

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL PODRAZIK,

Defendant-Appellant.

UNPUBLISHED
February 28, 2012

No. 302574
Jackson Circuit Court
LC No. 10-005989-FH

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of accessory after the fact to a felony, MCL 750.505; and reckless driving, MCL 257.626. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12; to 46 months to 20 years' imprisonment for the accessory after the fact conviction and to 93 days in jail for reckless driving. For the reasons set forth in this opinion we affirm.

Our review of the record before us reveals that on July 15, 2010, Margaret Emerson was shopping at a Meijer store in Jackson County, Michigan. Emerson turned away from her shopping cart for a moment. Another woman, Deanna Rowe walked away with the cart, which contained Emerson's purse. Emerson attempted to confront Rowe, but Rowe quickly walked away from Emerson. Emerson called out for help to stop Rowe. Rowe then grabbed Emerson's purse from the shopping cart and ran out of the Meijer store.

Once outside, Rowe was chased by bystanders from inside the store. Rowe threw Emerson's purse into a truck driven by defendant, who was Rowe's boyfriend at the time. Rowe jumped into the truck and repeatedly yelled "go" to defendant. Outside the truck, three or four people yelled statements to the effect of "she stole a purse." A young woman, Chyanne Rose, opened defendant's door and reached across defendant's body to try to recover the purse. While Rose tried to grab the stolen purse, she repeatedly told defendant "she stole a purse." Even though defendant was in the driver's seat in the truck, Rowe put the car in gear and stomped on the gas pedal. The truck accelerated away from the store at approximately 45 to 55 miles per hour, coming within four feet of hitting a seven or eight-year-old child.

Before Rowe and defendant left Meijer, a Meijer employee wrote down the truck's license plate number. Police were able to discover that the truck involved in the incident was registered to Michael Podrazik, defendant's father. The police called defendant's cellular

telephone and defendant promised to turn himself in. However, defendant and Rowe were stopped by the police approximately two hours and 45 minutes after the incident at Meijer.

After defendant was arrested and provided with his *Miranda*¹ warnings, police officers questioned defendant and defendant gave a statement to them. Officer Thomas Bertram testified at trial concerning that statement, telling the jury that defendant admitted that he was with Rowe when she went to Meijer, but said that he thought that she was going to use the Automated Teller Machine (ATM). Defendant also admitted that he saw Rowe run out of Meijer with people chasing her. Rowe then got into the truck and told defendant to “punch it.” Defendant “floored” the truck and drove away. Defendant explained that he drove out of the Meijer parking lot even though he saw Rowe being chased because he was afraid that Rowe’s ex-boyfriend was trying to hurt her. Defendant stated further that after he and Rowe left the Meijer parking lot, he saw the purse Rowe took from Emerson, and that Rowe then told defendant she stole the purse. Defendant stated that he “panicked” at that point and chose not to stop and wait for the police. He also told police he used \$11 from Emerson’s purse to buy gasoline for the truck and that he convinced Rowe to throw the purse away.

At trial, Rowe was called as a defense witness. Prior to Rowe’s testimony, the prosecution brought before the trial court an issue regarding the admissibility of evidence that a separate investigation was being conducted into an allegation that Rowe had committed another purse snatching and had negotiated forged checks. The prosecution indicated that Rowe and defendant were seen together at the scene of the previous incident. Defendant objected to the introduction of evidence concerning that incident because it would be highly prejudicial and Rowe had not been charged with any crime arising from the previous incident. The trial court held that because Rowe had not yet been charged, the allegations could not be used for impeachment under MRE 609.

Despite this ruling, the final question defense counsel asked Rowe in his direct examination was “[d]id the prosecutor ever try to put you under any pressure not to testify?” Rowe answered “[y]es.” Following an exchange between the attorneys and the trial court, the prosecution engaged in the followed exchange with Rowe:

Q. Now, [defense counsel] said the prosecution put pressure on you. But there is no pressure put on you, correct?

A. There was no pressure put on me?

Q. Correct.

A. Yes, there was.

Q. And it’s because that information has surfaced recently that about three weeks prior to this date you are a suspect in another purse, purse snatching

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

that occurred at this same store at Meijers at East Michigan Avenue with a white male. Quarter to twelve in the daytime hours, grocery section of Meijers, approaching someone, taking their purse, leaving. But they couldn't get the license plate number that time.

The prosecution continued: “[a]nd out of that incident came to light that this purse contained some checks, there was a check that was forged and cashed in the amount of seven hundred and forty-three dollars, and that there’s an investigation going on and you’re a suspect?” Defense counsel responded: “[y]our Honor, I’m gonna object for the record. You know – for the record, Your Honor, she had not been charged with anything. Prosecutor never brought any of this to light until the day of trial yesterday when she was trying to be persuaded if she should testify.”

A second evidentiary issue occurred later in Rowe’s cross-examination where the prosecution questioned Rowe regarding a prior police statement she made in the case.

Q. [D]id you also make the statement to Officer Lubahn that you had been, you had been engaged in shoplifting before?

A. I said I got caught when I was younger for shoplifting. When I was like eleven.

Q. Did you make the statement to Officer Lubahn that you had been, that the defendant, your boyfriend, had been with you on some of those incidents, or?

A. No.

Q. You didn’t make that statement?

A. No, I didn’t.

Q. That you had been shoplifting at Kroger’s on East Michigan.

A. No, he asked where places were that people shoplift from and where it was easy and I told him Kroger’s.

Q. And did you make a statement that you had been with the defendant at Kroger’s when you had done that?

A. No.

Q. Never made that statement?

A. No.

The prosecution then called Officer Lubahn as a rebuttal witness to counter Rowe’s statement that she never told Officer Lubahn that defendant accompanied her during some of her shoplifting incidents. Lubahn testified in rebuttal:

I had asked [Rowe] open and candidly about being shoplifting at prior times, different places. And she had stated it was a few. She had stated that she had been to Kroger's on East Michigan Ave. and had shoplifted there several times. And I asked her, "Are you stealing food?" and she laughed and said, "No." At that point I then asked her, "Then what are you stealing?" and she said that it was, I believe it's make up or something cosmetics, along that line.

I then asked her if [defendant] was with her all those times and she said, "A few" or "sometimes", I believe was the exact statement.

Defendant did not object to either the prosecution's questions of Rowe during her cross-examination or to Lubahn's rebuttal testimony.

As previously indicated, the jury found defendant guilty of accessory after the fact to a felony and reckless driving. Defendant was sentenced as noted above and this appeal ensued.

On appeal, defendant argues that defense counsel was ineffective in failing to object to the two separate sections of trial testimony set forth above. Because the issue was not raised before the trial court, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 675; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997).

From the outset we note that the prosecution seemingly concedes that defense counsel's complained-of actions fell below an objective standard of reasonableness. When informed that the prosecution was going to introduce evidence of Rowe's prior uncharged conduct, defense counsel sought, and received, a favorable ruling from the trial court prohibiting introduction of such evidence. Then, defense counsel proceeded to open the door to the very testimony ruled inadmissible. Next, he failed to object to the additional 404(b) testimony introduced by the prosecutor, of which defense counsel had no prior notice. Rather than engage in a justification of these challenged deficiencies, the prosecutor argues that "even assuming deficient performance, defendant cannot show a reasonable probability of an acquittal."

The parties agree that the applicable standard here is that set forth in *Strickland*. In *Strickland*, the United States Supreme Court required that in order to prevail on a claim of ineffective assistance of counsel, the defendant must prove prejudice. *Strickland*, 466 US at 691-692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. See

also, *Cullen v Pinholster*, 563 US ___; 131 S Ct 1388, 1403; 179 L Ed 2d 557 (2011). As stated in *Strickland*, “[A] reasonable probability is a probability sufficient to undermine confidence in the outcome.” 466 US at 694. “That requires a ‘substantial,’ not just a ‘conceivable,’ likelihood of a different result.” *Cullen*, 131 S Ct at 1403, citing *Harrington v Richter*, 562 US ___; 131 S Ct 770; 178 L Ed 2d 624, 647 (2011).

Applying these legal principles to this case, we concur with the prosecutor that even assuming trial counsel’s performance was deficient, and assuming all of the challenged testimony was precluded, defendant cannot meet the prejudice requirement set forth in *Strickland* and adopted by our Supreme Court in *Toma*, 462 Mich at 302 and *Mitchell*, 454 Mich at 158. “An accessory after the fact is one who, with knowledge of the principal’s guilt, renders assistance to hinder the detection, arrest, trial, or punishment of the principal.” *People v King*, 271 Mich App 235, 239; 721 NW2d 785 (1998). Additionally, an accessory after the fact aids the concealment of evidence of the crime, or the flight or concealment of the perpetrator. *People v Perry*, 218 Mich App 520, 534; 554 NW2d 362 (1996). The evidence proving defendant’s guilt of this crime is overwhelming. Rowe admits that she stole a purse from a woman at a Meijer store. Rowe left the store being pursued by three or four people yelling “she stole a purse.” Rose testified that she opened defendant’s door and reached across defendant’s body to try and recover the purse while repeatedly telling defendant, “she stole a purse.” Defendant and Rowe then fled the scene of the crime together. While leaving the parking lot, witnesses testified that the truck came within four feet of striking a young girl. When questioned by police, defendant admitted that Rowe told him she stole the purse. He also admitted to taking \$11 from the purse to purchase gas and to telling Rowe to throw the purse away. While defendant stopped driving the truck after he and Rowe left the Meijer parking lot, he allowed Rowe to drive the truck for almost two hours and 45 minutes following the theft of the purse. None of this evidence was impacted in any way by the challenged testimony. Therefore, because the unchallenged evidence was sufficient to support defendant’s conviction, even assuming that defense counsel acted deficiently under an objective standard of reasonableness by allowing the challenged testimony into evidence, defendant cannot establish that there is a reasonable probability that, but for defense counsel’s errors, the result of the proceeding would have been different. *Strickland*, 466 US at 691-692, 694; *Toma*, 462 Mich at 302; *Richter*, 131 S Ct at 791; *Cullen*, 131 S Ct at 1403; *People v Kowalski*, 489 Mich 488, 509; 803 NW2d 200 (2011). Accordingly, defendant is not entitled to a new trial.

Defendant next argues that the trial court erred by using two juvenile adjudications and four adult misdemeanor convictions listed on defendant’s presentence investigation report (PSIR) in sentencing defendant, or, in the alternative, that defense counsel was ineffective for failing to investigate and object to the use of those adjudications and misdemeanors at sentencing.

Defendant first claims that he is entitled to resentencing because two juvenile adjudications and four adult misdemeanor convictions in his PSIR violated his constitutional right to counsel and should not have been used in scoring prior record variable (PRV) 4 and PRV 5. At sentencing, defense counsel told the trial court that “[t]he guidelines appear to be scored correctly.” Waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has

extinguished any error.” *Carter*, 462 Mich at 215, as quoted in *People v Kowalski*, 489 Mich at 503. Here, defense counsel did not object to the scoring of PRVs or offense variables, and instead told the trial court that “[t]he guidelines appear to be scored correctly.” “When defense counsel clearly expresses satisfaction with a trial court’s decision, counsel’s action will be deemed to constitute a waiver.” *Kowalski*, 489 Mich at 503.

Regardless of defendant’s waiver of this issue, even if we were to find that the two juvenile adjudications and the four adult misdemeanor convictions should not have been used in scoring PRV 4 and PRV 5, defendant would not be entitled to resentencing. The effect of that holding would not change defendant’s minimum sentence range under the legislative guidelines.

The trial court scored PRV 4 at five points and PRV 5 at 20 points. A court may score PRV 4 at five points where the offender has two prior low severity juvenile adjudications. MCL 777.54(1)(d). Not considering the two challenged adjudications, defendant had at least two additional adjudications that were scorable under PRV 4. Thus, PRV 4 was properly scored at five points. A court may score PRV 5 at 20 points where an offender has 7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications; 15 points is the appropriate score where offender has five or six prior misdemeanor convictions or prior misdemeanor juvenile adjudications. MCL 777.55(1)(a)-(b). Absent the challenged adjudications and convictions, defendant had five scorable adjudications and convictions for purposes of PRV 5. Scoring PRV 5 at 15 points instead of 20 points would reduce defendant’s overall PRV score from 70 points to 65 points. Accessory after the fact is a class E offense. MCL 777.16x. The sentencing grid for class E offenses provides for a PRV level E where a defendant’s PRV score is 50 to 74 points. MCL 777.66. Thus, the reduction of defendant’s PRV score from 70 points to 65 points would not alter defendant’s recommended minimum sentence range under the legislative guidelines. Where a scoring error does not alter the appropriate guidelines range, resentencing is not required. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Defendant nevertheless claims a “real likelihood” that removing six convictions from defendant’s PSIR could affect the trial court’s decision to sentence defendant at the top of the recommended minimum sentence range under the legislative guidelines. Defendant does not provide a factual or legal basis for this “likelihood.” An appellant may not “merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, . . .” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Regardless, the trial court did not rely on the challenged offenses or defendant’s lengthy criminal record in sentencing defendant. Thus, resentencing is not required. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). The trial court did not abuse its discretion in sentencing defendant.

Defendant finally claims that defense counsel was ineffective in failing to correct defendant’s PSIR. As previously stated, even if defense counsel had been successful in eliminating the complained of prior offenses, defendant would still not be entitled to resentencing. Hence, defendant cannot demonstrate that there was a “reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 US at 694; *Kowalski*, 489 Mich at 503.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello