

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PETER ANTONIO RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED

June 24, 2010

No. 290599

Jackson Circuit Court

LC No. 08-004508-FC

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and conspiracy to commit armed robbery. He was sentenced to 68 to 180 months imprisonment for each conviction, which sentences are to run concurrently, with 30 days credit for time served. Defendant appeals as of right. We affirm.

Near midnight on the night of November 21, 2007, the day before Thanksgiving, defendant drove Josh Lay, Antwone Ruff, and Antwon Baker to Polly's Country Market grocery store in Jackson, Michigan. Defendant left the three men in the parking lot of the grocery store, and drove away. Lay, Ruff and Baker entered and robbed the store while armed with two BB guns. They then left the store and walked to a parking lot of an adjacent apartment complex, where defendant picked them up. All four men and defendant's daughter, Jodie Rodriguez, were arrested for armed robbery and conspiracy to commit armed robbery. Before trial, Lay, Ruff, and Baker pleaded guilty to one count of armed robbery in exchange for their testimony against defendant and Jodie, who were tried together. Defendant was convicted and Jodie was acquitted.

Defendant first argues that there was insufficient evidence to convict him of armed robbery, MCL 750.529. On appeal for sufficiency of the evidence, we review all evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The trier of fact, not this Court, determines what inferences may be drawn from the evidence and concludes the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of credibility and the intention of witnesses are also left for the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

MCL 750.529 governs armed robbery and provides, in pertinent part:

A person who engages in conduct proscribed under [MCL 750.530] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

The proscribed conduct in MCL 750.530(1) reads as follows:

A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

Although there was conflicting testimony regarding what happened before and after the robbery, and the extent of defendant's involvement, we resolve all conflicts in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). There was competent testimony that Lay went to defendant's home approximately one hour before the robbery, where he obtained a BB gun and backpack. Baker, Ruff and Lay each testified that defendant drove Lay to Polly's and picked up Ruff and Baker along the way, with Baker sitting in the backseat with the BB gun on his lap. Ruff testified that it was defendant's idea to wait for them in the adjacent apartment parking lot after the robbery. Lay's testimony supported that defendant was aware of the plan to rob the grocery store, and that they would use BB guns. In light of this testimony, we find that a reasonable trier of fact could have concluded beyond a reasonable doubt that defendant committed armed robbery. MCL 767.39 ("Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission. . . shall be punished as if he had directly committed such offense.").

Next, defendant argues that the trial court abused its discretion when at sentencing it did not find substantial and compelling reasons to depart below the sentencing guidelines. We disagree. The interpretation and application of a statutory sentencing guideline presents a legal question that that we review de novo. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. [MCL 769.34(10).]

Defendant does not argue that the PRVs or OVVs were incorrectly scored, or that the trial court relied on inaccurate information. Thus, his argument falls outside the scope of the two limited grounds for appeal. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006); *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Here, the trial court sentenced defendant to a minimum of 68 months in prison. This falls squarely within the middle of the sentencing guidelines for a defendant convicted of a class A felony, MCL 777.16y, with a pre-offense variable (PRV) score of ten and offense variable (OV) score of 20. MCL 777.62. We

must affirm. In doing so, we note that the decision to depart is a discretionary matter, MCL 769.34(3), and defendant did not have a right to a downward departure.¹

Next, we address the several arguments raised by defendant in his Standard 4 brief. First, defendant argues that the prosecutor engaged in numerous instances of prosecutorial misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Plain error occurs at the trial court level if: (1) error occurred, (2) that was clear or obvious, and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). "We will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *Thomas*, 260 Mich App at 454 (citation omitted).

Claims of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The thrust of a prosecutorial misconduct analysis is to determine whether defendant was denied a fair trial. *People v Willie Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005).

First, defendant argues that the prosecutor wrongly elicited testimony from Lay, Baker and Ruff that they had already pleaded guilty to armed robbery in exchange for their willingness to testify truthfully against defendant. We disagree. It is commonplace for "a codefendant to testify in exchange for a plea bargain or sentence agreement [and] Michigan courts have sanctioned [this practice] for some time." *People v Calvin Wilson*, 242 Mich App 350, 358; 619 NW2d 413 (2000) (citation omitted). When an accomplice testifies, defense counsel or the prosecutor can inform the jury that the testimony was secured by way of a favorable plea agreement with the prosecutor. *Id.*; see also *People v Dowdy*, 211 Mich App 562, 571-572; 536 NW2d 794 (1995). If defense counsel does not want evidence of the plea agreement to be introduced at trial, he must object before the prosecutor attempts to elicit the testimony from the accomplice on direct examination. *Dowdy*, 211 Mich App at 572. However, if defense counsel chooses not to object, and instead cross-examines the accomplice about the plea agreement to undermine his credibility, that defendant cannot then argue on appeal that introduction of the plea agreement prejudiced him at trial. *Id.* Here, defense counsel did not object to the testimony at issue, but instead used the plea agreements to impeach the credibility of each accomplice on cross-examination and during closing argument. Thus, we reject defendant's attempts to now claim prejudice from the same testimony. *Id.*

¹ Defendant also asks this Court to correct a clerical mistake on the judgment of sentence. However, after filing this appeal, defense counsel and the prosecutor stipulated to amend the judgment of sentence to accurately reflect defendant's convictions, and the trial court filed an amended judgment of sentence correcting the error. As there is no longer an error for this Court to remedy, the issue is moot. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994).

Defendant also argues that the prosecutor impermissibly vouched for the credibility of Lay, Baker and Ruff when she elicited statements from each that they were testifying truthfully as a condition of their plea agreements. “A prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness; however, the prosecutor may argue from the facts that a witness should be believed.” *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). We conclude that the prosecutor’s comments did not suggest any special knowledge for truthfulness. Rather, the testimony suggested that the witnesses testified pursuant to a plea agreement, which, as previously indicated, is allowed. *Dowdy*, 211 Mich App at 572; *Calvin Wilson*, 242 Mich App at 358. Moreover, the prosecutor’s comments during opening statement and closing argument were valid. The purpose of an opening statement is to inform the jury as to “what the advocate proposes to show.” *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). That is what the prosecutor did in this case. Further, a prosecutor can argue from the facts in the record that a witness should be believed. And, it is not prosecutorial misconduct to argue for the credibility of a witness after their credibility was attacked by opposing counsel, as it was here. *McGhee*, 268 Mich App at 633; *Rodriguez*, 251 Mich App at 31.

Defendant also alleges misconduct because the prosecutor called Detective Timothy Schlundt, of the Jackson County Sheriff’s Office, for the sole purpose of vouching for the credibility of Ruff. Defendant has mischaracterized the purpose of Schlundt’s testimony. He first testified about his investigation during the prosecutor’s case in chief. Ruff then testified and defense counsel impeached him on cross-examination with the plea agreement and the fact that Ruff was on ecstasy during the robbery. Ruff stated that he did not have a clear memory of the events of the evening. The prosecutor then recalled Schlundt, who testified that Ruff’s testimony at trial was consistent with his own investigation of the events of the robbery, and with his own prior interview with defendant. Schlundt did not offer an opinion as to Ruff’s credibility or truthfulness. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Ruff’s credibility had been called into question, and the prosecutor had a right to rehabilitate him. *People v Jones*, 240 Mich App 704, 707 n 1; 613 NW2d 411 (2000).

Defendant further argues that the prosecutor committed a fraud on the trial court when at sentencing she argued that defendant’s version of the night of November 21, 2007, could not have occurred. We disagree. The prosecutor is allowed to present an argument based on the facts in the record. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Here, the prosecutor suggested that based on other testimony in evidence, defendant’s recollection of the night of the robbery could not have occurred as he said it did. Defendant’s version indeed was incongruous with other facts in the record. The prosecutor merely argued from the facts that supported her case in chief.²

Defendant also argues that the prosecutor intentionally elicited false testimony from both Deputy Kirk Douglas Carter of the Jackson County Sheriff’s Department and Lay at trial.

² We further find that the prosecutor did not misrepresent the record by arguing that the robbery did not occur until 12:30. A plain reading of the prosecutor’s statement indicates that although she may have used poor syntax, she did not misconstrue the record.

However, our review of the record indicates that both witnesses testified consistently and nothing indicates that the prosecutor “knowingly use[d] false testimony to obtain a conviction.” *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). In sum, we find that none of the alleged instances of prosecutorial misconduct amounted to plain error. *Thomas*, 260 Mich App at 453-454. Thus, defendant has not demonstrated any prosecutorial misconduct requiring reversal.

Next, defendant argues that the verdict was not read aloud in open court and recorded, in violation of MCR 6.420(A) and MCL 763.2. We review unpreserved nonconstitutional errors for plain error affecting defendant’s substantial rights. *People v Cornell*, 466 Mich 335, 363 n 16; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). We review de novo issues involving statutory interpretation. *Babcock*, 469 Mich at 253. Here, the verdict was not instantly recorded and transcribed because the court clerk mistakenly forgot to turn on the recording device in the courtroom. However, although not recorded in the trial transcript, the trial court’s remarks immediately thereafter indicated, without objection, that the jury verdict was indeed read in open court. Thus, MCR 6.420(A) was not violated. Further, the trial court indicated on the record that it had received the verdict and polled the jurors. Therefore, MCL 763.2 was not violated. No error occurred.

Next, defendant argues that the trial court improperly scored OVs 5, 8, and 12, and that the errors resulted in a longer sentence. He suggests that the OVs should have been scored at zero points. Our review of the sentencing information report (SIR) indicates that these challenged OVs were indeed scored at zero points. Thus, there is no error to review; the alleged scoring defect at sentencing never occurred.

Next, defendant argues that the trial court erred when it denied defense counsel the opportunity to cross-examine Lay with a pending charge of unlawful driving away of an automobile (UDAA). “Whether a trial court has properly limited cross-examination is reviewed for an abuse of discretion.” *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). Similarly, this Court reviews a trial court’s decision to admit evidence at trial for abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). To the extent that the trial court’s decision involved the interpretation of a rule of evidence, our review is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Generally, all relevant evidence is admissible. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. That said, “[c]ross-examination may be denied with respect to collateral matters bearing only on general credibility[.]” *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992) (citation omitted). Disregarding the exceptions, none of which are applicable to this case, MRE 609 prevents counsel from introducing evidence of past criminal convictions to impeach the credibility of a prosecutorial witness. This rule extends to pending charges as well. *People v Hall*, 174 Mich App 686, 690; 436 NW2d 446 (1989). Here, at some point before trial, Lay provided a written statement that the armed robbery charge was the first and last criminal charge on his record. Defense counsel wanted to introduce the pending UDAA charge as evidence that he had not been truthful. While “the fact that a prosecution witness has charges pending is particularly relevant to the issue of the witness’ interest in testifying and may be admitted for this purpose,” *Hall*, 174 Mich App at 690-691, this stems from the proposition that “[t]he credibility of a witness is always an appropriate

subject for the jury's consideration [and e]vidence of a witness' bias or interest in a case is highly relevant to credibility," *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). In the present case, the trial court's decision to not allow the cross-examination was apparently based on the conclusion that evidence of a pending charge is inadmissible unless it operates to demonstrate the witness's alleged bias or interest. We note that such a conclusion is logical under the language from *Hall*. However, the trial court's conclusion fails to recognize the true purpose of the proposed evidence. Defense counsel was not seeking to introduce evidence of the pending charge so much as he was attempting to introduce evidence that Lay had demonstrated a disregard for honest dealings with the justice system. Nonetheless, we need not decide whether the evidence was properly admissible because defendant cannot establish that the evidence would have had any bearing on the outcome of the case. It has been established that a trial court's ruling regarding the admissibility of evidence is subject to the harmless error analysis. *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988). As has been noted throughout this opinion, the prosecution presented overwhelming evidence regarding defendant's guilt. The prosecution's case did not hinge on Lay's credibility. Therefore, defendant is not entitled to relief.

Next, defendant alleges seven specific instances of ineffective assistance of trial counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant did not obtain an evidentiary hearing, our review is limited to the mistakes apparent in the trial record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000) (citation omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, defendant must show that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant argues that his counsel should have objected to the several alleged instances of prosecutorial misconduct discussed *supra*. He also argues that counsel should have objected to the alleged perjured testimony of Deputy Carter discussed *supra*. However, as indicated, we find that prosecutorial misconduct did not occur and that Carter's testimony was not perjury. As such, any objection by counsel would have been futile, and could not, therefore, be considered ineffective assistance. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant also argues that his trial counsel failed to investigate the timing of the arrival of the police on the scene and their subsequent investigation procedures, which in turn allowed the prosecutor to misrepresent the timeline of events at trial and discredit defendant's version of the night. He further argues that defense counsel failed to investigate whether Lay had been issued four driving citations, which could have been used to impeach. Defendant does not point to any evidence in the record to support either claim, and nor has he provided this Court with any evidence on these matters. Defendant even acknowledges in his brief that no factual record exists to support these claims. Defendant bore the burden of establishing the factual predicate for his claims. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). He has not done so, and

we conclude has not met the first element of a claim of ineffective assistance. *Gonzalez*, 468 Mich at 644.

Defendant also argues that defense counsel should have put forth a different, and ultimately successful, legal argument in favor of introducing evidence of Lay's pending UDAA charge, discussed *supra*. However, counsel's method and reasons for wanting to introduce the evidence is considered a matter of trial strategy, which we will not assess with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). Moreover, "[a] failed strategy does not constitute deficient performance." *People v Petri*, 279 Mich App 407, 412-413; 760 NW2d 882 (2008). Defendant has not shown how counsel's strategy here fell below an objective standard for reasonableness. *Gonzalez*, 468 Mich at 644.

Defendant additionally argues that counsel should have requested a "mere presence" jury instruction, as per Criminal Jury Instruction 2d 8.5 (CJI2d 8.5). However, our review of the trial transcript indicates that the trial court provided an instruction that was virtually identical to CJI2d 8.5, which defendant claims should have been requested. Therefore, it would have been futile for defense counsel to request a different instruction. *Mack*, 265 Mich App at 130.

Defendant finally argues that counsel should have objected at sentencing to the scoring of OVs 5, 8, and 12. However, as previously indicated, these OVs were indeed scored at zero points. Thus, again, any objection would have been futile. *Id.*

In sum, we find that defendant has not met his burden of proving that his counsel's performance fell below an objective standard for reasonableness for any of the alleged instances of ineffective assistance of counsel. *Gonzalez*, 468 Mich at 644.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens