

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NORRIS E. PRIESTER,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 244117

Washtenaw Circuit Court

LC No. 01-000917-FH

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from jury convictions of three counts of delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv). We affirm.

The charges arose out of three deliveries of cocaine to an undercover police officer on three different dates. Defendant claimed that he was not involved in the deliveries. The undercover officer testified at trial that she knew defendant as “J.R. Brooks,” on three occasions she purchased cocaine from defendant in face-to-face meetings after an initial introduction and buy with an informant present, and that she was “absolutely positive” defendant was the person who sold her the cocaine on all four occasions.

On appeal, defendant argues that he was denied the effective assistance of counsel because his attorney opened the door, during cross-examination of the undercover officer, to the admission of a photograph that was taken of defendant at the time of a traffic stop which occurred after the last delivery of cocaine. We disagree. Because a *Ginther*¹ hearing was not conducted, this Court’s review is limited to errors apparent on the record. *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must affirmatively 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 proceedings would have been different and that the result was fundamentally unfair and unreliable. *People v*

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Pickens, 446 Mich 298, 303, 312; 521 NW2d 797 (1994); *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Effective assistance of counsel is presumed and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant's argument is premised on the admission of a photograph of him. The prosecution initially moved to admit the photograph during the direct examination of the undercover officer in the context of her testimony that, immediately after the last transaction with defendant, she gave a description of the car in which defendant was a passenger and also indicated that he was wearing a red shirt. The trial court sustained defendant's objection to the admission of the photograph depicting defendant wearing a red shirt during the traffic stop made after the drug transaction on the ground that the prosecution had failed to produce the photo pursuant to defendant's discovery request. During cross-examination, however, defense counsel queried the undercover officer as follows:

Q. Do you have any pictures taken by your surveillance team of Mr. Priester while he's allegedly making these transactions?

A. No.

Q. Other than the testimony that comes out of your mouth or another officer's mouth, is there any other objective evidence that this jury can see to corroborate what your story is?

A. Any other evidence – you mean hard –

at which point the prosecutor interrupted and indicated that defense counsel had opened the door with regard to the admission of the photograph. The trial court agreed, and the undercover officer testified about the photograph. The police officer who made the traffic stop subsequently testified that defendant was the person who was in the vehicle that he stopped and, because defendant gave him a different name than he expected and did not have identification on his person at the time of the stop, he took defendant's picture. Defendant was wearing a red shirt. When the prosecution moved, again, to admit the photograph, defense counsel objected but the trial court overruled the objection, admitting the photograph.

Defendant has failed to establish his ineffective assistance of counsel claim. Even if we were to conclude that his counsel's performance fell below an objective standard of reasonableness when he "opened the door" to the admission of the photographic evidence, it is not reasonably probable that the result of the proceedings would have been different if the photograph had not been admitted or that the result was fundamentally unfair and unreliable. Defendant was conclusively and adamantly identified as the person who delivered the cocaine by the undercover officer who had direct, face-to-face contact with him on four different occasions. Defendant was also positively identified by a member of the surveillance team who was aware of the last drug transaction between defendant and the undercover officer, drove past the traffic stop

that occurred shortly thereafter, and saw that defendant was outside the identified vehicle and was wearing a red shirt. The officer had several previous contacts with defendant and knew him on sight. Further, the officer who completed the traffic stop testified that defendant was the passenger in the identified vehicle he stopped on the night of the last drug transaction and he had on a red shirt. In light of the substantial identification testimony, we cannot conclude that it is reasonably probable that the admission of the photograph changed the result of the proceedings or caused the result of the proceedings to be unreliable; therefore, defendant failed to establish his ineffective assistance of counsel claim.

Next, defendant argues that the photograph should have been suppressed as the fruit of an illegal detention. However, even if we were to conclude that the issue whether the photograph was a product of an illegal traffic stop was preserved for appellate review and that an evidentiary error did occur with its admission, reversal would not be warranted. An evidentiary error is not grounds for reversal unless it affirmatively appears more probable than not that it was outcome determinative. *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, as discussed above, the admission of the photograph does not tend to undermine the reliability of the verdict in light of the weight of the untainted identification evidence. See *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

Finally, defendant argues that the prosecutor engaged in misconduct by eliciting testimony that police had official contact with defendant on several previous occasions and that defendant and his brother were known to use each other's names. We disagree.

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial 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. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Here, defendant's theory of defense was that he was not involved in the charged drug transactions and that it was a case of mistaken identity, as evidenced by the fact that the undercover officer knew the perpetrator by a different name. Therefore, during examination of police witnesses, the prosecutor questioned whether the police officers got a good look at the perpetrator, whether they knew defendant prior to his arrest, and whether they were sure that it was defendant who was involved in the drug transactions for which he was charged. Accordingly, the brief questioning of the officers regarding defendant's identity as the perpetrator of the charged crimes was responsive to defendant's defense theory, constituted a good-faith effort to establish a necessary element—identity, thus, was relevant, and its probative value exceeded the potential for unfair prejudice. Further, the disputed testimony did not specify

the circumstances of the prior police contacts; such contacts could have been that defendant was a witness, an informant, or assisted police in some other manner. Consequently, we reject defendant's prosecutorial misconduct claim.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper