

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 10, 2012

v

CLARENCE DESHUN THOMAS,

Defendant-Appellant.

No. 302341
Saginaw Circuit Court
LC No. 10-034241-FH

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions for unlawful driving away of an automobile, MCL 750.413, carrying a weapon in a motor vehicle, MCL 750.227 (CCW), resisting and obstructing a police officer, MCL 750.81d(1), possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b, and receiving and concealing a stolen firearm, MCL 750.535b. Defendant was sentenced to two to five years' imprisonment for both the unlawful driving away and CCW convictions, one to two years' imprisonment for the resisting and obstructing conviction, two to 20 years' imprisonment for the receiving and concealing stolen property conviction, and a two-year mandatory term for the felony-firearm conviction. We affirm.

I. BASIC FACTS

At almost 4:00 a.m. on the morning of April 24, 2010, Saginaw police officer Blake Hiben attempted to effectuate a traffic stop on a Chevrolet Trailblazer travelling at a high rate of speed. After a pursuit, the vehicle eventually pulled to the side of the road and stopped; however, when Hiben approached the vehicle's rear bumper, the driver sped off. Hiben again pursued the Trailblazer, briefly losing sight of it before it came to rest in a field. The doors were open and Hiben observed three black males running from the vehicle. Several officers responded to the scene and assisted in attempting to apprehend the vehicle's occupants. Defendant was arrested by Officer Daniel Hernandez. Defendant's co-defendant, Jason Jamal Hubbert, was arrested by Anthony Teneyuque. A third individual, Alonte Smith, was also arrested. Officers were unable to apprehend a fourth individual, who escaped in the woods.

The officers then searched the path the suspects had taken in order to locate any discarded items. A gun was found approximately five feet from Hiben's police car and another gun was located in the Trailblazer. Both guns were later identified as stolen. The Trailblazer

was recently reported stolen by its owner, Brittney Dorsey. Both passenger-side windows on the Trailblazer had been broken.

Defendant was convicted and sentenced as outlined above. He now appeals as of right.

II. DEFENDANT’S RIGHT TO CONFRONTATION OF WITNESSES

A defendant has the right to be confronted with the witnesses against him under the federal and Michigan constitutions. US Const, Am VI; Const. 1963, art 1, § 20. This right “insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness.” *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), quoting *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994). “The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.” *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008). Statements are testimonial where the primary purpose of the statements or the questioning that elicits them is to establish or prove past events potentially relevant to later criminal prosecution. *People v Lewis (On Remand)*, 287 Mich App 356, 360; 788 NW2d 461 (2010), affirmed in part, 490 Mich 921 (2011), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). “A witness is considered unavailable if he or she 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.’” *Yost*, 278 Mich App at 370, quoting MRE 804(a)(5).

“[W]hether the admission of evidence would violate a defendant’s constitutional right of confrontation is a question of law that we review de novo.” *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010).

A. EXPERT TESTIMONY

Defendant first argues that he was denied a fair trial due to the introduction of the laboratory report in the absence of testimony from the technician who prepared the report. Although we agree with defendant that this report should not have been admitted at trial where it was clearly testimonial in nature, *Bullcoming v New Mexico*, ___ US ___; 131 S Ct 2705; 180 L Ed 2d 610 (2011); *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009), defendant, who did not object at trial, cannot show that this error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Police officers took samples of the broken glass from the Trailblazer for analysis. Keith Lamont, a Michigan State Police forensic scientist, sent the glass samples to a laboratory in Grand Rapids, the only lab in the state equipped for such analysis. Troy Ernst, of the Grand Rapids lab, analyzed the glass from the vehicle along with glass taken from Hubbert’s clothing, and prepared a report. The prosecution endorsed Ernst as a witness that would show that both sets of glass samples were consistent with each other. However, Ernst was not produced at trial and no explanation for his absence was given. Ernst’s report was read into the record by Lamont

who also testified that, based on Ernst's report, the two glass samples appeared "similar." Defense counsel objected to neither the testimony, nor the introduction of the lab report.

The testimony of Lamont regarding the glass report should not have been admitted under the *Bullcoming* and *Melendez-Diaz* framework. The glass analysis report was clearly testimonial evidence. The prosecution did not assert that Ernst, the technician that prepared the report, was unavailable. Ernst's report was read into the record by Lamont, a technician with no knowledge of that particular report or its preparation. Further, Lamont made inferences from the data provided by Ernst's report. Defendant had no opportunity to cross-examine Ernst at trial, nor any other time.

However, the error was not outcome determinative. Defendant testified at trial against the advice of counsel. Defendant admitted that he was in the passenger's seat of the Trailblazer. An individual named "James" had picked up defendant earlier that morning. James provided a reasonable explanation for why the Trailblazer's windows were broken – his girlfriend was angry about another woman. Defendant did not know the vehicle was stolen. When asked why defendant and the others attempted to flee Officer Hiben, defendant admitted that it was because he had a gun in his possession. Defendant explained that he found the gun two days prior to his arrest. Again, defendant claimed he had no knowledge that the gun was stolen. While the glass evidence report supported the conclusions that the glass found on Hubbert's clothing was similar to that of the broken window in the Trailblazer, there was also testimony that glass was found on defendant's clothing. Detective Vasquez noted that there were shiny specks on the black clothing. Defendant's clothes were sent for analysis, but the report had not been completed at the time of trial. Defendant was found running near the scene of an abandoned stolen car past 4:00 am. He admitted he was in the car and that he possessed one of the guns found near the scene. Defendant failed to show that the outcome of trial could have been different had the glass report and Lamont's testimony been correctly excluded.

B. COMPLAINING WITNESS

Defendant next argues that the trial court impermissibly admitted Brittney Dorsey's preliminary examination in lieu of her testimony at trial. We disagree.

Defendant admits that he had an opportunity to cross-examine Dorsey at the preliminary examination. Thus, the relevant inquiry is whether she was "unavailable" within the meaning of MRE 804(a)(5). If, as the trial court ruled, Dorsey was unavailable, her prior recorded testimony falls under the MRE 804(b)(1) hearsay exemption. In a criminal case, the prosecution has the burden of showing it exercised due diligence in producing an endorsed, res gestate witness for trial. *Yost*, 278 Mich App at 370. If the prosecution did not exercise due diligence in obtaining the owner's presence at trial, she was not "unavailable," and thus her preliminary examination testimony was not inadmissible.

The prosecution served Dorsey with a subpoena for trial. She failed to appear at a December 1, 2010 trial date. The prosecution then moved to have Dorsey's preliminary examination testimony read into the record as the prior recorded testimony of an unavailable witness. Defense counsel objected and the trial court heard testimony as to efforts to locate Dorsey. Officer Ruben Vasquez testified that he called the phone number listed for Dorsey twice

and received no response. A detective went to the home and knocked, but there was no response. Another detective “sat” on Dorsey’s listed residence for three hours one evening and “there was absolutely no movement. The house was dark, not even sure if anybody’s still living there.” Jail records were checked to make sure Dorsey was not “locked up.”

After hearing oral argument, including defense counsel’s admission that he was present at the preliminary examination and was afforded an opportunity to cross-examine Dorsey, the trial court found that “the prosecutor has met the burden and that the requirements of the rule have been met for allowing the testimony;” i.e., that the prosecution had exercised due diligence in attempting to produce Dorsey, and that Dorsey was thus “unavailable” within the meaning of MRE 804(a)(5). Dorsey’s testimony was then read into the record.

We find no error in the trial court’s determination that due diligence had been exercised. Since the prosecution exercised due diligence, the owner’s prior testimony was admissible.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was deprived of the effective assistance of counsel at trial. We disagree.

An ineffective assistance of counsel claim is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *Id.* A trial court’s findings of fact are reviewed under a clearly erroneous standard. *Id.* Constitutional law questions are reviewed de novo. *Id.* However, because no evidentiary hearing was held, our review is “limited to mistakes apparent on the record.” *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. To prove ineffective assistance of counsel, a defendant must show counsel’s performance was deficient and that the deficiency resulted in prejudice to the defendant. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To show prejudice, defendant must demonstrate a reasonable probability of a different outcome were it not for counsel’s deficiency. *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). There is a “strong presumption that counsel’s performance constituted sound trial strategy.” *Carbin*, 463 Mich at 600. Counsel’s performance must be evaluated without the benefit of hindsight. *Grant*, 470 Mich at 485.

A. FAILURE TO SUPPRESS DEFENDANT’S JAIL RECORDINGS

Defendant first argues that his trial counsel erred by failing to attempt to suppress recordings of defendant’s phone calls he made while incarcerated.

Detective Vasquez testified regarding a telephone conversation an individual with defendant’s Personal Identification Number had while incarcerated:

He spoke with an unknown female, and what you'll hear is as soon as she answered the phone she immediately asked what did you all do, something to that effect.

He gives a description of, in summary, took the police on a high speed chase, a gun in the car, resisting arrest. Furthermore in the conversation, which again you will hear, he began talking again about a 30-minute chase, and the girl responded by saying why didn't you guys just stop. And again he responded, because I told you there was something in the car. Then something to the effect of, but I'll – I'll tell you later because I know these phones are being recorded.

A recording of the conversation was then played for the jury.

While defendant objects to the introduction of the recordings, and counsel's decision to cite to the recordings during opening statement, defendant presents no theory on which to find counsel ineffective, or any argument as to how the recordings were improperly admitted. Defendant does not address what, if any, statements were inadmissible from the recordings, and fails to argue how trial counsel's opening statements concerning the statements prejudiced defendant or constituted error. Defendant also presents no case law to support his position. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, defendant rejected his attorney's advice that he not testify at trial. In taking the stand, defendant admitted that he was an occupant of the vehicle and that he possessed one of the two guns found at the scene. Both the gun and the vehicle were stolen items. Even if defendant could craft an argument that counsel was ineffective for failing to object to the evidence, it cannot be argued that counsel's actions affected the outcome of defendant's trial.

B. IMPROPER COMMENT DURING OPENING STATEMENT

Defendant next argues that his trial counsel made two improper statements in his opening statement. First, as discussed above defense counsel mentioned the jail recordings. Second, defendant takes issue with defense counsel's assertion, "I'm not saying [defendant] hasn't had any contact with the police before or anything like that. I'm not saying anything of that sort of nature, but he is very young." However, defendant provides no case law or argument other than the conclusion that this statement was "devastatingly improper." To the extent that this could even be said to represent an objectively unreasonable statement, defendant cannot show that it had any effect on the outcome of the trial.

C. IMPROPERLY ALLOWING THE PROSECUTION TO AMEND ITS WITNESS LIST

Next, defendant argues that his trial counsel improperly allowed the prosecution to amend its witness list. Defendant does not cite any case law to support this argument, and certainly does not establish that any alleged failure of trial counsel undermined the reliability of the verdict. This issue has also been abandoned for appeal. *Prince*, 237 Mich App at 197.

D. FAILURE TO PRESERVE THE RIGHT TO CONFRONTATION

Defendant argues that trial counsel should have preserved defendant's right of confrontation by cross-examining the car's owner at the preliminary examination. "Decisions regarding . . . how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant seems to argue that defense counsel should have predicted Dorsey's unavailability. As Dorsey's preliminary examination testimony amounted to the fact that her car was stolen (an assertion defendant never challenged), it is difficult to imagine how defense counsel's alleged failure actually prejudiced defendant.

E. CUMULATIVE ERROR

Finally, defendant argues that the cumulative effect of the alleged instances of ineffective assistance of trial counsel deprived him of a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Having failed to show any merit in his arguments above, defendant's cumulative error argument must also fail.

IV. PROSECUTORIAL MISCONDUCT

Finally, defendant argues that he was denied a fair trial by the conduct of the prosecution concerning prosecutor's closing arguments. However, because defendant did not object, we review these claims of error for plain error affecting defendant's substantial rights. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 763-764.

"A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *Unger*, 278 Mich App at 241. Defendant argues that the prosecution made several such statements in its closing argument.

First, defendant challenges the prosecutor's statement to the jury, "In fact, I think you heard testimony from Mr. Lamont that glass was found on the clothing of all individuals, but more specifically Mr. Hubbert." However, to the extent this was an erroneous recitation of the evidence, the trial court instructed the jury that counsel's statements were not evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). This mitigates the prejudicial effect of any error. Moreover, defendant testified that he was a passenger in the vehicle and that there was glass in the area in which he sat.

Defendant next argues that the prosecutor made statements that implied the group nature of defendant's crime, referenced the actions of defendant's accomplices, and made inferences from defendant's testimony. The prosecutor argued:

They're working in concert together. Whatever their ultimate plan was that night, they're all together. And I will say this, although no other gun was found, it was dark enough out there, there could have been marijuana tossed. Mr. Hubbert talked about trying to – wanted to sell some. There could have been other guns out there lost. It's dark.

You can't – you can't search the entire area. There's no huge enormous floodlights we can turn on. It's not like a football stadium where we can turn massive lights on out there. You're restricted to whatever you can find with your flashlight there in the middle of the night.

Prosecutors are “free to argue the evidence and all reasonable inferences as it relates to [their] theory of the case.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). While there is no support for the prosecutor's statement regarding marijuana, the jury was properly instructed that the attorneys' arguments were not evidence. The remainder of the prosecutor's argument was a proper comment on the evidence. Co-defendant's strategy (which was ultimately successful) was that Hubbert did not possess a weapon. The prosecutor seemed to argue that all of the occupants of the Trailblazer collectively possessed the weapons.

Defendant also argues that the cumulative effect of the alleged instances of prosecutorial misconduct deprived him of a fair trial. However, having failed to show any, defendant's argument must fail.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly