STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2005
v	No. 257308 Muskegon Circuit Court
DANIEL H. VANDEBORNE, Defendant-Appellant.	LC No. 03-048644-FH

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant Daniel Vandeborne was charged with second-degree home invasion,[1] breaking and entering into a building with the intent to commit larceny,[2] and receiving and concealing stolen property,[3] for entering a home without permission and removing property with the assistance of an accomplice, Jeff Smith. Vandeborne appeals as of right from his jury conviction of second-degree home invasion and his resulting sentence as a fourth-degree habitual offender to six years and four months' to 30 years' imprisonment. We affirm.

I. Basic Facts And Procedural History

On July 2, 2002, Brenda Kay Rogers was living at her brother's house but remodeling a house at 8028 North Old Channel Trail in preparation for moving there. Although she was not yet residing at the Old Channel Trail house, Rogers did have some personal property stored there. Rogers worked until approximately 10:15 p.m. to 10:30 p.m. on July 2, 2002, and then went to the Old Channel Trail house with her boyfriend, Jerry Gifford, in order to show him some of the recent work she had completed. On arriving at the house, the couple noticed a pickup truck parked nearby. According to Rogers, after entering the garage, she noticed that several items were missing, including two cases of beer, her freezer, two televisions, a bike, phone, filing cabinet, and weed whacker. Her computer system, which had been stored in the back bedroom of the house, was also missing. Rogers then called 911.

[1] MCL 750.110a(3).

[2] MCL 750.110.

[3] MCL 750.535(3)(a).

While Rogers was on the phone, Gifford went down to investigate the truck that they had noticed parked nearby. Gifford testified that no one was in the truck, but he noticed something moving in the back bed of the truck. After Gifford walked back to the house to ask for a flashlight, the truck's engine started and then the truck quickly passed him. Gifford testified that he saw two people in the truck and ran back up the driveway to tell Rogers to let the police know. Gifford then followed the truck in his own vehicle. Gifford testified that he followed the truck and was eventually able to write down the license plate number, which he gave to the police.

Jeff Smith testified that he had known Vandeborne for 20 to 25 years and was with him on July 2, 2002. Smith testified that Vandeborne came to pick him up that day in his mother's green Chevy pickup and that the two drank some beer and then decided to go swimming off the pier in Montague that afternoon. Smith added that they took Old Channel Trail Road to the swimming area but, on their way to the pier, they noticed a dumpster fire in front of a residence and stopped to have someone call the fire department. Smith and Vandeborne then went back to the house where they met a firefighter before leaving. Smith testified that, either while they were swimming or during their drive back, Vandeborne mentioned to Smith that there had been some "stuff" in the garage of the residence, and the two decided to "swing by and check it out." Smith testified that he and Vandeborne took two televisions and a computer system from the house. The two then went back to the house and were inside the garage when someone pulled into the driveway, so he and Vandeborne "took off."

The next day, police searched the apartment where Smith was staying and found one of Rogers' televisions. Smith then told the police what had happened, and Vandeborne and Smith were both arrested. Roger Robillard, a detective with the Muskegon County Sheriff's Department (MCSD), interviewed Smith at the police department. Detective Robillard testified that this interview was taped. He also testified that Smith ultimately signed a written statement describing what had happened on July 2, 2002, and drew a map showing where he and Vandeborne had parked while at Rogers' house. But, at trial, Smith did not recall drawing a map for the police.

Detective Robillard testified that, in preparation for Vandeborne's trial, he attempted to locate the map, statement, and tape; however, he discovered that these items were purged with other property in July 2003 because the police understood that the case against Smith was closed.[4] During cross-examination, Detective Robillard agreed that it did not appear that police had checked to see if the case was over with Vandeborne as well before purging the evidence. However, Detective Robillard testified that he also completed a detailed police report that included what Smith told him.

A. Pre-trial Motion

Before trial, Vandeborne moved for a dismissal of the charges against him, arguing that dismissal is warranted where the police destroy evidence in bad faith. Vandeborne argued that

[4] Smith pleaded guilty to a charge of breaking and entering.

bad faith could be inferred from the fact that the police destroyed the evidence while knowing that both Vandeborne and Smith were suspects, and that, although Smith had pleaded guilty to a charge of breaking and entering, Vandeborne's trial was forthcoming. As alternatives to dismissal, Vandeborne requested that the trial court either not allow Smith to testify against Vandeborne, arguing that defense counsel would be unable to effectively cross-examine Smith without the missing evidence, or instruct the jury that they should infer that the missing evidence would have been favorable to his defense.

The prosecutor conceded that the evidence had been destroyed as part of a routine audit of the evidence room after the police determined that the case against Smith was closed. The prosecutor argued, however, that there was no evidence that the police destroyed the items in bad faith. The prosecutor added that Detective Robillard wrote a detailed police report that included Smith's verbatim interview statements and that defense counsel was given a copy of this report.

The trial court found that Vandeborne had failed to show any bad faith in the destruction of the evidence and denied Vandeborne's motion to dismiss as well as his request that Smith not be allowed to testify. However, the trial court stated that defense counsel could ask police witnesses about the evidence, inform the jury that evidence was missing, and make appropriate arguments concerning witness credibility based on the fact that the evidence was missing. The trial court deferred its decision regarding Vandeborne's request for a special instruction.

B. Voir Dire

During voir dire, the prosecutor explained the concept of intent and asked the jurors if any of them would have a problem following the trial court's instruction that would require them to consider someone's statements, actions, and surrounding circumstances in determining intent. The prosecutor then discussed the concept of reasonable doubt, noting that the concept allows jurors to use their reason and common sense and that his burden in proving Vandeborne guilty beyond a reasonable doubt did not equate to proving Vandeborne's guilt by 100 percent. The prosecutor then asked the jurors whether anyone would require him to prove Vandeborne's guilt by 100 percent. Next, the prosecutor noted the definitions of breaking, entering, and possession and asked whether each juror understood those definitions. The prosecutor also explained the concept of accomplice liability—that one who encourages or aids in a crime is as guilty as the person who actually commits the crime—and asked whether any of the jurors had a problem with such a concept. Later, while interviewing a replacement juror on the panel, the prosecutor asked the juror whether he had listened to the prosecutor's previous questions and discussion about certain concepts and whether those concepts made sense.

C. Closing Arguments

Defense counsel promptly rested her case at the conclusion of the prosecution's case. During her closing argument, defense counsel reminded the jury about Smith's taped interview, his written statement, and the map that Smith purportedly drew during his interview with Detective Robillard. Defense counsel then emphasized that all of this evidence was unavailable for the jury's review because the police had destroyed it. Defense counsel then implied that the police destroyed the evidence because it did not fit with their theory of the case.

During his rebuttal closing argument, the prosecutor noted that defense counsel's focus on inconsistencies was a common defense ploy. The following exchange then ensued:

> THE PROSECUTOR: We went through with Detective Robillard and he indicated to you that his conversation with Jeff Smith was memorialized in a police report. In fact, if you recall, we went through all the statements that were written down in Detective Robillard's report that Jeff Smith said. *And do you really think, Ladies and Gentlemen, that Detective Brent Sowles, a police officer for 20 years, Detective Roger Robillard, a police officer for more than 20 years, is going to get up on that witness chair, lie under oath, commit the crime of perjury, risk their pension* - -
>
> DEFENSE COUNSEL: Objection, Your Honor. I would say that he's commenting on the veracity of witnesses. That's the jury's - -
>
> THE COURT: Yeah. He's entitled to do that. The only prohibition is an attorney cannot personally vouch for the credibility of a witness, but either attorney can make arguments to support or detract from the credibility of the witness. Go ahead.
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> THE PROSECUTOR: Thank you.
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> *Police officers, over 40 years of experience, they're going to risk their pension, their retirement, their careers, to lie under oath to you today for one Defendant? Does that make sense? Of course not. Of course not.* [Emphasis added.]

D. Jury Instructions

After the trial court instructed the jury, Vandeborne's counsel noted again her request for an instruction concerning the missing evidence. The following exchange took place:

> DEFENSE COUNSEL: Your Honor, I think I had mentioned the extra jury instruction because of bad faith on behalf - - oh, the missing evidence, and also that I had asked for a special instruction on that when we did the motion, and you said that you would rule on that if you found bad faith.
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> THE COURT: Right. And I guess I did not find that.
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> DEFENSE COUNSEL: Yeah.
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> THE COURT: That's right. I did not find any bad faith from that record.
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> DEFENSE COUNSEL: I just wanted to put it on record that that's why the jury instruction - - because you said you would later rule on that during this time. So, I wanted to make sure it was on the record.
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> THE COURT: That's correct. And I wasn't giving [sic] any law to suggest that a special instruction could be given even if there was good faith. And

> as I say, in our hearing in terms of what was presented to me, I did not find bad faith on the part of law enforcement in destroying or purging from the files certain items that related to the Jeffrey Smith case.

E. Sentencing

Vandeborne's original sentencing information report included a sentencing guidelines range recommendation of 19 to 76 months. However, during the sentencing hearing, the prosecution requested that offense variable (OV) 9 be scored at ten points. The prosecutor argued that OV 9 allowed for the scoring of ten points when there were two or more victims in the offense and the two victims in this case included Rogers, whose property was stolen, and her insurance company, which had to reimburse her for those stolen items that were either not returned or broken. Defense counsel countered that OV 9 allows ten points to be scored when two or more victims were placed "in danger of an injury or loss of life" and that the insurance company was not a victim in this case because Rogers paid insurance premiums to the company for this coverage and the company knows that a loss may occur. In scoring OV 9 at ten points, the trial court stated:

> Well, let me indicate I am going to score it at ten, although I want to indicate that I don't—if that shifts the guidelines, *I don't think it's going to shift the sentence I'm tentatively thinking of, which would probably be within this range that's already on the paper*.
>
> So I think the prosecutor is correct, at least is arguably correct, I am going to score it at ten, but that's not going to make a big difference here of what my tentative thought of doing today is. All right. So, it may increase the range, but it probably will not increase the tentative minimum that I am contemplating today. [Emphasis added.]

The prosecutor also argued that OV 14 allowed for the scoring of ten points where Vandeborne was the leader of a multiple-offender situation and that the record showed that it was Vandeborne's idea that he and Smith go back and steal Rogers' property. Defense counsel argued that, although Vandeborne made the suggestion, he was not a leader because the two men made the decision to commit the crime together and accomplished the crime together. However, the trial court agreed with the prosecutor and scored OV 14 at ten points. With these changes, Vandeborne's minimum guidelines range changed to 36 to 142 months. The trial court ultimately sentenced Vandeborne as a fourth offense habitual offender to a term of six years and four months' to 30 years' imprisonment.

II. Prosecutorial Misconduct

A. Standard of Review

Vandeborne first asserts that he was denied his right to a fair trial by the prosecutor's misconduct during voir dire and closing arguments. Vandeborne's claim of prosecutorial

misconduct during voir dire is not preserved and is, therefore, reviewed for plain error affecting his substantial rights.[5] Under the plain error rule, 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.[6] The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.[7] Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context.[8] The propriety of a prosecutor's remarks depends on all the facts of the case.[9]

B. Voir Dire

Vandeborne argues that the prosecutor's questions during voir dire regarding legal concepts such as intent, reasonable doubt, and the definitions of breaking, entering, and possession, were designed "to entrap, influence, or commit jurors" by painting the prosecutor as an instructor of law and, thus, in a higher place in the trial process than defense counsel.

As noted by our Supreme Court:

> A defendant who chooses a jury trial has an absolute right to a fair and impartial jury. The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. In voir dire, meaning "to speak the truth," potential jurors are questioned in an effort to uncover any bias they may have that could prevent them from fairly deciding the case.[10]

We conclude that the purpose of the prosecutor's questions regarding the jurors' understanding of concepts like reasonable doubt, possession, and intent, and their ability to follow such legal concepts was to identify those jurors who disagreed with the definitions and who would not be able to render a decision based on those concepts. Therefore, the prosecutor's questions were properly designed to uncover bias that would have prevented the jurors from fairly deciding the case. Vandeborne has failed to show plain error. Further, to the extent that Vandeborne alludes to the possibility that his trial counsel was ineffective for failing to object to these questions, we note that his trial counsel was not required to advocate a meritless position.[11]

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[5] *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[6] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[7] *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

[8] *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

[9] *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

[10] *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (citations omitted).

[11] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

C. Closing Arguments

Vandeborne also argues that he was deprived of his right to a fair trial by the prosecutor's misconduct during closing arguments. Specifically, Vandeborne argues that the prosecutor improperly vouched for the credibility of the detectives who testified during trial and, thereby, shifted the burden to Vandeborne to disprove the prosecution's case.

We conclude that the prosecutor's remarks were an appropriate response to defense counsel's argument that the police were lying. It is true that "a prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness."[12] However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes."[13]

In *People v Thomas*,[14] this Court considered a prosecutor's comments that lying on the stand could cost an officer his career and noted that the prosecutor did not personally vouch for the officer's credibility but only argued that the officers had no reason to lie. This Court found that, given the responsive nature of the comments and the context in which they were made, the prosecutor's comments were not improper.[15] Likewise, in the present case, the prosecutor never personally vouched for the detective's credibility or otherwise implied that he had special knowledge of their veracity but, in response to defense counsel's argument that police conveniently destroyed evidence and perhaps left out other evidence from the police report, the prosecutor argued those reasons why the detectives would not lie during their testimony. This was not improper. Therefore, Vandeborne has failed to show any prosecutorial misconduct.

III. Motion to Dismiss

A. Standard of Review

Vandeborne next asserts that the trial court abused its discretion by denying his motion to dismiss based on the destruction by police of three pieces of evidence: Smith's taped interview and written statement, and the map that Smith drew. We review a trial court's ruling regarding a motion to dismiss for an abuse of discretion.[16]

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[12] *Thomas*, *supra* at 455.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004).

B. Failure To Preserve Exculpatory Evidence

Both parties cite *Arizona v Youngblood*,[17] concerning the effect of the prosecution's failure to preserve exculpatory evidence. Specifically, the United States Supreme Court in *Youngblood* opined:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady* [*v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is . . . that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause . . . as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. *We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law*. [Internal citations omitted; emphasis added.]

Both Smith and Detective Robillard testified at trial concerning the interview. Smith testified that his statement to Detective Robillard was similar to his testimony at trial, and Detective Robillard testified that his police report included what Smith told him "word for word." Therefore, although the missing evidence could have been of potential use to defense counsel in her cross-examination of Smith, Vandeborne has failed to show that the evidence was exculpatory and not cumulative.

Furthermore, Vandeborne has failed to show that the police destroyed the evidence in bad faith. During arguments concerning Vandeborne's motion, the prosecutor informed the trial court that the evidence was destroyed as part of a routine audit of the evidence room because Smith's case was no longer pending. In fact, defense counsel conceded that she did not believe that the police intentionally destroyed the evidence in an effort to keep it from Vandeborne. Therefore, we conclude that the trial court did not abuse its discretion by denying Vandeborne's motion to dismiss.

[17] *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

IV. Jury Instructions

A. Standard of Review

Vandeborne asserts that the trial court abused its discretion in denying his request for an instruction to the jury that it should have presumed that the missing evidence would have favored his defense. We review Vandeborne's claim of instructional error de novo.[18] "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court."[19] We review jury instructions in their entirety to determine if error requiring reversal occurred.[20] "There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights."[21]

B. Evidence Of Bad Faith

In *People v Davis*, this Court held that the defendant was not entitled to an instruction that missing evidence would have favored his defense because he did not demonstrate that the prosecutor acted in bad faith.[22] Therefore, because Vandeborne has failed to show that missing evidence was destroyed in bad faith, we conclude that the trial court did not err in refusing to give the requested instruction.

V. Sentencing

A. Standard Of Review

Vandeborne next asserts two sentencing errors: one involving the scoring of OV 9 and OV 14 and one involving the proportionality of his sentence of six years and four months' [76 months] to 30 years' imprisonment.

The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record which adequately supports a particular score.[23] "'Scoring decisions for which there is any evidence in support will be upheld.'"[24]

B. Scoring Of Offense Variables

Vandeborne's sentencing guidelines range before the addition of the 20 points was 19 to 76 months. Because Vandeborne's minimum sentence of 76 months falls within the appropriate

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[18] *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993).

[23] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

[24] *Id*., quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

sentencing guidelines range with or without the 20 total points scored in OV 9 and OV 14, and because the trial court made it clear that it intended to sentence Vandeborne to a minimum at the top of the original guidelines range (19 to 76 months), Vandeborne's argument that he is entitled to resentencing lacks merit.[25]

Relying on *Blakely v Washington*[26]and *United States v Booker*,[27] Vandeborne also argues that the trial court's determinations of certain facts when scoring the offense variables was unconstitutional. In *People v Claypool*,[28] the Court indicated that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. We are bound by that decision.[29]

C. Proportionality Of Sentence

"Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality if the sentence falls within the guidelines."[30] Although Vandeborne challenges the proportionality of his sentence, he does not argue in this issue that he was sentenced outside the appropriately scored guideline range. And, as we already concluded, Vandeborne's sentence is within the appropriately scored guidelines range. Therefore, pursuant to MCL 769.34(10), we must affirm Vandeborne's sentence.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey

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[25] *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002).

[26] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[27] *United States v Booker*, 543 US ___; 125 S Ct 738; 160 L Ed 2d 621 (2005).

[28] *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

[29] *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). We acknowledge that the Michigan Supreme Court has granted leave to appeal this Court's decision in *Drohan*. *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005). However, "a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2); *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996).

[30] *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002).