

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICK TERRY-ALLEN REAMSMA,

Defendant-Appellant.

UNPUBLISHED

September 20, 2002

No. 231384

Kent Circuit Court

LC No. 00-003077-FC

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(c), and aggravated stalking, MCL 750.411i. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to forty to seventy-five years' imprisonment for the first-degree criminal sexual conduct conviction and 7½ to 15 years' imprisonment for the aggravated stalking conviction. We affirm.

Defendant contends that he was denied the effective assistance of counsel when his trial counsel failed to object to the prosecutor's questioning of several witnesses who detailed what the victim told them about the attack. Defendant contends that his trial counsel permitted the prosecutor to use hearsay evidence to impermissibly bolster the victim's testimony. We disagree. Because there was no *Ginther*¹ hearing, our review of this issue is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

"To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial that it deprived him of a fair trial. *Id.* The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy, as this Court will not second-guess counsel regarding matters of trial strategy and, even if defense

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

counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *Id.* at 385-386 and 386-387 n 7.

Defendant has failed to overcome the presumption that his counsel's actions amounted to sound trial strategy. We begin by pointing out that this case was largely a credibility contest between the victim and defendant. The victim testified that defendant, her former live-in boyfriend, broke into her house, beat her and forced her to engage in numerous sex acts. Defendant argued that the victim, who had earlier secured a personal protection order (PPO) against him, consented to sexual intercourse. Defendant admitted that he physically assaulted the victim after they had intercourse.

That being the case, defendant's strategy employed at trial was to point out all of the inconsistencies in the victim's story. To accomplish that, defense counsel vigorously cross-examined the victim, and other witnesses about what they knew about the events in question. In his closing remarks, defense counsel illustrated several discrepancies in the testimony of some of these witnesses. Just as defendant argues that the prosecution's case was somehow "bolstered" by the witnesses' account of what the victim told them, defendant's theory that the victim consented to sexual intercourse was supported by every inconsistency in the victim's account that was revealed through these witnesses. Accordingly, because defendant fails to overcome the presumption that his trial counsel's actions were trial strategy, his contention that his trial counsel was ineffective is without merit.

Defendant next contends that he was denied a fair trial due to several instances of prosecutorial misconduct. At the outset, we point out that only two of these instances were properly preserved by a timely and specific objection. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). When reviewing instances of alleged prosecutorial misconduct, we must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *Avant, supra* at 508. Unpreserved issues are reviewed for plain error affecting defendant's substantial rights, which generally requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). For those instances where his trial counsel failed to preserve the issue with a timely and specific objection, defendant alternatively argues his trial counsel was ineffective. Neither argument has merit, as defendant fails to show that any of the alleged instances rise to the level of misconduct warranting reversal.

Defendant first refers to the instances mentioned above where he alleges the prosecutor improperly introduced inadmissible hearsay evidence. However, even assuming those statements would have been deemed hearsay, prosecutorial misconduct cannot be predicated on the good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *Id.* at 660-661. Here, the prosecutor successfully admitted evidence without objection and defendant has not demonstrated bad faith on the part of the prosecutor or that he was prejudiced by the admission of the testimony. See *id.* Therefore, defendant's assertion that the prosecutor committed prosecutorial misconduct on this basis is without merit.

Defendant next cites the prosecutor's cross-examination of defendant, in which the prosecutor asked questions about whether defendant should have been out that late at night, and

whether he should have been drinking alcohol. As defendant argues in his brief, this appears to be a veiled reference to defendant's parole status. Defendant asserts that the prosecutor attempted to inflame the passions of the jurors in order to have them convict defendant. We disagree. Although the prosecutor's line of questioning was arguably irrelevant and improper, we believe that, in light of the evidence against defendant, the questioning about defendant's drinking and curfew was of minimal prejudice. In this case, defendant acknowledged that he had two earlier convictions for breaking and entering. Defendant conceded that he violated a PPO and visited the victim on the night in question, as well as attempting to contact her on another occasion. Moreover, defendant admitted that, during the incident in question, he became angry with the victim and hit her several times in the face. Defendant knew what he did was wrong, and stated that he would admit responsibility. Considering these statements, we find that the questioning about whether defendant had consumed alcohol or was out past his curfew was innocuous. Moreover, the trial court instructed the jurors to disregard the comments. Defendant fails to show how this line of questioning, which the jurors were instructed to disregard, denied him a fair trial. See *Avant, supra*.

Defendant also points to another exchange where the prosecutor asked him several questions about the contents of the affidavit that was attached to the PPO. During the victim's testimony, the prosecutor sought to have the PPO entered into evidence. Upon defense counsel's objection, the accompanying affidavit was not admitted, as it contained hearsay statements. Although we agree that it was improper for the prosecutor to make reference to the affidavit, which had been excluded, we are not convinced that the mere mention of the affidavit, and its contents, demonstrates plain error. The victim had previously testified at several points in the trial that defendant was physically and mentally abusive, that she feared for her life, and that defendant had threatened her. Moreover, the PPO itself was admitted into evidence, and the jurors could have reasonably inferred that, because she sought the protection of a PPO, the victim feared for her safety. Any prejudice that defendant suffered from the exchange was minimal in light of the other evidence. Therefore, defendant has failed to establish plain error affecting his substantial rights. *Carines, supra*.

Next, defendant asserts that during closing argument, the prosecutor improperly referred to facts not in evidence. Defendant contends that the prosecution committed misconduct when it made reference to prior assaults that served as the basis for the victim's PPO. We disagree. A prosecutor is free to argue the evidence and all reasonable inferences arising therefrom as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the victim had previously testified that, one of the reasons she obtained a PPO to keep defendant away was because he forced her to enter his car at knifepoint. The victim further testified that defendant had been physically abusive in the past. Thus, the prosecutor was merely arguing the facts adduced at trial. Accordingly, defendant fails to show how this amounts to prosecutorial misconduct.

Defendant also claims that the prosecutor unfairly prejudiced him when he told the jury that it was defense counsel's job to "throw a cloud of smoke." A prosecutor cannot personally attack the defendant's trial attorney or suggest that defense counsel is intentionally trying to mislead the jury because this type of attack can infringe upon the defendant's presumption of innocence. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, reviewing this isolated

comment in context, we find no error requiring reversal. An otherwise improper remark may not rise to the level of error requiring reversal when the prosecutor is responding to defense counsel's argument. *Id.* Such is the case here, where the prosecutor's comment was in response to defense counsel's cross-examination of the victim regarding inconsistencies in her testimony. Further, we find that any resulting prejudice was cured by the trial court's instruction to the jury and admonishment to the prosecutor.

Defendant further argues that the prosecutor improperly vouched for the credibility of the victim and appealed to the jury to sympathize with the victim. We disagree. Albeit some of the prosecutor's comments may have been ill-advised, such as asking the jurors to put themselves in the shoes of the victim, the prosecutor was merely arguing that the victim was worthy of belief based on the evidence. *Bahoda, supra*; see also *People v Cooper*, 236 Mich App 643, 653; 601 NW2d 409 (1999) (prosecutor may argue from the evidence that a witness is credible). The prosecutor was not asserting that he had some special knowledge concerning the victim's truthfulness. See *Bahoda, supra* at 276. In any event, reversal is not required as any impropriety in the prosecutor's remarks could have been cured with a timely instruction. *People v Schutte*, 240 Mich App 713, 721; 613 Nw2d 370 (2000). Additionally, prosecutors are not required to argue in the blandest possible terms and are given great latitude regarding their arguments and conduct. *Bahoda, supra* at 282; *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Accordingly, plain error affecting defendant's substantial rights has not been shown. *Carines, supra*.

Defendant also argues that the prosecutor improperly injected issues broader than whether defendant was guilty beyond a reasonable doubt when he argued that not guilty verdicts would "trivialize" what happened to the victim and not to let defendant carry out the threats he made. We recognize that a prosecutor should not inject issues into the trial that are broader than the defendant's guilt or innocence. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). However, we are not persuaded that the prosecutor's arguments, when viewed in context, encouraged the jurors to suspend their own powers of judgment. See *id.* Again, some of the prosecutor's comments may have been ill-advised, but when read in context, the prosecutor was merely urging the jurors to convict defendant based on the evidence. Moreover, any resultant prejudice could have been cured with a timely instruction. *Schutte, supra*. Accordingly, plain error has not been shown. Further, because errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial have not been identified, there can be no cumulative effect of errors meriting reversal. *Knapp, supra* at 388.

Finally, defendant argues the trial court abused its discretion in failing to grant his motion for a mistrial. We disagree. We review a trial court's decision regarding a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Initially, it should be noted that "not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial." *Id.* In fact, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Id.* (citations omitted). In this case, the witness' remark that formed the basis of defendant's motion for a mistrial was an unresponsive, volunteered answer to a proper question by the prosecutor. The mention of defendant's prior incarceration of which defendant complains was not elicited by the prosecutor, but was an unexpected and unresponsive editorial to a proper question. Thus, this brief and incidental mention did not warrant a mistrial. See *id.* at 36-37. Further, the prosecutor and the

witness both represented to the trial court that the prosecutor cautioned the witness not to make mention of defendant's prior incarceration, which the trial court found to be inadvertent and an honest mistake. Moreover, a cautionary instruction was read to the jurors, admonishing them to disregard the remark. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant's argument that the trial court's denial of a motion for mistrial amounted to an abuse of discretion is without merit.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Christopher M. Murray