

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON JONTAY GARDNER,

Defendant-Appellant.

UNPUBLISHED

October 9, 2007

No. 267952

Ingham Circuit Court

LC No. 04-000560-FC

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his convictions following a jury trial of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to imprisonment of 8 to 15 years for the assault with intent to rob while armed conviction consecutive to imprisonment of 2 years for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecutor engaged in misconduct when he inappropriately sought to elicit sympathy for the victim by asking him irrelevant personal questions. Prosecutorial misconduct claims are reviewed on a case-by-case basis, considering the prosecutor's comments in context and in light of the defense arguments and their relationship to evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Defendant's failure to properly preserve this issue means that we review it for plain error affecting substantial rights. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

We agree with defendant that the victim's smoking and drinking habits are not relevant to any of the issues at trial. But there is no reason to believe that a jury would find more trustworthy a witness who does not smoke or drink much. Conversely, the victim's medical condition was relevant because it explained the origin of his tax problem and thus appropriately responded to defendant's theory of the case. Therefore, the testimony regarding those issues did not result in plain error affecting defendant's substantial rights. Further, defendant has not shown that he was either actually innocent or that the prosecutor's actions seriously undermined the fairness, integrity, or public reputation of the judicial proceedings.

Defendant also argues that he was denied effective assistance of counsel when his counsel failed to object to any of the prosecutor's alleged misconduct and when counsel elicited from defendant that he was on parole from his conviction for selling cocaine. Our review of this challenge is limited to the existing record. *Thomas*, supra at 456.

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. *Pickens*, supra at 325. There is therefore a strong presumption of effective assistance when it comes to issues of trial strategy. *Strickland*, supra at 689. An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *Id.*

As indicated above, there was no prosecutorial misconduct warranting reversal. Even if defendant's counsel had objected to the prosecutor's questions regarding the victim's smoking and drinking, defendant fails to show that the outcome of trial would have been any different in light of the evidence adduced, particularly the identification testimony of the victim. Further, any objection regarding the victim's medical condition would have been meritless because it was directly relevant to the victim's tax delinquency, an issue defendant introduced into the proceedings. There is no obligation for counsel to advocate a meritless position. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant's second claim of ineffective assistance of counsel is also meritless. Defendant argues that it was reversible error to bring up defendant's parole for selling cocaine. But the entire basis of defendant's defense was that he is a cocaine dealer, has been for years, and that the alleged victim's allegation of attempted robbery was in retaliation for defendant's stealing cocaine from him and then not giving him any of the proceeds from its sale. Thus, this evidence supports defendant's theory of the case. Moreover, mentioning that defendant was on parole is inconsequential when defendant's testimony amounted to a total confession of the sort of conduct that resulted in his being on parole. Thus, defendant is not entitled to relief on this issue.

We affirm.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey