

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY J. BETHUNE,

Defendant-Appellant.

UNPUBLISHED

December 13, 2005

No. 257079

Wayne Circuit Court

LC No. 03-012324-01

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct (“CSC”), MCL 750.520b(1)(e), one count of third-degree CSC, MCL 750.520d(1)(b),¹ and assault with intent to rob while armed, MCL 750.89. He was sentenced to concurrent prison terms of twenty to thirty-five years for the first-degree CSC and assault with intent to rob convictions, and ten to fifteen years for the third-degree CSC conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred by failing to sua sponte give a cautionary instruction in response to the prosecutor’s attempted improper impeachment of defendant. We find no plain error affecting defendant’s substantial rights.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Because defendant did not preserve this issue by requesting a cautionary instruction in the trial court, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 766-767, 772-773; 597 NW2d 130 (1999); *People v Rice (On Remand)*, 235 Mich App 429, 443; 597 NW2d 843 (1999).

Although MRE 609(a) allows a defendant to be impeached with evidence of a prior conviction for a crime containing an element of dishonesty or theft, “it is error to cross-examine

¹ Defendant was originally charged with three counts of first-degree CSC. He was acquitted of one count and convicted of the lesser offense of third-degree CSC on another.

a defendant about the duration and details of prior prison sentences to test his credibility.” *People v Lindberg*, 162 Mich App 226, 234; 412 NW2d 272 (1987); see also *People v Rappuhn*, 390 Mich 266, 273-274; 212 NW2d 205 (1973). The rationale for this rule is that only a defendant’s prior conduct is relevant to his credibility, not the punishment meted out for that conduct. *Lindberg*, *supra* at 234. Thus, it was improper for the prosecutor to ask defendant whether he served a “period of four years confinement for burglary” when questioning defendant about his prior conviction for burglary.

Although defendant now contends that the trial court should have given a cautionary instruction in response to the prosecutor’s improper question, he did not request a cautionary instruction at trial. The record discloses that defense counsel objected to the prosecutor’s question before defendant had a chance to respond, resulting in a sidebar discussion with the court. As it turned out, the question was never answered and the subject of defendant’s sentence was not raised again. Under these circumstances, the trial court did not plainly err by failing to sua sponte issue a curative instruction in response to the prosecutor’s question. Such an instruction might have unnecessarily drawn attention to the issue of defendant’s sentence. Moreover, the trial court properly instructed the jury that only defendant’s prior convictions could be used to assess his credibility, and that the attorney’s questions and comments are not evidence. Jurors are presumed to follow the court’s instructions. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Thus, defendant’s substantial rights were not affected.

II

Defendant next argues that defense counsel was ineffective for failing to request a cautionary instruction in response to the prosecutor’s improper impeachment, by failing to object to improper comments by the prosecutor during closing argument, and by failing to properly investigate the case. We disagree.

Because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), our review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312, 314. Where counsel’s conduct involves a choice of strategies, it is not deficient. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A. Improper Mention of Defendant’s Prior Sentence

Defendant has not shown that defense counsel was ineffective for failing to request a cautionary instruction in response to the prosecutor’s attempted improper impeachment. An attorney’s decision whether to request a cautionary instruction is presumed to be a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). As discussed in part I,

supra, defendant never responded to the prosecutor's improper question concerning defendant's prior sentence for burglary, and a curative instruction may have only drawn attention to defendant's prior convictions and sentences. Defendant has failed to overcome the presumption that counsel did not request a cautionary instruction as a matter of sound trial strategy.

B. Prosecutor's Closing Argument

Whether to object to a perceived impropriety is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defense counsel did not object to the prosecutor's comments that allegedly expressed a personal belief in defendant's guilt. As discussed in part III(A), *infra*, however, the prosecutor's comments were not improper. Therefore, defense counsel was not ineffective for failing to object. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defense counsel did object to the prosecutor's comments which defendant maintains improperly denigrated the defense, and to the various other comments that allegedly injected issues broader than defendant's guilt or innocence. Therefore, there is no merit to defendant's argument that defense counsel was ineffective for failing to object.

C. Trial Preparation and Investigation

An attorney has a duty to conduct a reasonable investigation, and failure to do so can amount to ineffective assistance of counsel. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). However, "[d]ecisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis (On Rehearing)*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption of sound trial strategy, a defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving the defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Defendant asserts that counsel should have investigated the victim's claim that defendant's vehicle had automatic locks and no inside handle on the passenger side door. Defendant concedes, however, that the police investigated this claim, examined the vehicle, and testified that defendant's truck did not have automatic locks, that there was a handle on the inside of the passenger door, and that the mechanism was operational. Defendant fails to explain what more counsel could have done, or how further pursuit of this matter may have affected the outcome. Therefore, defendant has failed to overcome the presumption of sound trial strategy, or show that he was prejudiced by any omission.

Defendant also argues that counsel should have investigated his alleged reading and writing difficulties. At trial, however, defendant explained that he did not correct alleged errors in his police statement because he could not read it. Again, defendant fails to explain what else counsel should have done or how it might have affected the outcome. Defendant has failed to show that counsel was ineffective in this regard.

Similarly, there is no record support for defendant's claim that counsel failed to contact defendant's sister. While defendant's sister might have been able to corroborate defendant's

claim that he arrived at her home before 2:30 a.m., that would have been consistent with the victim's version of events. Defense counsel may have chosen not to call defendant's sister as a witness because she had nothing relevant to add, or because she may have contradicted defendant's version of the facts. Defendant has failed to overcome the presumption of sound trial strategy or show that counsel's failure to call his sister as a witness deprived him of a substantial defense.

Similarly, there is no record support for defendant's claim that counsel failed to investigate the allegation that defendant and the victim had met months before the charged incident. Indeed, defendant testified at length on this subject at trial, and, while the victim denied having had a prior sexual relationship with defendant, she admitted knowing him. Defendant has failed to show that counsel committed prejudicial error.

Defendant also argues that counsel was ineffective for failing to object when the prosecutor asked defendant whether he heard the arresting officer's testimony. It is improper for a prosecutor to ask a witness, including a defendant, to comment on the credibility or truthfulness of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Here, however, the prosecutor merely asked defendant whether he had heard the officer's testimony, as a foundation for asking defendant questions concerning evidence found in defendant's truck. Defendant has failed to show that the prosecutor's question was improper. Thus, defendant has not shown that his counsel was ineffective for failing to object. *Kulpinski*, *supra* at 27.

We also reject defendant's claim that counsel was ineffective for failing to pursue defendant's right to request a polygraph examination. Under MCL 776.21(5), a defendant charged with criminal sexual conduct has a right to a polygraph examination, upon demand. *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003). Here, however, counsel may have chosen not to pursue the matter because she believed that the outcome would not be favorable to defendant. Further, as the Court in *Phillips*, observed, "even if defendant had taken and passed a polygraph test, the results would not have been admissible at trial"; therefore, they could not have affected the outcome. *Id.* at 397. Once again, defendant has failed to overcome the presumption of sound trial strategy or shown that he was prejudiced by counsel's alleged error.

Lastly, defendant argues that counsel was ineffective for failing to object to the trial court's use of the "struck jury method." As discussed in part IV, *infra*, however, the jury selection procedure used by the trial court did not involve the prohibited "struck jury method," and is acceptable under the court rules. Thus, counsel was not ineffective for failing to object.

III

Defendant next argues that misconduct by the prosecutor denied him a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Here, however, defendant failed to preserve some of his claims of misconduct with an appropriate objection at trial. We review those unpreserved issues for plain error affecting defendant's

substantial rights. *Carines, supra* at 763-764; *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000).² Appellate relief is precluded if a curative instruction could have eliminated any prejudice. *Id.*

A. Personal Belief in Defendant's Guilt

Defendant correctly argues that a prosecutor may not place the prestige of his office behind the assertion that the defendant is guilty, although he may argue that the evidence establishes the defendant's guilt. *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988). In this case, the two comments challenged by defendant, viewed in context, merely involved the prosecutor asking the jury to convict defendant as charged in light of the evidence. The prosecutor did not improperly express a personal belief in defendant's guilt. Defendant has failed to show a plain error.

B. Denigrating the Defense

As defendant observes, "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). It is also improper for a prosecutor to inject issues broader than the defendant's guilt or innocence. See *Rice, supra* at 438. However, the prosecutor's comments must be evaluated in light of defense counsel's comments. *Watson, supra* at 592-593. "[A]n otherwise improper remark may not rise to error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id.* at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

In this case, we agree that the prosecutor improperly suggested that all defense attorneys attempt to mislead their juries. However, defense counsel's objection to the remark was sustained and the trial court later instructed the jury not to consider matters concerning which an objection was sustained. The court also instructed the jury that it must decide the case on basis of the properly admitted evidence only, and that the questions and comments of the attorneys are not evidence. Jurors are presumed to follow the trial court's instructions. *McAlister, supra* at 504. Under these circumstances, defendant has failed to show that the prosecutor's improper remark deprived him of a fair trial.

C. Injecting Issues Broader than Defendant's Guilt or Innocence

A review of the record, including defense counsel's closing argument, discloses that the various other comments challenged by defendant on appeal were responsive to defense counsel's arguments concerning the victim's testimony and credibility. The comments did not inject issues broader than defendant's guilt or innocence, and were proper comments on the evidence. The prosecutor did not commit misconduct that deprived defendant of a fair trial.

IV

² Overruled on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Lastly, defendant argues that reversal is required because the jury was selected using the struck jury method proscribed in *People v Miller*, 411 Mich 321, 323, 326; 307 NW2d 335 (1981). We disagree.

The construction and application of a court rule, including an alleged violation of the jury selection process, is a question of law that is reviewed de novo. *Wickings v Artic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000); *Schmitz, supra* at 528; see also *People v Fletcher*, 260 Mich App 531, 554; 679 NW2d 127 (2004).

The method of jury selection used here did not involve the “struck jury method” prohibited by *Miller, supra*. Further, MCR 2.511(A)(4) now allows jurors to be selected “by any other fair and impartial method directed by the court or agreed to by the parties.” In this case, defendant did not object to the jury selection procedure used by the trial court, and expressed satisfaction with the jury. Additionally, defense counsel exercised only nine of twelve available peremptory challenges. See MCR 6.412(E)(1). Under these circumstances, reversal is not warranted. *Fletcher, supra* at 555-557; *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998).

Affirmed.

/s/ Helene N. White

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder