STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WILLIS PEGUESE,

Defendant-Appellant.

UNPUBLISHED
November 12, 1999

No. 209538
Recorder's Court
LC No. 97-502659

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced to four to twenty years in prison as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant appeals as of right. We affirm.

Defendant first argues that prosecutorial misconduct deprived him of a fair trial. We disagree. The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because no objection was made at trial, we will review defendant's claims of prosecutorial misconduct only to determine if the misconduct was "so egregious that no curative instruction could have removed the prejudice to the defendant or if manifest injustice would result from our failure to review the alleged misconduct." *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

First, defendant claims that the prosecutor improperly elicited hearsay testimony from Officer Fluker regarding statements made by Mitchell. We disagree. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Hearsay is generally inadmissible. MRE 802; *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). However, Fluker's testimony regarding Mitchell's statements did not amount to hearsay if it was not offered to prove the truth of the matter asserted. Statements to a police officer that are offered to show their effect on the officer and to explain his conduct are not hearsay. *People v Knolton*, 86 Mich App 424, 429; 272 NW2d 669 (1978); *People v Garcia*, 31 Mich App 447, 455; 187 NW2d 711 (1971). Here, we agree with the prosecution's argument that Mitchell's

statements were not offered for their truth, but were offered to show their effect on Fluker, and to explain why he proceeded to the party store. We therefore conclude that Mitchell's statements to Fluker were not inadmissible hearsay. Thus, the elicitation of such testimony was not improper, and did not amount to misconduct. Furthermore, defendant was not prejudiced by the admission of the testimony because Mitchell testified to substantially the same facts, that is, that the purpose of their drive to the party store was to obtain drugs.

Defendant also contends that the prosecutor's closing arguments denied him a fair trial. First, defendant asserts that the prosecutor improperly argued that defendant was the "middleman" and Mitchell was the "salesman." After reviewing the remarks in context, we conclude that the prosecutor's argument was a reasonable inference from Fluker's testimony that he observed defendant hand something to Mitchell, and Mitchell subsequently turned over cocaine to Fluker. A prosecutor is permitted to argue reasonable inferences from the evidence. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Second, defendant contends that the prosecution made improper references to defendant's participation in an international drug conspiracy, and argued that drugs are not sold on credit where neither either of these statements was supported by evidence in the record. A prosecutor may not argue facts that are not in evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Although these arguments were improper, defendant was not prejudiced by the remarks because the judge instructed the jury that the attorneys' arguments were not evidence. *People v Ullah*, 216 Mich App 669, 682-683; 550 NW2d 568 (1996). Similarly, we find no error in the prosecutor's reference to the crimes of domestic violence, rape, and murder, where the reference was made in response to defense counsel's argument regarding the number of witnesses presented by the prosecution, *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989), and where the jury was instructed that the arguments of counsel were not evidence, *Ullah*, *supra*.

Next, defendant argues that the prosecutor made improper civic duty arguments, urging the jurors to think about defendant using their family members to sell drugs for him. We agree that these remarks were improper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, any prejudice from the improper comments was cured by the judge's immediate instruction to the jury to disregard the argument. In addition, defense counsel apologized for the remark before the jury, acknowledging that the remark was improper. Thus, we conclude that defendant was not denied a fair and impartial trial by prosecutorial misconduct.

Defendant next argues that his attorney's failure to object to the alleged prosecutorial misconduct constituted ineffective assistance of counsel. We disagree. The standard for reviewing claims of ineffective assistance of counsel requires defendant to "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, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). Because defendant did not request a new trial or an evidentiary hearing, our review is limited to errors apparent from the record. *Id.*

Officer Fluker's testimony was not hearsay, and thus, defense counsel's failure to object to the testimony was not improper. Defense counsel is not expected to raise meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Furthermore, defense counsel's failure to object during the prosecutor's closing argument is presumed to be sound trial strategy. *Plummer*, *supra*. There are times when it may be prudent to refrain from objecting for fear of focusing the jury's attention on an improper argument. *Ullah*, *supra*, at 685, citing *Bahoda*, *supra*, at 287 n 54. Here, defendant has not overcome the presumption that defense counsel's failure to object was sound trial strategy.

Furthermore, defendant suffered no prejudice as a result of defense counsel's failure to object to the prosecutor's questioning of Fluker or to the challenged statements made during closing arguments. No prejudice resulted from Fluker's testimony regarding Mitchell's statements to him, because defense counsel elicited substantially the same facts from Mitchell's testimony. Any prejudice resulting from the prosecutor's closing arguments was cured by the judge's instruction to disregard the arguments regarding the jurors' family members and by his instruction that arguments of counsel are not evidence. Accordingly, defendant was not denied a fair trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell