

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY EUGENE BURGER,

Defendant-Appellant.

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UNPUBLISHED

December 17, 1999

No. 212590

Hillsdale Circuit Court

LC No. 98-227844 FH

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of larceny over \$100, MCL 750.356; MSA 28.588, and sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of 1 $\frac{1}{4}$  to 7 $\frac{1}{2}$  years' imprisonment. Defendant appeals as of right. We affirm.

This case arises out of the theft of a personal computer from a department store. At trial, defendant admitted to removing the computer from the store but claimed that he did so with the mistaken belief that the contents of the boxes containing the computer had been purchased by his wife, who was shopping with him that day.

Defendant first contends that he was denied the effective assistance of counsel when his trial counsel failed to request an instruction on the defense of intoxication. Because defendant failed to request an evidentiary hearing concerning this claim, our review is limited to errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, that the results of the proceeding were fundamentally unfair or unreliable, and that there is a reasonable probability that, but for counsel's error, the results of the proceeding would have been different. See *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). In attempting to persuade a reviewing court that counsel was ineffective, a defendant bears the burden of overcoming the "strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

After review of the record, we do not believe that defense counsel rendered ineffective assistance by failing to request a jury instruction on the defense of intoxication. Although portions of both defendant's and his wife's testimony indicated that as a result of his ingesting alcohol and prescription drugs defendant may not have been in possession of his full faculties on the day of the offense, intoxication was not the most viable defense supported by the trial testimony. Rather, the more viable option was assertion of the defense of mistake. Defendant testified that when he left the store with the boxes containing the computer, he mistakenly believed those boxes contained items purchased by his wife. While defendant asserted that this mistake was due in part to his being "out of it" that day, the basis of his claim was that he had simply made a mistake. In light of limited testimony supporting an intoxication defense, counsel for defendant chose to emphasize the facts supporting a defense of mistake. This Court will not second-guess defense counsel regarding matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Moreover, defense counsel did not neglect the evidence indicating that defendant may have been in a weakened state of mind at the time of the offense. Defense counsel requested and received an instruction on the defense of mistake. Counsel utilized defendant's ingestion of alcohol and prescription medication to bolster this defense, arguing that in such a mental state it was understandable that defendant could have made such a serious mistake. Given the sparse testimony evidencing intoxication, we do not believe that the outcome of defendant's trial would have been different had defense counsel requested an intoxication instruction. On the basis of the existing record, counsel's assistance presents no error prejudicial to defendant's case.

Defendant next argues that he was denied a fair trial by misconduct of the prosecutor during closing argument. Specifically, defendant asserts that in making his closing statements the prosecutor improperly argued facts not in evidence and injected issues broader than guilt or innocence.

When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). In this case, defendant did not object to any of the prosecutor's allegedly improper argument. As recently stated by this Court in *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998):

Appellate review of improper prosecutorial remarks is generally precluded absent an objection because it deprives the trial court of an opportunity to cure the error. Because a well-tried, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged, we will reverse in such instances only if a curative instruction could not have eliminated the prejudicial effect of the improper remarks or where our failure to review the issue would result in a miscarriage of justice. [Citation omitted.]

Defendant first contends that the prosecutor improperly argued facts not in evidence when he referenced a specific weight of the boxes defendant claims he mistakenly loaded into his car. A prosecutor may not argue facts not entered into evidence. *Stanaway, supra*, at 686. While we agree

that the prosecutor erred in attributing a specific weight to the boxes, any prejudice suffered by defendant could have been dispelled by a curative instruction on timely objection by defense counsel. Given the lack of relevance of the challenged remark to defendant's asserted defense, no miscarriage of justice will result from a failure to further review this issue.

Defendant also contends that the prosecutor impermissibly interjected issues broader than guilt or innocence when, during rebuttal argument, he noted that defendant smoked cigarettes despite his asthma, mixed drugs and alcohol, and failed to contribute to the support of his family. Otherwise impermissible prosecutorial comments do not require reversal where the challenged remarks address issues raised by defense counsel. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Here, the prosecutor's comments were responsive to defense counsel's closing argument comments regarding defendant's health. As before, any perceived prejudice to defendant resulting from the prosecutor's comments could have been cured by an appropriate instruction upon objection by defense counsel. Manifest injustice will not result from a failure to further review this issue.

Affirmed.

/s/ William B. Murphy  
/s/ Harold Hood  
/s/ Janet T. Neff