

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 203760

Recorder's Court

LC No. 96-501986

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession with intent to deliver marijuana, MCL 333.7401(2)(d); MSA 14.15(7401)(2)(d). Defendant was sentenced to five to twenty years' imprisonment for the possession with intent to deliver cocaine conviction, and six months' probation for the possession with intent to deliver marijuana conviction, the sentences to run consecutively. We affirm.

Defendant first argues that he was denied a fair trial due to the prosecutor's repeated references to a forfeiture action pending against him. However, defendant did not timely and specifically object to the specific instances which he now claims amount to prosecutorial misconduct. Instead, defendant chose to wait until the end of trial, and then moved for a mistrial based upon the prosecutor's comments. Because defendant's objections were not timely, he failed to preserve this issue for appellate review. *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990). Generally, where a claim of improper prosecutorial remarks has not been preserved for appellate review, review is precluded because the trial court was deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception to this general rule exists where a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra*, 446 Mich 687.

Our review of the prosecutor's remarks reveals that any prejudice resulting from the questioning could have been eliminated by a curative instruction and that a miscarriage of justice will not result from our failure to further review the issue. *Stanaway, supra*, 446 Mich 687. Moreover, the prosecutor

was fairly responding to defendant's argument that the police searched the wrong house and, therefore, the remarks were not improper. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Accordingly, defendant is not entitled to reversal on the basis of this issue.

Defendant next argues that he was denied a fair trial because the prosecutor improperly used statements obtained during plea negotiations in an attempt to impeach defendant's character witnesses, in violation of MRE 410. We disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

MRE 410 provides that *evidence* of statements made during the course of plea negotiations is not admissible against a defendant who participated in the plea discussions. *People v Dunn*, 446 Mich 409, 414; 521 NW2d 255 (1994). Here, no evidence of such statements was admitted because the prosecutor's questions are not evidence and none of the witnesses answered the questions regarding the statements made during the plea negotiations in the affirmative. Furthermore, even if the prosecutor's questioning was improper, the prosecutor's conduct did not deny defendant a fair and impartial trial. First, the jury was instructed that the lawyers' questions were not evidence. Second, the questioning did not reveal that defendant engaged in plea negotiations. Finally, in light of the overwhelming evidence of defendant's guilt, we do not believe the prosecutor's questioning based on information obtained during plea discussions affected the verdict.

Finally, defendant argues that the failure to object to the prosecutor's improper conduct constitutes ineffective assistance of counsel. We disagree. To properly preserve the issue of ineffective assistance of counsel, a defendant must object to his counsel's performance in the court below and establish a record of facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Defendant did not object to his trial counsel's performance, and no record was created. Therefore, our review is limited to the facts apparent in the lower court record. *Fike, supra*, 228 Mich App 181.

To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial. *People v Carrick*, 220 Mich App 17, 22; 558 NW2d 242 (1996). To establish prejudice, a defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *Carrick, supra*, 220 Mich App 22. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). When considering a claim of ineffective assistance of counsel, counsel's performance must be evaluated without the benefit of hindsight. *Plummer, supra*, 229 Mich App 308. A defendant must overcome the presumption that the challenged action was sound trial strategy. *Id.*

Defendant argues that the fact that his trial counsel objected when Charlie Bilberry was asked a question based on information obtained during plea negotiations, but refrained from objecting when the same, or a similar, question was asked to other witnesses, demonstrates that his trial counsel did not have any legitimate trial strategy. Defendant further argues that the failure to object to each of the

improper questions demonstrates that his trial counsel was not paying attention during trial. Reviewing the facts evident from the existing record, the fact that trial counsel chose to object during the questioning of Charlie Bilberry, but not at other times, by itself, does not demonstrate that defendant's trial counsel lacked a legitimate trial strategy. Nor does it support defendant's contention that his trial counsel was not paying attention. Furthermore, because we have concluded that the prosecutor's questions based on information obtained during plea discussions did not result in reversible error, defense counsel's failure to object to all instances of the questioning did not deny defendant the effective assistance of counsel. *Carrick, supra*, 220 Mich App 22.

Defendant's claim that his trial counsel was ineffective in failing to object to the prosecutor's references to the civil forfeiture action must also fail. As previously explained, the prosecutor's statements regarding the civil forfeiture action were made in response to an argument advanced by defendant. Therefore, the statements were not improper, and defendant's trial counsel was not ineffective in failing to object. *Kennebrew, supra*, 220 Mich App 608. Furthermore, in light of the overwhelming evidence of defendant's guilt, including defendant's confession, defendant has not shown that he was prejudiced by defense counsel's representation. Accordingly, defendant has failed to overcome the presumption that he received the effective assistance of counsel.

Affirmed.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald