

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL W. CHRISTIAN,

Defendant-Appellant.

UNPUBLISHED
October 26, 1999

No. 211343
Wayne Circuit Court
LC No. 97-502911

Before: O’Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced to a term of imprisonment of one to four years. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. Because defendant failed to move for a new trial or evidentiary hearing, our review is limited to the facts apparent in the record below. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998); *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). To justify reversal, “a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate that counsel’s performance was deficient, “a defendant must also overcome the presumption that the challenged action was trial strategy.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). To demonstrate prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant claims that counsel’s performance was deficient because counsel asked a defense witness about the witness’s prior convictions and did not limit the questioning to crimes involving theft or dishonesty. The witness noted various convictions, including possession of stolen property, possession of controlled substances, and prison escape, and indicated that he had revealed all of his felony convictions. The prosecutor then impeached the witness by eliciting that he had also been convicted of

felonious assault and thus demonstrating that the witness was not truthful regarding the extent of his criminal record.

Defendant has failed to overcome the presumption that defense counsel's questioning of the witness was trial strategy. The witness's convictions of possession of stolen property would likely have been introduced by the prosecutor during cross-examination under MRE 609(a)(2); therefore, defense counsel's decision to ask the witness about these convictions on direct examination was likely an attempt to lessen their impact on the jury. Furthermore, the questioning regarding the other convictions may have been an attempt by defense counsel to demonstrate to the jury both that the witness was completely forthright and that the witness had a drug problem, thus suggesting that the cocaine in the car belonged to the witness and not to defendant. Although the prosecutor was then able to impeach the witness because he had not been completely honest in telling the jury about his criminal convictions, this was through no fault of defense counsel. "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Additionally, defendant has not argued that a reasonable probability exists that, had defense counsel not questioned the witness about his convictions, the result of the proceeding would have been different. Accordingly, we conclude that defendant was not denied the effective assistance of counsel.

Next, defendant argues that reversal of his conviction is warranted because the prosecutor improperly commented on the credibility of defense witnesses, improperly characterized the testimony of defense witnesses as inconsistent, and improperly misstated the elements of the charged offense. Defendant failed to preserve his claims of prosecutorial misconduct because he did not object to the alleged misconduct at trial. *Stanaway*, *supra* at 687. "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The key determination in evaluating claims of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

In this case, the prosecutor remarked that two defense witnesses were unbelievable and pointed out inconsistencies in their testimony. However, it is not improper for a prosecutor to argue from the facts that a witness is not worthy of belief. *Launsbury*, *supra* at 361. Defendant argues that the testimony of the two witnesses was not as clearly inconsistent as the prosecutor characterized it. Our review of the record leads us to conclude that the prosecutor's comments were fair inferences from the evidence. Nonetheless, the trial court instructed the jury that the arguments of counsel were not evidence and that the jury must evaluate all the evidence and assess its credibility. We find no manifest injustice resulting from the prosecutor's comments, and we conclude that defendant was not denied a fair trial.

Defendant also claims that the prosecutor improperly stated the elements of the charged offense when the prosecutor told the jury, "Elements of this crime are to prove beyond a reasonable doubt it's

his jacket.” Defendant was charged with possession of cocaine that was found in a jacket in the passenger compartment of a vehicle, and defendant disputed that the jacket and the cocaine were his. The prosecutor’s comment fairly narrowed an issue for the jury. Additionally, the prosecutor informed the jury that the judge would define the crime of possession, and the trial court did instruct the jury regarding the elements of the charged offense. No manifest injustice resulted from the prosecutor’s comment, and defendant was not denied a fair trial.

Defendant next argues that the trial court erred by failing to respond to the jury’s request to have certain testimony reread. We review the trial court’s decision whether to reread testimony to the jury for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). “A trial court must exercise its discretion to assure fairness and to refuse unreasonable requests . . .” *People v Howe*, 392 Mich 670, 676; 221 NW2d 350 (1974). However, the court may not foreclose all possibility of having any testimony reread. *People v Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976).

During jury deliberations, the trial court received a note from the jury requesting the rereading of the testimony of a defense witness. The trial court attempted unsuccessfully to reach defense counsel to discuss the request. A half-hour later, the court received a note that the jury had reached a verdict. After consulting with counsel, the court informed the jury that, unless it needed an answer to its request, the court was prepared to accept its verdict. The jury then rendered a verdict of guilty. Contrary to defendant’s argument, the trial court in this case did not foreclose any possibility of rereading the testimony. Rather, while the court was attempting to reach counsel to consider the request, the jury indicated that it had reached a verdict. The court then accepted the verdict after the jury indicated that the earlier request no longer needed to be considered. Defense counsel assented to this approach. We find no abuse of discretion because the trial court acted reasonably in considering the jury’s request.

Finally, defendant argues that the court erred in admitting evidence of the cocaine because it was obtained during an illegal search. However, defense counsel did not move to suppress the evidence and in fact stipulated to the admission of the cocaine at trial. Therefore, this issue is unpreserved because defendant failed to raise it before the trial court. *People v Carroll*, 396 Mich 408, 412; 240 NW2d 722 (1976). In order to avoid forfeiture of this unpreserved constitutional issue, defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Were we to conclude that the evidence should have been suppressed, the error would certainly be outcome determinative where defendant was charged with possession of the seized cocaine. However, we find that the trial court did not err in admitting the evidence. Defendant argues that the seizure of the cocaine resulted from an illegal inventory search of the vehicle because the prosecutor did not demonstrate that the police followed an established standard procedure for conducting inventory searches. The record indicates that, after the vehicle was lawfully stopped, a police officer noticed drug paraphernalia in the vehicle and arrested one of the occupants of the vehicle. The officer then discovered cocaine in that occupant’s pocket. At that point, the other occupants of the vehicle, including defendant, were ordered out of the vehicle, and the officers searched the vehicle and found cocaine in a cigarette box in a jacket in the passenger compartment of the vehicle. Defendant was

charged with possession of this cocaine. Without determining whether a proper inventory search was conducted, we conclude that the search of the vehicle and seizure of the cocaine was legal under the so-called “automobile exception” to the warrant requirement.

“It is well settled that the police may lawfully search an automobile without a warrant where they have probable cause to believe that the vehicle contains contraband.” *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992). The officers may search containers within the vehicle that could conceal the object of the search, including the personal belongings of the occupants of the vehicle. *Wyoming v Houghton*, ___ US ___; 119 S Ct 1297, 1301, 1304; 143 L Ed 2d 408 (1999). Here, once the officers discovered drug paraphernalia in the vehicle and cocaine in the pocket of one of its occupants, they had probable cause to believe that illegal drugs were present in the vehicle. Therefore, the officers could legally search the vehicle and containers within the vehicle for drugs. The search and seizure was legal, and the trial court did not err in admitting evidence of the cocaine.

Affirmed.

/s/ Peter D. O’Connell

/s/ Michael J. Talbot

/s/ Brian K. Zahra