

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOMO KENYATTA SANDERS,

Defendant-Appellant.

UNPUBLISHED

August 24, 2004

No. 246921

Genesee Circuit Court

LC No. 02-010550-FH

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of fleeing a police officer in the third degree, MCL 750.479(a)(3), following a jury trial. We affirm.

I. Facts and Proceedings

Defendant's conviction arises out of an incident that occurred in the city of Flint on August 7, 2002. Officer Karl Petrich testified at trial that, while on a surveillance mission in the area of Lippincott and Crock streets, he observed defendant in a burgundy Cavalier participate in what he suspected to be two drug deals. After defendant drove away from the scene, Officer Petrich called for a marked police vehicle to effectuate a traffic stop because defendant was not wearing a seat belt. Consistent with departmental policy, Officer Petrich followed defendant until the marked vehicle arrived. Once the marked vehicle activated its lights and siren, defendant drove the Cavalier across a median to evade the police. A second marked police vehicle that was driving on the opposite side of the street also entered the chase. Defendant eventually drove the Cavalier across a set of railroad tracks, which damaged the car to such an extent that defendant was forced to abandon it and flee on foot.

Officer Petrich testified that there was a wooded area around the railroad tracks, and that when he observed the abandoned Cavalier, he drove to the other side of the wooded area to search for defendant. However, defendant had evaded the police. Officer Petrich notified his Sergeant, Mark Blough, who immediately came to the scene. Officer Petrich and Sergeant Blough searched the area surrounding the Cavalier and woods, and after failing to locate defendant, Sergeant Blough inventoried the Cavalier and found a set of keys and a wallet that contained defendant's temporary driver's license. Officer Petrich and Sergeant Blough ran the registration on the Cavalier to obtain an address for the owner. The Cavalier was registered to the same address that was listed on defendant's temporary driver's license. Officer Petrich and

Sergeant Blough proceeded to the address to search for defendant, but the house appeared to be empty. One of the keys from defendant's car was tried, and when the key fit the lock, Officer Petrich and Sergeant Blough left the house and returned to the station.

After Officer Petrich had returned to the station, he ran the name found on the temporary license through the department's Law Enforcement Information Network to obtain a photograph. Using the photograph, Officer Petrich was immediately able to identify defendant. Defendant was subsequently arrested, tried and convicted. On appeal, defendant asserts claims of prosecutorial misconduct and ineffective assistance of counsel.

II. Standards of Review

We generally review claims of prosecutorial misconduct de novo; however, unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantive rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "Reversal is warranted only when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id* at 448-449. When the trial court has not conducted a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 227 (1973), our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Rodriquez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

III. Analysis

Defendant first argues that the prosecution violated his due process rights by referring to a business card found in his wallet and admitted into evidence as a "rap card." Defendant contends that this was an improper introduction of his prior criminal record. We disagree. In evaluating claims of prosecutorial misconduct, "the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Defendant did not object to the remark during trial, so his claim is unpreserved and reviewed for plain error affecting substantive rights.

Examining the prosecutor's remarks in context, we conclude that a plain error did not occur. During Officer Petrich's testimony, the prosecutor confirmed the contents of defendant's wallet to be offered into evidence, including a business card offering disc jockey services by "in Rap entertainment." The prosecutor made no reference to defendant's status as a parolee, and defendant does not assert otherwise. Thus, the prosecutor's reference to a "rap card" was not misconduct constituting plain error.

In defendant's second claim of error, defendant contends that he was denied effective assistance of counsel after his trial attorney unnecessarily informed the jury of defendant's prior conviction during opening statements. We disagree. In order to prove ineffective assistance of counsel, defendant must establish that (1) the attorney's performance was deficient, and (2) but for the attorney's error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). When attempting to demonstrate that an attorney's performance was deficient, a defendant must overcome the strong presumption that counsel's actions were part of sound trial strategy. *Id*. In the instant case, the prosecutor informed defendant and trial counsel that if defendant chose to testify, evidence of defendant's

prior conviction would be introduced pursuant to MRE 609. Defendant acknowledged for the record his intention to testify, and defense counsel so advised the jury in his opening statement and strategically informed the jury of defendant's prior conviction. However, defendant later decided not to testify. While it is true that, because of defendant's last minute decision not to testify, evidence of defendant's conviction could not have been introduced by the prosecution pursuant to MRE 609, nevertheless, an "[a]ction appearing erroneous from hindsight does not constitute ineffective assistance if the action was taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney." *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994) (Mallett, J. concurring in part and dissenting in part), quoting *People v Garcia*, 398 Mich 250; 247 NW2d 547 (1976). Because counsel's decision to advise the jury of defendant's conviction was strategically sound at the time the decision was made, counsel's performance was not deficient.

Further, defendant was not prejudiced by counsel's opening statement. The jury was instructed that "[t]he lawyers' statements, their arguments to you, their summations, that's not the evidence." The judge also instructed the jury that it could not convict defendant because of a belief that he was guilty of other bad conduct. Because the jury is presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), there is nothing apparent on the record to indicate that, but for counsel's remarks, the trial would have had a different outcome.

Finally, defendant argues that he was denied effective assistance of counsel when trial counsel failed to object to an in-court identification by Officer Petrich. Defendant contends that because of his status as a parolee and the focus of the investigation, he had a right to have counsel present when Officer Petrich made his photo-identification at the police station. Defendant further argues that the photo-identification was unduly suggestive and conducive to irreparable misidentification. We disagree with each of these assertions.

In *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993), the Michigan Supreme Court held that "[i]n the case of photographic identifications, the right to counsel attaches with custody." This rule applies when the custody at issue is "pursuant to the offense in relation to which the lineup is held." *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986). While defendant may have been considered in the custody of the Michigan Department of Corrections by virtue of his parole status, MCL 791.238, he was clearly not in custody "pursuant to the offense in relation to which the lineup is held." *Id.*

Furthermore, Officer Petrich's photo-identification of defendant was not unduly suggestive. Pretrial identification is examined in light of the totality of the circumstances to determine if it was so unduly suggestive as to have led to a substantial likelihood of misidentification. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). The relevant factors include: (1) the opportunity for the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of a prior description, (4) the witness' level of certainty at the pretrial identification procedure, and (5) the length of time between the crime and the confrontation. *Id.* at 304-305.

Testimony at trial established that Officer Petrich had a clear view of defendant when he observed the suspected drug transaction. Officer Petrich testified that he had been trained to closely observe an individual's face, such that he would be able to recognize and identify the

individual at a later date. Officer Petrich also observed defendant's face when he fled from the police. Within a short time after losing sight of defendant, Officer Petrich reviewed a picture of defendant on the Law Enforcement Information Network and immediately recognized defendant as the individual he had previously observed. Under the totality of circumstances, we conclude there was a credible basis for Officer Petrich's pretrial identification and his in-court identification of defendant was not tainted. Because counsel is not required to make futile objections, *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004), defense counsel was not ineffective in failing to object to the in-court identification for either reason asserted by defendant.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter