

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAVID RONALD BELMONT,

Defendant-Appellant.

UNPUBLISHED

October 26, 2001

No. 222550

Huron Circuit Court

LC No. 99-004069-FH

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on one count of delivery of marijuana, MCL 333.7401(2)(d)(iii), for which he was sentenced to one year imprisonment. We affirm.

I

Defendant first argues that the prosecutor's comments during his closing rebuttal argument that defendant deceived his mother and ex-wife were not derived from the evidence, distracted the jury from defendant's guilt or innocence on the charge, and resulted in a miscarriage of justice. Defense counsel did not object to the prosecutor's rebuttal argument. Thus, this issue was not preserved for appeal. However, because prosecutorial misconduct may deny defendant a fair and impartial trial and thus violate the defendant's constitutional rights, this issue, although unpreserved, is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-766; 597 NW2d 130 (1999). To prevail, the defendant must demonstrate plain error that affected his substantial rights. *Id.* at 763. Reversal is not warranted unless the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 774. Moreover, error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

This Court reviews claims of prosecutorial misconduct case by case, and the prosecutor's remarks are examined in context, to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The propriety of the prosecutor's comments depends on the facts of the case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Further, the prosecutor's comments must be read as a whole

and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra* at 721. Prosecutors are free to argue the evidence and all reasonable inferences from it. *Id.*

Here, defendant's argument regarding prosecutorial misconduct lacks merit. The prosecutor did not improperly express his own beliefs with respect to defendant's credibility. Rather, he urged the jury to determine defendant's credibility on the basis of the evidence. It was reasonable to infer from the evidence that defendant was being deceitful with his mother by taking steps to conceal the fact that he was calling from a bar. It was also a fair and reasonable inference that defendant was being deceitful with his ex-wife by going to a bar and then returning home before his ex-wife arrived, where his admitted intent was to conceal his activities.

Moreover, the trial court specifically instructed the jurors that it was their duty to determine the credibility of witnesses and the attorneys' statements and arguments should not be considered evidence. The court also instructed that the burden of proof lay with the prosecution and that it was the obligation of the prosecution to prove its case to the jury beyond a reasonable doubt. Finally, the trial court instructed the jurors, before closing arguments began, that they would not hear any more evidence in the case and that they were only going to hear arguments and instructions. Under these circumstances, the prosecutor's comments did not constitute plain error that affected defendant's substantial rights.

II

Defendant also argues that defense counsel's failure to elicit testimony that no body cavity search of the main prosecution witness occurred constituted ineffective assistance of counsel. Because defendant did not move for *Ginther*¹ hearing, we review this claim for error apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

To establish that his counsel was ineffective, defendant must first demonstrate that counsel's performance was deficient by showing that counsel made errors so serious that he was not functioning as the counsel to which defendant was constitutionally guaranteed. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Next, defendant must establish that his counsel's deficient performance prejudiced his defense by showing that the errors were so serious that they deprived him of a fair trial with a reliable result. *Hoag, supra*. Defendant must also overcome the presumption that the alleged error was trial strategy. *Id.* at 6. He must show a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant cites no authority to support his position that counsel was ineffective for failing to cross-examine a police officer about a witness hiding drugs inside a body cavity during a controlled drug purchase and for attempting to establish that proper police protocol for controlled drug purchases includes extensive body cavity searches. The defense theory was that

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant did not purchase drugs from the prosecutor's witness and because this witness was a known drug addict, he was not credible. However, there was no evidence that the witness had any reason to setup defendant by hiding drugs in a body cavity to fake a drug sale or that any witness saw him with drugs outside the time of the controlled purchase. Defense counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant has not established that counsel's failure was objectively unreasonable and so prejudicial that it deprived him of a fair trial. Additionally, defendant has not established that the search that was conducted of the prosecutor's witness was either not sufficient or not according to police protocol. Last, defendant has failed to establish that but for counsel's alleged error, there was a reasonable probability that the result of the proceeding would have been different. Thus, defendant's claim of ineffective assistance of counsel fails. *Hoag, supra; Johnson, supra.*

Affirmed.

/s/ Brian K. Zahra

/s/ Michael R. Smolenski

/s/ Michael J. Talbot