STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY EDWARD HILL,

Defendant-Appellant.

UNPUBLISHED
December 23, 2008

No. 280986
Jackson Circuit Court
LC No. 06-004562-FH

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

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to six to 20 years in prison. Defendant appeals by right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecuting attorney presented evidence that on a night in October 2006, defendant, while intoxicated, entered an occupied residence's enclosed porch, noisily tried, but failed, to enter the house first through a child's window, and then through the front door. Shortly afterward the police found defendant a short distance from the residence with a humidifier and a roller skate. The head of the invaded household identified both as her property; the skate matched a companion still on that porch (Tr, 97, 98).

The arresting police officer testified that he asked defendant where he got the skate and humidifier. Defendant said that they were his, but otherwise, he made "no sense whatsoever" because of his state of intoxication (Tr, 101-102). The officer continued that, because of defendant's drunkenness, he took him to the hospital instead of jail (Tr, 103-104).

Defendant testified that he had been drinking all day. He stated he used to live in the area, but that he had no recollection of what happened that night until he found himself in the hospital, and that he had no reason to accost the residence in question (Tr, 116-117).

On appeal, defendant argues that he was denied a fair trial by improper prosecutorial argument and by defense counsel's ineffective performance.

I. Prosecutorial Argument

This Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). But defense counsel did not object to the remarks to which defendant takes issue. "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or failure to review the issue would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (internal quotation marks and citation omitted).

A. Denigration of the Defense

Defendant argues that the prosecuting attorney repeated denigrated him personally. A prosecuting attorney "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Still, a prosecuting attorney has wide discretion in fashioning arguments and is free to argue from the evidence and all its reasonable inferences. *Id.* See also *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989) (the prosecutor need not present his argument in the "blandest of all possible terms" [internal quotation marks and citation omitted]).

Defendant first complains that the prosecuting attorney, during closing arguments, called him a "drunken idiot." (Brief at 8; see Tr, 151). In the context cited, however, the prosecuting attorney was describing a homeowner's distress at finding "some drunken idiot on the porch" at midnight. This was not actually a characterization of defendant, but rather one of how a homeowner likely felt in that situation.

Defendant next points out that the prosecuting attorney stated, "Even though, I admit, this isn't the smartest burglar or home invader in making all that noise, he was drunk, okay, and maybe because he was drunk, he was very clumsy and didn't do things right." (Brief at 8; see Tr, 157.) However, the prosecuting attorney was arguing defendant's acts satisfied the elements of home invasion, and was reminding the jury that one need not be a shrewd operator, to commit the crime. Moreover, those comments accurately reflected the evidence. Accurate commentary on what the evidence showed does not become improper disparagement of a defendant only because that commentary put the perpetrator of the crime in an unflattering light.

Concerning whether defendant intended permanently to deprive the rightful owner of the humidifier and roller skate found in his possession, the prosecuting attorney stated as follows:

> I'm sure he had no intent to bring it back. He was heading in the opposite direction until the police caught him. I'm sure it would [have] ended up someplace and that humidifier would have been traded probably for, what I used to call GI's when I was a kid, it was a 45 ounce beer that maybe you put in a paper bag. [Tr, 154.]

We regard these as statements of the obvious and the prosecuting attorney's ruminations on what defendant would have done with the humidifier as merely gratuitous. Defendant himself admitted that he had been drinking heavily on the day in question and testified that he had no memory of the hours preceding his awakening in the hospital. Because the evidence pointed to a perpetrator in a state of self-induced and heavy drunkenness, postulating that defendant might

have traded the appliance for beer hardly placed him in a light worse than what defendant's admissions, coupled with the evidence of his rampage on the victims' porch, already suggested.

Further, to the extent that the prosecuting attorney's remarks crossed the line into improper disparagement of defendant, had there been an objection to some of the prosecuting attorney's characterizations of defendant or his conduct, a caution to the prosecuting attorney to avoid denigrating defendant and a curative instruction to the jury would have cured any prejudice. Accordingly, no appellate relief over this unpreserved issue is warranted. See *Unger*, *supra*.

B. Mention of Sentencing Possibilities

Defendant argues that the prosecuting attorney improperly encouraged the jury to consider the penalty defendant might face if convicted. We agree, but deem the error harmless. The prosecuting attorney's closing arguments included the following:

> The fact that he's drunk, that's something that the Judge will consider, if he's found guilty. . . . Now, factors such as he was drunk, you know, he was making a lot of noise, which is not typically of the kind of person that you would expect to be sneaking around trying to break into somebody's house or steal something, okay. That doesn't mean that the crime hasn't been committed and the Judge may take that into consideration at the time of sentencing when he decides what to do with this guy, but penalty should not be something that you're supposed to think about. Possible penalty should not influence your decision. It's the duty of the Judge to affix the penalty within the limits provided by law. [Tr, 152-153.]
>
> * * *
>
> . . . [I]f there's an issue because of his intoxication, because he was making a lot of noise, that's something the Judge can factor in, in sentencing. [Tr, 156-157.]
>
> * * *
>
> . . . Please, please, I beg you, don't feel sorry for this guy, don't . . . cut him slack just because he was drinking. Can you promise that you wouldn't? Okay, follow the law and then, if he's convicted, let the Judge decide what the proper sanction under the limits of the law is. Maybe the Judge will put him in a rehab program, we don't know. It's up to the Judge. [Tr, 168.]

In general, juries in criminal cases are to confine themselves to deciding the question of guilt and not concern themselves with the penal consequences that might follow from a guilty verdict. See *People v Goad*, 421 Mich 20, 26-28; 364 NW2d 584 (1984) (recognizing an exception where not guilty by reason of insanity is among the possible verdicts). Accordingly, the trial court in this case instructed the jury, "You must not let sympathy . . . influence your decision," (Tr, 170) and "Possible penalty should not influence your decision. It is the duty of the Judge to fix the penalty within the limits provided by the law." (Tr, 180.)

As an initial matter, we note that the prosecuting attorney liberally interspersed his comments on possible sentencing consequences with reminders that sentencing was purely the judge's, and not the jury's, concern. To the extent that the prosecuting attorney reminded the jurors that they were not to concern themselves with sentencing implications, counsel was accurately reflecting law and policy and anticipating instructions that the court would be providing.

But the prosecuting attorney stepped beyond such benign argument when he mentioned that the judge might exercise mercy and sentence defendant to "a rehab program."[1] Such commentary specifically invited the jury to contemplate what penalty defendant might receive. This was error.

Nonetheless, we find that the error was harmless under the circumstances. Those remarks could only have influenced the jury to the extent that the jurors might have allowed sympathy for defendant to influence their verdict. Juries have the inherent capacity to exercise mercy in this fashion. See *People v Cazal*, 412 Mich 680, 687; 316 NW2d 705 (1982) ("Although some compromise verdicts may be assailable in logic, they are supportable because of the jury's role in our criminal justice system . . . ."). But such deviations from their duty to determine whether guilt has been proved are disfavored in this state. See *People v Ward*, 381 Mich 624, 628; 166 NW2d 451 (1969) (although juries have the power to disregard the trial court's instructions, it is not by right that juries exercise that power). See also *People v St Cyr*, 129 Mich App 471, 474; 341 NW2d 533 (1983) (Michigan does not recognize a right to have a jury instructed on its power of nullification).

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the jury was properly instructed not to allow possible penalty to influence its decision, no unfair prejudice occurred when the prosecuting attorney in this case alluded to the possibility that if convicted defendant's penalty might not be harsh.

For these reasons, defendant's allegations of prosecutorial misconduct do not warrant appellate relief.

II. Assistance of Counsel

Defendant alternatively recasts his prosecutorial misconduct argument under the rubric of ineffective assistance of counsel, citing counsel's lack of objections below. Defendant additionally argues that trial counsel was ineffective for failing to seek suppression of certain remarks he made to the police.

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*,

[1] Defendant rightly points out that, given defendant's status as a habitual offender, the prosecuting attorney knew that avoidance of a prison sentence would not be an option.

237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (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 Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

A. Prosecutorial Remarks

Concerning the alleged denigration of defendant, because we concluded above that what defendant characterized as such denigration was in fact fair argument from the evidence, we conclude here that defense counsel had little to gain from raising any objections. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

As to the prosecuting attorney's encouraging the jurors to consider the possibility that defendant might not receive a harsh sentence if convicted, we discern a strategic defensive reason for declining to raise objections. In suggesting to the jury that defendant might not face a severe penalty if convicted, the prosecuting attorney was gambling that the jurors would indeed properly not concern themselves with penalty, at the risk that emphasizing that a penalty would follow a conviction. But, if the jurors felt at all sympathetic to a seemingly harmless defendant who did not remember the incident in question, they might simply ensure that there would be no conviction in the first instance. Defense counsel had nothing to lose if the challenged remarks had their desired effect of guaranteeing that the jury would follow its instruction not to take possible penalty into account, but everything to gain if the prosecuting attorney's strategy backfired and encouraged the jury to exercise its power of nullification.

Because a strategic reason for allowing the argument concerning possible penalty to continue is apparent, no claim of ineffective assistance may be predicated on defense counsel's failure to object.

B. Suppression of Evidence

Defendant argues that defense counsel was ineffective for failing to seek suppression of the statements defendant made to the police when they first confronted him and which he gave without benefit of *Miranda*[2] warnings. Plaintiff in turn argues that the conversation in question stemmed from a mere *Terry*[3] stop, for which no *Miranda* warnings were required. See *Berkemer v McCarty*, 468 US 420, 437-422; 104 S Ct 3138; 82 L Ed 2d 317 (1984) (*Miranda* warnings are generally not required during a routine traffic stop or a stop pursuant to *Terry*). We need not decide whether the interview in question occurred under sufficiently constrained and coercive circumstances to have required *Miranda* warnings, however, because defendant fails to bring to light any confession from the discussion in question.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

"An admission of fact is distinguished from a confession of guilt by the fact that an admission, in the absence of proof of facts in addition to those admitted by the defendant, does not show guilt." *People v Gist*, 190 Mich App 670, 671-672; 476 NW2d 485 (1991). "'If . . . the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission . . . ." *People v Schumacher*, 276 Mich App 165, 181; 740 NW2d 534 (2007), quoting *People v Porter*, 269 Mich 284, 290; 257 NW 705 (1934). "[W]here the defendant's statements were admissions of fact, rather than a confession of guilt, no finding of voluntariness is necessary." *Gist, supra* at 671.

Defendant points out that, according to the police, he had asserted that the humidifier and roller skate were his own. But he does not challenge any other statement that he allegedly made. The assertion that those items were in fact his property was a mere admission (true or not) of lawful possession, not confession of any crime.

Accordingly, defense counsel had nothing to gain from seeking suppression of the evidence of what defendant said to the police that night. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Because defense counsel had nothing to gain from seeking suppression of defendant's admissions, there is no basis for a claim of ineffective assistance of counsel.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder