

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD EUGENE COMSTOCK, JR.,

Defendant-Appellant.

UNPUBLISHED

January 24, 2008

No. 274133

Iosco Circuit Court

LC No. 06-002566-FH

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of uttering and publishing, MCL 750.249, for which he was sentenced to three years' probation with the first 60 days in jail. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court impermissibly infringed on his right to present a defense by denying his request to admit Western Union documents into evidence. The trial court's ruling regarding the admission of evidence is generally reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

We conclude that even if the documents were admissible, any error in excluding them was harmless. The fact that defendant attempted to wire money to the Netherlands to open an account into which additional funds would be deposited was evidence that he was a victim of an Internet scam. However, it was undisputed that defendant was the victim of such a scam. The controlling issue was whether defendant knew that the check he deposited with the bank was fraudulent when he presented it for deposit, intending to defraud the bank. See *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003), "overruled" on other grounds by *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006). Defendant's knowledge and fraudulent intent were evidenced by his statement to a bank teller that the check was part of an inheritance and by his subsequent statements admitting that he "didn't believe the check was real" but deposited it anyway. The fact that defendant attempted to wire money to the scammers showed that he was hopeful of receiving the additional funds, not that he knew the check was genuine when he deposited it. Therefore, it is not more probable than not that exclusion of the documents affected the outcome of the case. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001); *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Because defendant has not shown that the alleged error was outcome determinative, his claim that counsel was ineffective

for failing to admit the documents into evidence must also fail. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003).

Defendant next contends that he was denied a fair trial due to prosecutorial misconduct. Because defendant did not object to the prosecutor's conduct at trial, we review this issue for plain error that affected the outcome of the trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

It is improper for the prosecutor to ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). In this case, the prosecutor never asked defendant to comment on the credibility of the prosecution witnesses. He asked whether his witnesses had accurately recounted the statements that defendant had made to them and whether defendant had actually made the statements the witnesses attributed to him, not whether they had testified truthfully. Questions intended to frame the areas of agreement and disagreement between a defendant's account and the accounts of other witnesses do not rise to the level of a *Buckey* violation. *Ackerman*, *supra* at 449. Therefore, defendant has failed to show plain error. Because defendant has not shown error, counsel was not ineffective for failing to object to the questioning. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant lastly contends that he is entitled to a new trial due to ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or request for an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*Watkins*, *supra* (citations omitted).]

Defendant argues that defense counsel was ineffective for failing to introduce email correspondence from his benefactor and her bank to corroborate his testimony regarding how he came to receive the check at issue. However, defendant has not shown that he could establish a proper foundation for admission of the emails, see MRE 901; *People v Ford*, 262 Mich App 443, 460-462; 687 NW2d 119 (2004), and thus has not established the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Absent a showing that the emails were admissible, counsel cannot be deemed ineffective for failing to move for their admission.

Defendant also contends that counsel was ineffective for eliciting and then failing to object to improper character evidence. Specifically, she elicited testimony that drugs and drug paraphernalia were seized from his house and did not object to that testimony. Although the

evidence was not admissible under MRE 404(b), there is nothing in the record to suggest that counsel intended to introduce improper character evidence against her client. Rather, the record suggests that counsel was attempting to establish that execution of the search warrant did not produce any evidence to incriminate defendant in the charged offense. Counsel's decision not to request a cautionary instruction was a matter of trial strategy, *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003), and considering that the drugs were irrelevant to any fact in issue and were never mentioned again, it is unlikely that the outcome of the trial would have been different had counsel requested such an instruction.

Affirmed.

/s/ Jane E. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood