

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 23, 2013

v

OLIVER WOODS,

No. 307515
Genesee Circuit Court
LC No. 10-027797-FH

Defendant-Appellant.

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of manufacturing or possessing a Molotov cocktail or similar explosive device, MCL 750.211a, and arson of real property, MCL 750.73. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve concurrent terms of 90 to 300 months' imprisonment, which were to run consecutive to parole.¹ We affirm defendant's convictions, but remand for correction of the presentence investigation report (PSIR).

Defendant's convictions arise out of a fire that occurred at a bar in Flint, Michigan in the early morning hours. When the fire broke out, two witnesses saw defendant with a green Sprite bottle near the bar. It was determined that the fire was initiated by the introduction of a Molotov cocktail, which is composed of a bottle filled with an ignitable liquid and wick to ignite the liquid. Defendant was immediately apprehended in the area, and he subsequently admitted to making the Molotov cocktail and setting fire to the bar because he thought the bouncers at the bar had beaten and robbed him.

¹ The judgment of sentence is unclear as to what the trial court meant by "consecutive to parole." However, the term "consecutive to parole" typically refers to MCL 768.7a(2), which provides that if a person is convicted and sentenced for a felony committed while the person is on parole, the term of imprisonment imposed for the later felony does not begin to run until the remaining term of imprisonment imposed for the previous offense has expired. See *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009).

First, defendant argues that he was denied effective assistance of counsel when defense counsel asked defendant about his prior conviction on direct examination. We disagree. Our review is “limited to mistakes apparent from the record” because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request an evidentiary hearing as required by *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). “The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo.” *Id.*

To prove defendant received ineffective assistance of counsel, he must show: (1) “that counsel’s performance was deficient in that it fell below an objective standard of professional reasonableness,” and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel’s performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). There is a presumption of effective assistance of counsel and the burden is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

“While it is established law that the party placing a witness on the stand vouches for the witness’s credibility and may not, ordinarily, impeach the witness, the prohibition is only applicable where the witness’s credibility is being attacked.” *People v Fernandez*, 153 Mich App 743, 748; 396 NW2d 517 (1986) (citation omitted). Contrary to what defendant argues, it does not appear defense counsel was using the prior conviction to impeach defendant’s credibility. Instead, it appears that counsel was attempting to reinforce defendant’s credibility by being forthright about his past. See *id.* at 748-749.

While this Court has long recognized that it is permissible trial strategy for defense counsel to raise defendant’s convictions before the prosecutor’s cross-examination in an attempt to make the information less damaging, see e.g., *People v Clyburn*, 55 Mich App 454, 457; 222 NW2d 775 (1974), here defense counsel’s actions fell below an objective standard of professional reasonableness. Pursuant to MRE 609(c), the prosecutor would not have been able to use this prior conviction to impeach defendant because it had been more than ten years since the date of the conviction and defense counsel should have known that. Thus, there would have been no legitimate reason for defense counsel to raise the conviction on direct examination, especially knowing that the prosecutor would be prohibited from introducing it on cross-examination.

However, there is not a reasonable probability that the outcome of the trial would have been different but for defense counsel’s performance. Defense counsel’s actions were not outcome determinative, particularly because defendant admitted to setting the fire and told the investigating officers how he made the Molotov cocktail. Two witnesses also saw defendant with the Molotov cocktail near the bar. Additionally, despite defendant’s contention, a forensic psychiatrist determined that he was not mentally ill at the time of the incident. There was an overwhelming amount of evidence against defendant, and it is unlikely that the reference to his prior conviction would have changed the outcome of the trial.

Next, defendant argues that the trial court abused its discretion in refusing to strike challenged information from the PSIR, after it specifically stated that it was not going to use the

information in sentencing defendant. We agree. We review a trial court's decision regarding a defendant's challenge to inaccurate information contained in the PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

MCR 6.425(E)(2)(a) provides in relevant part:

If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information, whichever is appropriate

Additionally, MCL 771.14(6), provides,

At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

Here, defendant requested that certain information contained in the agent's description of the offense be stricken from the PSIR because there was no testimony regarding it. The trial court stated that it was not going to delete the challenged information because everyone has their own versions of the events. However, the trial court reassured defendant that it was not going to consider the information in sentencing him. Accordingly, because the trial court did not rely on the challenged information in sentencing defendant, that information must be stricken from the PSIR, but resentencing is not required. *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001) (holding that when a defendant challenges information in the PSIR and the sentencing court states on the record that it is "not weighing that in sentencing," the challenged information must be stricken from the PSIR). Thus, we remand this matter for deletion of the paragraph beginning with "While at the scene . . ." from the PSIR.

Finally, defendant argues that the trial court erred by admitted the preliminary examination testimony of a missing witness because the prosecutor did not use due diligence to locate her. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW 2d 797 (2007). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, if the trial court's decision involves a preliminary issue of law where a constitutional provision, statute, or rule of evidence determines admissibility, then it is subject to de novo review. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

MRE 804(b) and the Sixth Amendment Confrontation Clause permit the introduction of former testimony at trial if the witness is unavailable and the defendant has had a prior

opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A witness is considered unavailable if the witness “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.” MRE 804(a)(5). The use of preliminary examination testimony in lieu of the witness’s live testimony at trial does not violate the defendant’s right to confront the witness if the prosecutor used due diligence to produce the absent witness. *People v Bean*, 457 Mich 677, 682-683; 580 NW2d 390 (1998). “The test for due diligence is one of reasonableness, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it.” *People v James*, 192 Mich App 568, 571; 481 NW2d 715 (1992). Reasonableness is determined by the facts and circumstances of each case. *People v Dye*, 431 Mich 58, 67; 427 NW2d 501 (1988).

Additionally, as stated, the defendant must have had a prior opportunity to cross-examine the witness for the former testimony to be admissible. This means that defendant must have “had an opportunity and similar motive to develop the testimony.” MRE 804(b)(1). “Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony was presented at each proceeding.” *Farquharson*, 274 Mich App at 275. The following factors should be considered:

(1) whether the party opposing the testimony “had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue”; (2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities) [*Id.* at 278, quoting *United States v DiNapoli*, 8 F3d 909, 914-915 (CA 2, 1993)].

Here, the prosecutor used diligent good-faith efforts to procure the witness’s testimony for trial. Although the record is unclear whether the witness was served a subpoena to appear on the first day of trial, after she did not appear, reasonable attempts were made to contact her. Specifically, several calls were made to the witness and an officer went by her last known address. There was also a discussion on the record regarding a place she was known to frequent, and the trial court directed an officer to send a squad car by that place. Later that day, the witness was located in the county jail, but she was suffering from something unknown that made her incompetent to testify. Subsequently, the prosecutor contacted the county jail to request that they hold her and later attempted to deliver a subpoena to her in the jail. However, the prosecutor learned that the witness had been released the prior evening, despite his efforts to have her held. Following her release from jail, more unsuccessful attempts were made to contact her by phone and by visiting the address that she provided at the jail. An officer also contacted the witness’s mother, who was in the hospital, and she was going to try to call three numbers she had for the witness’s friends to see if she could contact her. It is clear that the prosecutor made reasonable efforts to locate the witness.

Additionally, there was a prior opportunity to cross-examine the witness in this case. The prosecutor introduced the witness’s preliminary examination testimony at trial for the same purpose that it did at the preliminary examination—as evidence that defendant possessed the

Sprite bottle, or Molotov cocktail, and was near the bar right before and after the fire started. In addition, defendant had the same attorney for the preliminary examination and the trial, and his attorney cross-examined the witness at the preliminary examination. Although the burden of proof at the preliminary examination is different from the burden of proof at trial, defendant still has a similar motive to cross-examine the witness. See *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1998). Further, during cross-examination, defense counsel attempted to attack the witness's recollection of the events and her ability to properly identify defendant at the scene. Counsel was also able to ask questions regarding the witness's observation of defendant's physical and mental state at the time. Specifically, the witness testified that defendant had grass stains on his pants and appeared disheveled, as if something was wrong. Accordingly, defendant had an opportunity and similar motive to develop the witness's testimony.

We affirm defendant's convictions, but remand for correction of the PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens