STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 6, 2009
v	No. 287276 Jackson Circuit Court
JAMES WILLIAM BELTON, Defendant-Appellant.	LC No. 07-003731-FH

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

PER CURIAM.

Defendant appeals by right his conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). We affirm but remand for correction of the judgment of sentence.

Defendant first contends that he is entitled to a new trial because he received ineffective assistance of counsel. Specifically, defendant contends that his counsel was ineffective for conceding that defendant was guilty as charged. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To establish his claim, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. [*People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).]

A complete concession of the defendant's guilt renders counsel ineffective. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). But, it is a permissible trial tactic for counsel to "admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Mark Schultz,* 85 Mich App 527, 532; 271 NW2d 305 (1978). In other words, counsel is not ineffective for conceding what is obvious based upon the evidence. *People v Wise,* 134 Mich App 82, 98; 351 NW2d 255

(1984). This Court will not second-guess trial counsel's strategy of conceding certain elements of the charge at trial. *Id*.; *People v Chapo*, 283 Mich App 360, 369-370; __ NW2d __ (2009).

The record does not support defendant's claim. The evidence showed that the police found the cocaine on defendant's shoe; it had apparently slipped out of defendant's pants while he was being patted down. Given that, counsel admitted that defendant possessed the cocaine but disputed that he intended to deliver it to anyone and urged the jury to find defendant guilty of simple possession. When counsel initially advanced the idea that defendant might have been taking the cocaine to a party, he did not indicate that defendant intended to deliver it to other attendees. At most, counsel implied that defendant and his passengers jointly possessed the cocaine and would jointly use it, not that defendant intended to distribute it to anyone. Given the evidence that the cocaine apparently fell out of defendant's pants, it was reasonable for counsel to admit guilt of the lesser included offense and argue against the greater offense. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant next contends that he was denied a fair trial because of prosecutorial misconduct. Defendant objected to both statements at issue but not on the same grounds asserted on appeal; consequently, the issue has not been preserved. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Our review is limited to plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). "The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *Id*.

We agree that the prosecutor improperly referred to the problem of crack cocaine "decimating a lot of our communities." The scourge of illegal drugs on society was irrelevant to the issue whether defendant intended to deliver the cocaine in his possession and constituted an appeal to the jurors' fears. It is improper for a prosecutor to inject issues broader than the guilt or innocence by making so-called "civic duty" arguments. See *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). Still, we cannot find that the prosecutor's comments affected the outcome of the trial. The trial court admonished the prosecutor to "stick to the facts," and the prosecutor never again mentioned the problem of drugs in our society. The court later instructed the jury that it was to decide the case based only on the evidence, and that the lawyers' arguments are not evidence, which was sufficient to dispel any prejudice from this one isolated remark. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

We find nothing improper about the prosecutor's statements that defendant had come from Detroit. Taking the statements about traveling from Detroit alone and out of context, one could certainly speculate that they were meant to suggest something unsavory about defendant's character. But when considered in context, as we must, it is clear that no such suggestion was being made. The prosecutor specifically stated that he did not mean to imply anything negative from the fact that defendant was from Detroit. He further explained that it was not the fact that defendant had come from Detroit per se, but the fact that defendant brought cocaine to Jackson from another city that permitted an inference of intent to deliver. That was a reasonable inference from the evidence admitted at trial and thus was not improper.

Defendant's conviction is affirmed, but we remand for the ministerial task of correcting the judgment of sentence which erroneously indicates that defendant was convicted by guilty plea rather than by a jury. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello