STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD THOMAS SCOTT,

Defendant-Appellant.

UNPUBLISHED
November 20, 1998

No. 200824
Calhoun Circuit Court
LC No. 95-003075 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD THOMAS SCOTT,

Defendant-Appellant.

No. 200995
Calhoun Circuit Court
LC No. 95-003076 FH

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant was convicted in two separate jury trials of delivery of cocaine in an amount less than fifty grams, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant to consecutive terms of 2-1/2 to 20 years' imprisonment. Defendant appeals as of right. We affirm.

These consolidated cases arose from drug sales that took place on November 4, 1994, (Docket No. 200824) and December 12, 1994 (Docket No. 200995). Plaintiff presented evidence that defendant sold cocaine on both occasions to Bruce Penning, an undercover police officer working

for the Southwest Enforcement Team. At both trials, defendant relied on a defense of duress, claiming that he had sold the drugs because his brother, Kevin, had threatened him and his family.

I

Defendant claims the evidence was insufficient to support his convictions. Specifically, defendant contends that there was insufficient evidence to prove that he did not commit the offenses under duress. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

Duress is a common-law affirmative defense. *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). The defense of duress is successfully raised where a defendant presents evidence from which a jury could conclude (1) there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant, (3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act, and (4) the defendant committed the act to avoid the threatened harm. *People v Terry*, 224 Mich App 447, 453; 569 NW2d 641 (1997). Furthermore, the threatening conduct or act of compulsion must be present and imminent. *Lemons*, *supra* at 247. Once the defendant successfully raises the defense, the prosecution has the burden of showing beyond a reasonable doubt that the defendant did not act under duress. *Terry*, *supra*.

In Docket No. 200824, Penning testified that he had arranged with defendant to purchase LSD and cocaine on November 4, 1994. When they met, defendant told Penning that he had not procured the LSD because it was too expensive. Following the transaction, Penning and defendant discussed future purchases of cocaine. Defendant testified that his brother threatened him and other family members during the fall of 1994. In November 1994, his brother ordered him to sell drugs.

In Docket No. 200995, Penning testified that defendant was eager to deal with him. Defendant told Penning during the transaction that he would be able to supply Penning with any quantity of drugs he wanted. Defendant was familiar with drug terminology and did not appear to be nervous or frightened. Defendant testified that he sold drugs to Penning because his brother had been threatening him and his family. Defendant's mother and sister also testified about the violent behavior of defendant's brother.

We conclude that defendant did not establish the essential elements of duress in either case. Although defendant testified that his brother had both threatened him and ordered him to sell drugs, nothing in his testimony tied the threats to the sale of drugs. See *id*. Moreover, defendant did not establish that he sold drugs to Penning because he feared present and imminent harm to himself or his family. See *Lemons*, *supra*. In addition, in each case a reasonable jury, relying on Penning's

testimony, could conclude that defendant's conduct was inconsistent with his duress defense. The evidence was sufficient to support defendant's convictions.

II

Defendant also argues that the trial court abused its discretion in denying defense counsel's motions for an adjournment. A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified on other grounds 457 Mich 883 (1998). Some factors to be considered include whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. Defendant must also demonstrate prejudice. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

In Docket No. 200824, defendant contends that the trial court abused its discretion because counsel had entered her appearance just five days before trial. However, while the substitution was filed with the court five days before trial, it was executed more than two weeks before trial. Although defense counsel said she had learned in the previous week about the existence of witnesses and tapes that allegedly would benefit the defenses of entrapment and duress, there is no showing of diligence in obtaining the presence of the witnesses or evidence. See MCR 2.503(C)(1)-(2). Finally, defendant has failed to demonstrate prejudice; he makes no showing that a continuance would have produced any evidence that would have aided his defense. See *People v Burwick*, 450 Mich 281, 296; 537 NW2d 813 (1995). Defense counsel requested an adjournment immediately before the start of trial. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for an adjournment.

In Docket No. 200995, defendant contends that his counsel was unprepared for trial, in part because she had not received materials from defendant's former counsel until a few days previously. As in the previous case, the motion for an adjournment was made at the time of trial. However, defendant does not explain how his counsel's lack of preparation prejudiced him. Defendant was able to present a duress defense through his own testimony and the testimony of his mother and sister. Again, we conclude that the court did not abuse its discretion in denying defendant's motion for adjournment.

III

In Docket No. 200995,[1] defendant argues that his trial was tainted by prosecutorial misconduct. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

After briefly reviewing the comments cited by defendant, we find no prosecutorial misconduct. The prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to

his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor may note evidence of a witness' bias or interest in a case because it is highly relevant to the witness' credibility. See *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). The prosecutor's comments do not constitute an improper civic duty argument. See *Bahoda*, *supra* at 282. Finally, although a prosecutor may not denigrate defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), a prosecutor may denigrate a defense if it is inconsistent with the evidence presented at trial, see *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). In sum, we find no allegation of error for which a curative instruction could not have eliminated any prejudicial effect or the failure to consider the issue further would result in a miscarriage of justice. See *Nantelle*, *supra*.

IV

Defendant contends that he was denied effective assistance of counsel because counsel failed to timely request adjournments. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995). Because defendant failed to move for a *Ginther*[2] hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

In Docket No. 200824, defendant contends that competent counsel would have known that five days, the amount of time between the filing of the substitution of counsel and the beginning of trial, was an inadequate amount of time to prepare for trial. Counsel may be found ineffective for failure to request an adjournment when combined with an abandonment of a defense. See *People v Tommolino*, 187 Mich App 14, 18; 466 NW2d 315 (1991). However, defendant has presented no evidence that would establish that trial counsel's belated request for a continuance deprived him of a defense. The trial court found that the evidence cited by counsel went to an entrapment defense, which can be heard by the court at any time, and in fact the record reflects that the court conducted a hearing on entrapment. Because defendant has not established that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different, his claim of ineffective assistance of counsel must fail. See *Pickens*, *supra*.

Similarly, in Docket No. 200995, defendant contends that counsel was ineffective for waiting until the day of trial to request an adjournment. As before, the record does not reveal that a defense was abandoned. Defendant, his mother, and his sister all testified in support of his duress defense. In denying defendant's motion, the court noted that it had already granted one adjournment at the request of defense counsel. Again, the court conducted a full evidentiary hearing on defendant's claim of

entrapment. Defendant has not shown what evidence would have been available had counsel properly requested, and been granted, a continuance.

Defendant also contends that his counsel was ineffective for failing to object to the prosecutor's comments during closing argument. However, we have already concluded that the prosecutor's comments were appropriate. Accordingly, counsel was not ineffective for failing to raise any objections. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[1] Defendant raises this claim in a pro se brief captioned with reference to No. 200824. However, the brief actually alleges errors regarding the December 12, 1994, incident at issue in No. 200995.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).