STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 6, 2005
v	No. 256737 Allegan Circuit Court
JASON DAVID DILS, Defendant-Appellant.	LC No. 03-013434-FH

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

A jury convicted defendant of two counts of domestic violence, MCL 750.81(2), one of which was enhanced for defendant being a third domestic violence offender, MCL 750.812(4). He appeals his convictions by right. We affirm.

The issues defendant raises on appeal are all unpreserved constitutional issues. We review them for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999). He first argues that remarks by the trial court deprived him of his due process right to a fair trial. He contends that the remarks had the effect of instructing the jury that its factual findings were not final and that the prosecution did not have to prove its case beyond a reasonable doubt. We disagree.

This Court must ask whether the trial judge's comments unduly influenced the jury and thereby deprived defendant of his right to a fair and impartial trial. *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957); see also *People v Wilson*, 21 Mich App 36, 37; 174 NW2d 914, (1969). The court's comments did not deprive defendant of a fair trial. The court made its statement in passing and in response to possible concerns about the impartiality of a juror who knew a police officer. The content of the statement is a general reference to the obvious fact that higher courts may overturn lower courts. It was illustrative of the court's point that everyone is human and that therefore the police and even judges are capable of error. In this context, the statement that no one in the courtroom is the final word other than the highest court said nothing about the prosecution's burden of proof or whether the jury's factual findings were final. Defendant's protestations about the court creating indifference within the jury are therefore unfounded.

Defendant argues that his counsel was constitutionally ineffective for failing to object to the trial court's remarks. The trial court's passing comments did not constitute error so any objection would have been futile. An attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant's second claim of ineffective assistance of counsel also lacks merit. He objects to how the prosecution ended its direct examination of a police officer witness with the following exchange:

> *Q*. And at the conclusion of the investigation what did you do?
>
> *A*. I turned in my report with a request for a domestic violence third to the prosecutors.
>
> *Q*. Okay. Have you had an opportunity to do any other follow up investigation with regard to this complaint at all before today?
>
> *A*. No.
>
> *Q*. Thank you deputy, nothing further.

Defendant contends that this exchange led the jury to convict him because of his bad character and the fact that the instant case was his third offense. He also argues that because the reference violated MCL 750.81b(a), the failure to request a mistrial was ineffective assistance of counsel. We disagree on all counts.

Defendant's counsel was not ineffective for failing to object. On its face, the officer's testimony was vague and ambiguous. It did not state in so many words that the domestic violence offense was defendant's third, and the prosecution did not explore the remark or seek to clarify it. An objection would have brought attention to the remark, which may have prompted the court or an attorney to explain that the officer meant that the instant alleged offense was defendant's third. Avoiding that scenario was therefore good trial strategy. A defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant is correct that MCL 750.81b(a) provides that when an enhanced sentence is sought by the prosecutor because of prior convictions of domestic violence that fact is not to be disclosed to the jury. However, as noted above, the brief mention in this case did not necessarily disclose that defendant had prior convictions for domestic violence. Even if we assume that the reference did disclose this information in violation of the statute, however obliquely, the statute does not prescribe any remedy for violating this prohibition and we do not agree that under the circumstances of this case a mistrial would have been warranted had counsel objected on this ground. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). It is more likely that a curative instruction would have been given. In that case, we must again conclude that the failure to object was, in all likelihood, sound trial strategy that we will not second-guess.

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey