STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY EUGENE NICOLL,

Defendant-Appellant.

UNPUBLISHED
August 1, 2024

No. 364695
Menominee Circuit Court
LC No. 22-004437-FH

Before: CAMERON, P.J., and N. P. HOOD and YOUNG, JJ.

CAMERON, P.J. (*dissenting*).

In my opinion, this case boils down to the prosecutor's inappropriate comment that defendant is "a criminal" who "doesn't show up for court[.]" I wholeheartedly agree with the majority that this statement was improper, and that trial counsel should have objected. But, I disagree that trial counsel's failure to object to this comment meets the prejudice threshold under *Strickand v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). That is, I do not believe there is a reasonable probability that a timely objection would have changed the jury's verdict. I also disagree that trial counsel provided constitutionally-deficient representation by not objecting to evidence relating to defendant's arrest warrants. In my view, the majority has revised defendant's arguments on appeal, exceeding our role as an error-correcting court, and, in doing so, has failed to apply the highly deferential abuse-of-discretion standard we must use when examining evidentiary issues. I therefore respectfully dissent.

I. SCOPE OF DEFENDANT'S ARGUMENT

As an initial matter, I question whether this Court should even consider defendant's argument about the admissibility of the arrest warrants, or any testimony relating to them. The scope of this Court's review is limited to arguments raised on appeal, and "[t]he failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). On appeal, defendant provides a cursory argument in support of his ineffective-assistance-of-counsel claim concerning the basis for the admitted warrants:

> Little time should be spent speculating how such testimony might be admissible. Under no rule of evidence would a misdemeanor arrest on a domestic violence or aggravated assault warrant be admissible at this trial. The evidence does not fit MRE 609. It is not admissible as character evidence under MRE 404a. No pre-trial [sic] notice was offered under MRE 404b. It is not minimally relevant under MRE 401-402. The prosecution never argued a theory of admissibility because it entered without objection.

Defendant does indeed devote "little time" to his argument. His conclusionary observations fail to contextualize our rules of evidence. Further, his argument fails to clarify the purported error under the *specific* wording of the rules. Defendant's failure to brief the merits of this argument amounts to abandonment of the issue, and it is inappropriate for this Court to conclude otherwise. *McPherson*, 263 Mich App at 136. I would therefore end the analysis here. Nevertheless, the majority reaches the merits of defendant's unsupported ineffective-assistance-of-counsel claim.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The majority concludes that trial counsel was constitutionally deficient for failing to object to testimony about the allegations underlying defendant's open arrest warrants and for failing to object to the admission of the certified arrest warrants themselves. As the majority correctly notes, ineffective-assistance claims involve a two-part test demonstrating "that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010).

A. TESTIMONY ABOUT THE WARRANTS

Defendant points to the following exchange between the prosecutor and the arresting officer, Deputy Aaron Ihander, which occurred after the prosecutor showed Deputy Ihander's bodycam footage to the jury:

> *Q*. What did [defendant] say? He said, "Nice seeing you again."? [sic]
>
> *A*. Yeah.
>
> *Q*. You guys know each other?
>
> *A*. Yes. Well, previous contacts, yes.
>
> *Q*. (inaudible) to mention . . . he had a misdemeanor warrant for domestic violence, aggravated assault?
>
> *A*. Yes.
>
> *Q*. Now that's a misdemeanor; is that correct?
>
> *A*. The domestic violence should be, yes.

Q. But you're also told before he (sic) started chasing him that he had a felony warrant?

A. Correct.

Q. Do they always tell you what the felony warrant is or do they sometimes just say he's got a felony warrant?

A. They will usually tell you what it is, not . . . always.

Q. Okay. Did they tell you this time?

A. I . . . don't recall.

Q. Okay, but when you . . . signed the warrant . . . and I don't want you to say what it was, but when you signed the warrant, the felony warrant, they did tell you what it was?

A. Yes, it says on there.

Q. Okay. Don't say what it was. And you signed that you took him into custody on that warrant, you signed the bottom of that?

A. Correct.

Q. And that's standard procedure?

A. Yes.

Q. Okay, and that was a valid warrant?

A. Yes.

Defendant opines that trial counsel's failure to object to this exchange amounts to ineffective assistance of counsel because "the testimony appears to have been barred by the in limine ruling described above." I disagree. The trial court's ruling on the motion in limine was very narrow; it prohibited only the admission of "[t]he certified copies of the bench warrants[.]" As the trial court explained:

> [T]he Court will only allow the actual bench warrant because typically they contain information as far as other charges that we wouldn't want the jury to hear about. I will not allow the certified copies of the bench warrant to come in unless there is an issue or a challenge to the reason for the stop, being that there are outstanding bench warrants, so if there is any challenge, either by way of argument or testimony that there is an issue with why he was being stopped, then those certified copies can come in, either in the case in chief or in rebuttal.

The trial court's ruling did not prohibit testimonial evidence about *any* arrest warrant. Rather, its ruling was limited to the admission of *certified copies* of the bench warrant. The

admission of this testimony, therefore, was not contrary to the trial court's earlier ruling. Thus, trial counsel was not ineffective for failing to object under this reasoning. See *People v Stevens*, 306 Mich App 620, 627 n 5; 858 NW2d 98 (2014) ("[C]ounsel cannot be considered ineffective for failing to raise a futile objection.").

The majority takes this argument one step further and posits that trial counsel was also constitutionally deficient for failing to object to Deputy Ihander's testimony about the underlying bases of the warrants. But, the larger issue in this case is whether trial counsel was ineffective for failing to object to the prosecutor's statement that defendant was a criminal who does not show up in court. To be clear, this remark by the prosecutor was inappropriate, and I discern no sound trial strategy for trial counsel's failure to object. The ineffective-assistance-of-counsel test also requires a showing of prejudice; defendant must demonstrate a reasonable probability "that, but for counsel's error, the result of the proceeding would have been different." *Fyda*, 288 Mich App at 450. In this case, the prosecutor's comment was made in the context of a two-day trial, which included video footage showing officers attempting to stop defendant's vehicle; a chase that ended at defendant's residence; and clear video evidence showing defendant in his yard resisting arrest. Adding to the video evidence, the arresting officer explained that he knew defendant from prior contacts, and saw him driving the car before the chase began. In my opinion, this overwhelming evidence weighs heavily against the majority's conclusion that there is a reasonable probability a timely objection to the prosecutor's improper remark would have changed the jury's verdict.

Moreover, the jury was properly instructed that "[t]he lawyers' statements and arguments are not evidence," and "[j]urors are presumed to follow their instructions[.]" *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). The fact that the prosecutor made this inappropriate remark in this context is not enough to show the result of the proceedings would have been different. Because defendant fails to meet the prejudice prong of the ineffective-assistance-of-counsel test, this Court should affirm on this basis as well.

B. CERTIFIED COPIES OF THE WARRANTS

The majority also seems to suggest that trial counsel was constitutionally deficient for not objecting to the admission of copies of the arrest warrants. But, trial counsel did object. Before trial, trial counsel made a well-reasoned objection to prevent copies of the arrest warrants from being admitted at trial. Indeed, the trial court agreed with trial counsel, ruling that copies of the warrants would not be admitted at trial unless the reason for the stop was challenged. The trial court cautioned the parties that if "there [was] an issue or a challenge to the reason for the stop . . . then those certified copies [could] come in, either in the case in chief or in rebuttal." After the prosecution rested, defendant personally interjected himself into the proceedings and directed his trial counsel to recall a witness in order to challenge the arresting officers' reason for making the traffic stop.[1] Apparently, defendant's strategy was to raise doubt in the jury's mind about

[1] Contrary to the majority's opinion, defendant challenged the validity of the stop, which triggered the admission of the arrest warrants. Ironically, it was defendant himself who caused this evidence to be admitted. During a break in the trial, trial counsel explained to the trial court that her client was insisting that the stop in this case was invalid because the police did not confirm the validity

whether the arresting officers were "in the lawful performance of [their] duty." MCL 750.479a(1). Trial counsel followed defendant's direction and challenged the validity of the stop. To no one's surprise, this line of questioning caused copies of the arrest warrants to be admitted at trial.

The majority concludes that trial counsel should have nevertheless objected at trial, and further surmises that the trial court would (or should) have sustained the objection. I disagree. The trial court's pretrial ruling was crystal clear; a challenge to the basis for the stop would result in the admission of the warrants. There is no reason to be believe that the same objection at trial would have caused the trial court to reverse its pretrial ruling. Therefore, a second objection would have been futile.[2] The majority's conclusion that defendant's attorney was deficient for failing to object has the perverse effect of rewarding defendant for the situation he personally created. See *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010) ("[A] party may not harbor error at trial and then use that error as an appellate parachute[.]").

I would therefore affirm.[3]

/s/ Thomas C. Cameron

---

of the warrants before making the stop. Specifically, trial counsel asserted: "Mr. Nicoll takes issue with the fact that although those warrants were valid at the time, the officer didn't know that, and therefore, the pursuit . . . wasn't proper." Defendant then interrupted his attorney, arguing the officers had no valid basis for the stop. Minutes later, trial counsel wisely indicated to the trial court that she intended to rest without calling any witnesses. But, defendant again interrupted and announced that the defense would recall Deputy Ihander, overruling his attorney. After a private conversation, defense counsel followed defendant's direction, called Deputy Ihander, challenged the bases for the stop, and, in so doing, opened the door to the admission of the arrest warrants.

[2] Implicit in the majority's opinion is that the trial court erred when it admitted an unredacted copy of the arrests warrants at trial. The majority's analysis misses several important points. First, defendant does not argue on appeal that it was error to admit copies of his arrest warrants at trial. Second, the majority fails to properly consider the trial court's pretrial order, which sought to strike a balance between the potential prejudice to defendant concerning the admission of the arrest warrants and the prosecutor's burden to prove a contested element of its case. Third, missing from the majority's opinion is how the trial court's attempt at balancing these competing interests measures up against the highly deferential abuse-of-discretion standard we are required to apply to the trial court's evidentiary decision. Fourth, the primary issue on appeal is not whether the trial court erred in admitting an unredacted copy of the warrants. In the context of ineffective assistance of counsel, the issue is whether trial counsel objected to their admission. Here, trial counsel made a timely objection, thereby preserving the issue on appeal. MRE 103(a)(2). In this situation, nothing more was constitutionally required.

[3] Defendant also raises challenges to the trial court's jury instructions for the fleeing-and-eluding charge as well as its reasoning at sentencing. Regarding the jury instructions, reversal is not necessary because there was not a complete failure to provide the jury with the elements of fleeing and eluding. See, e.g., *People v Duncan*, 462 Mich 47, 48; 610 NW2d 551 (2000). Similarly, resentencing is not warranted because the record does not indicate that the trial court used defendant's refusal to admit guilt against him at sentencing.