

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARDELL HERMAN JONES,

Defendant-Appellant.

UNPUBLISHED

February 8, 2002

No. 226565

Genesee Circuit Court

LC No. 99-005214-FC

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, in violation of MCL 750.520b(1)(e), felonious assault, in violation of MCL 750.82, carrying a concealed weapon, in violation of MCL 750.227, felon in possession of a firearm, in violation of MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), in violation of MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent sentences of 25 to 50 years' imprisonment for first-degree criminal sexual conduct, 3½ to 8 years' imprisonment for felonious assault, 4 to 10 years' imprisonment for carrying a concealed weapon, 4 to 10 years' imprisonment for felon in possession of a firearm, and to a consecutive sentence of two years' imprisonment for felony-firearm. Defendant appeals as of right. We affirm.

Defendant argues that three of plaintiff's questions on cross-examination of defendant constituted prosecutorial misconduct because they required defendant to comment on witnesses' credibility. This issue is unpreserved because defendant did not object to the questions at trial, and review is limited to plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is not warranted if the prejudicial effect of the error could have been cured by a cautionary instruction. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

It is improper for a prosecutor to ask the defendant to comment on witness credibility because this is a determination for the jury. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Although plaintiff asked defendant about the accuracy of police reports, the question required defendant to comment on the credibility of the officers who compiled the reports. We find that plaintiff's questions were improper. However, reversal is not required because any prejudicial effect could have been cured by a cautionary instruction had defendant objected. *Id.* at 18. Defendant even concedes this point, stating in his appellate brief that "[t]he trial court should have stopped this line of questioning and should have given a cautionary instruction."

Defendant next argues that he was denied effective assistance of counsel when his trial counsel failed to object to these three questions. We disagree. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Here, defendant cannot satisfy the second prong of the *Strickland* test. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v Carbin*; 463 Mich 590, 600; 623 NW2d 884 (2001). The inconsistencies in defendant's testimony had already been presented to the jury. If defendant's counsel had objected, the only testimony the jury would not have heard was defendant stating that the information contained in the police reports was wrong. This testimony addressed no dispositive issue in the case, and defendant's opinion was not probative. Therefore, defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff