STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2001
v	No. 222833 Lenawee Circuit Court
JACKIE CHRISTOPHER BROOKS, Defendant-Appellant.	LC No. 99-008306-FH

Before: Owens, P.J., and Holbrook, Jr., and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of delivering less than fifty grams of a mixture containing the controlled substance crack cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a third felony offender, MCL 769.11, to 30 to 480 months' imprisonment. Defendant appeals as of right. We affirm.

This case involves a controlled drug purchase from defendant by a paid confidential police informant. The informant testified at trial that he paged defendant, defendant returned the call, and they discussed the informant buying cocaine from defendant. Defendant instructed the informant to meet him at a bowling alley. They met in the parking lot of the bowling alley, and the informant then followed defendant to a residence, also at defendant's direction. Defendant went into the residence while the informant waited outside. According to the testimony of prosecution witnesses, when defendant came out the informant gave defendant forty dollars in marked funds, and defendant gave the informant what was later determined to be .12 grams of crack cocaine.

Defendant first argues on appeal that he was denied his Fifth and Fourteenth Amendment rights of due process because of police entrapment. Defendant did not raise this issue below.[1] Accordingly, defendant's claim that he was entrapped is forfeited. See *People v Douglas*, 122 Mich App 526, 528-529; 332 NW2d 521 (1983) ("Without the benefit of an evidentiary hearing and the attendant record evidence, defendant's claim of entrapment cannot be decided on

[1] Defendant filed a motion for a new trial in the trial court advancing the same arguments he now raises on appeal. However, defendant subsequently withdrew his motion and the court entered an order to that effect.

appeal."); *People v Elmore*, 94 Mich App 304, 308; 288 NW2d 416 (1979) (Where a "defendant made no attempt to have the trial court rule on the issue of entrapment, appellate review is precluded.").[2]

Next, defendant argues that the trial court improperly admitted evidence of prior bad acts. A defendant can waive appellate review of the admission of bad act evidence by failing to timely object. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). Because defendant did not object to the testimony at trial, we review the alleged error under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552; 520 NW2d 123 (1994). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines, supra* at 763.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity wherewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

There are three requirements for evidence to be admissible under MRE 404(b)(1). One, the evidence must be admitted for a proper purpose. *People v Vandervliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than to show defendant's propensity to commit the offense. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). Two, the evidence must be relevant. *Vandervliet, supra* at 55. Three, the probative value must not be substantially outweighed by unfair prejudice. *Id*.

At trial, the informant gave the following testimony during direct examination by the prosecution:

> *Q*. Okay, Chris Brooks pulls up and what happens?
>
> *A.* I got out, went over to him, and he said meet him over at his mom's house at Friendly Village.
>
> *Q*. Okay. Did he – did he have any explanation why he didn't have the crack cocaine with him?
>
> *A.* No, he just said he – I think he said he had to go pick it up somewhere.

---

[2] We note that defendant's claim of entrapment is directly contrary to his testimony at trial that he did not give or sell cocaine to the informant.

Q. All right. Did that surprise you?

A. Yeah, actually it did.

Q. Why did it surprise you?

A. Because he's known to have it on him whenever, and lot of people know that you –

Defendant contends that the witness' response that defendant was "known to have it on him" constitutes inadmissible bad acts evidence. Because defendant did not object to this evidence, the prosecutor never expressly identified the purpose of the testimony, and the trial court did not rule on the issue. However, it appears from the context of the exchange that followed that the prosecutor was merely extracting the sequence of events and did not expect the witness to give the response he did:

A. Because he's known to have it on him whenever, and lot of people know that you –

Q. You – you thought the transaction was going to happen at the bowling alley, right?

A. Yes, sir.

Q. Okay, all right. Now, he says to meet him where now?

A. At the Friendly Village behind the Morning Fresh Bakery on South Main Street.

The prosecutor cut off the witness' answer and attempted to elicit the testimony that he sought, i.e., that the witness expected the transaction to happen at the bowling alley. We find no error because the evidence was not offered for the improper purpose of showing propensity. Indeed, it cannot be said to have actually been offered by the prosecutor at all. In light of the fact that the prosecutor interrupted the witness' answer and redirected the witness, it appears that the testimony was unexpected. Therefore, there was no error, plain or otherwise.

Finally, defendant argues that he was deprived of his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to move for dismissal on the ground that defendant was entrapped, move for an entrapment hearing, or object to the evidence of prior bad acts. Because defendant did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To prove ineffective assistance of counsel, "the defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "[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). "Second, 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." *Stanaway, supra* at 687-688.

Trial counsel's theory of the case was that defendant did not sell the cocaine. Rather than assert that defendant was entrapped, counsel argued that no crime was committed. Trial counsel's decision in this regard was a matter of trial strategy. "This Court has held that a defense counsel's failure to raise a substantive defense, where there is substantial evidence to support the defendant's claim, may amount to ineffectiveness of counsel." *People v Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984). The record does not contain substantial evidence that defendant was entrapped. Because there is no basis on which we may conclude that a reasonable probability exists that an entrapment defense would have been successful, we cannot conclude that counsel's failure to pursue this defense constituted ineffective assistance of counsel. See *People v Maleski*, 220 Mich App 518, 523-524; 560 NW2d 71 (1996).

Similarly, because we find no error regarding the testimony challenged by defendant on appeal as bad acts evidence, defense counsel was not ineffective for failing to object to it. Further, defense counsel could properly have refrained from objecting "where an objection could have emphasized the testimony in the minds of the jurors and where no further reference was made to the testimony." *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). Based upon our review of the record, we do not conclude that defendant was denied the effective assistance of counsel.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot