffective assistance of counsel. Again, given the abundant evidence of defendant's guilt in this case, there was no reasonable probability that, absent the error, "the result of the proceeding would have been different." *Knox, supra* at 385, quoting *Stanaway, supra* at 687-688.