

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE TYSON,

Defendant-Appellant.

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UNPUBLISHED

July 31, 1998

No. 201644

Recorder's Court

LC No. 96-002153

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of kidnapping, MCL 750.349; MSA 28.581. Defendant was sentenced to concurrent terms of twenty to forty years in prison. We affirm.

First, defendant argues that he was denied a fair trial because the trial court's instruction to the jury regarding the requirement of a unanimous verdict was ambiguous. We disagree. Because defendant failed to object to the trial court's instructions below, review of this issue has been waived unless failure to review it would result in manifest injustice. *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996).

Michigan's constitution requires that a criminal defendant be convicted by a unanimous verdict. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). In order to protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *Id.* The trial court's instruction unambiguously informed the jury that a unanimous verdict was required and in no way implied that a less than unanimous verdict was acceptable. Accordingly, there was no error because the jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Perry*, *supra* at 526.

Defendant next argues that he was denied a fair and impartial trial by several of the prosecutor's comments and questions. We disagree. This Court determines whether defendant was denied a fair and impartial trial after examination of the record and evaluation of the contested remarks in context. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

First, defendant argues that the prosecutor improperly questioned Nicholas Dubose. However, because defendant did not indicate in his brief on appeal what the improper questions were or why they were improper, this Court deems defendant's claim waived. *People v Dixon*, 217 Mich App 400, 406; 552 NW2d 663 (1996).

Next, defendant argues that the prosecutor improperly questioned the complainant about defendant's other bad acts. Specifically, defendant objects to the complainant's testimony that defendant told Jovaughn Townsend that they should not have left any witnesses behind when they kidnapped the complainant.

Evidence of other acts may be admissible under MRE 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). *VanderVliet, supra*. Rather, "[r]ule 404(b) permits the trial court to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *Id.*

The complainant's testimony was admissible because it was offered for the purpose of establishing defendant's willing participation in the crime, rather than to prove defendant's character or propensity to commit the crime. *Id.* at 75. It was relevant to defendant's participation as a perpetrator of the crime, and its probative value was not substantially outweighed by the danger of unfair prejudice. *Id.* Accordingly, the prosecutor's questions and the answers elicited were not improper.

Finally, defendant argues that the prosecutor improperly characterized him as a liar. We disagree. The prosecutor simply asked the jury to view defendant's testimony as untruthful, and such a request was permissible. *People v Coddington*, 188 Mich App 584, 603; 470 NW2d 478 (1991). A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief and is not required to state inferences and conclusions in the blandest possible terms. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). While the prosecutor may not vouch for defendant's guilt by using the prestige of his office, a colorful argument that defendant's testimony is not credible is proper when based on the evidence. *People v Weatherspoon*, 171 Mich App 549, 558; 431 NW2d 75 (1988). In addition, given the overwhelming evidence of defendant's guilt and the isolated nature of the comments, the comments would not rise to the level of error requiring reversal. *Launsbury, supra* at 361.

Defendant next argues that the trial court erred in referring to his statement to the police as a confession. However, in his brief on appeal, defendant did not indicate where the prosecutor referred to defendant's statement to the police as a confession. In her closing argument, the prosecutor referred to defendant's "statement," and even indicated that defendant's statement to the police was exculpatory. Therefore, this argument is without merit. Defendant was not denied a fair and impartial trial by the prosecutor's questions and comments.

Defendant next argues that he was denied effective assistance of counsel. We disagree. Defendant did not move for a new trial nor did he seek an evidentiary hearing before the trial court. Therefore, this Court must review this issue on the basis of the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

Defendant first argues that he was denied effective assistance of counsel because his trial counsel pursued a defense of duress, which defendant contends was totally unreasonable. A defense attorney must enjoy great discretion in the trying of a case, especially with regard to trial strategy and tactics. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Defense counsel's strategic choice to focus on a defense of duress should not be presumed error simply because it was unsuccessful. *Id.*

Defendant testified that he was scared because Townsend waved a nine millimeter gun in his face, and that is why he helped Townsend kidnap the complainant and her son. Defendant testified that he did not run away when Townsend told him to go back in the house to get the baby because he did not want Townsend to shoot him. Defendant also testified that he did not call the police because Townsend said that he would kill the police, the complainant and himself. Defendant told Investigator Budz that Townsend had waved a gun in defendant's face.

Defendant's own testimony and description of the case indicate that he felt he was under duress and that is the reason he helped Townsend. Defendant cannot now argue that he was denied effective assistance of counsel because his trial counsel argued defendant's own theory to the jury simply because the jury did not believe defendant's defense. *Pickens, supra* at 330. Defendant has not overcome the presumption that his defense counsel's decision to pursue a defense of duress was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant's claim that his counsel's failure to object to the contested prosecutorial comments constituted a deprivation of his right to the effective assistance of counsel must also fail. As discussed above, the prosecutor's comments were not improper. Therefore, defendant's trial counsel was not ineffective when he declined to object to the comments at trial. Trial counsel was not required to raise or argue a frivolous or meritless objection. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant has failed to overcome the presumption that he received effective assistance of counsel.

Finally, defendant argues that the trial court incorrectly scored Offense Variable (OV)1 and OV2 on the sentencing guidelines because it relied on erroneous information. We disagree. On appeal, application of the guidelines states a cognizable claim for relief only where (1) a factual predicate is

wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Because defendant's sentence was proportionate and not based on wholly unsupported or materially false factual predicates, *Mitchell* precludes review of this claim.

Affirmed.

/s/ Martin M. Doctoroff

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot