STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE DARRELL CROSTHWAITE,

Defendant-Appellant.

UNPUBLISHED
August 10, 2010

No. 291645
Iosco Circuit Court
LC No. 07-003805-FH

Before: M.J. KELLY, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for fourth-degree criminal sexual conduct. We affirm.

I. Factual background

In summer 2007, Brittney Mochty was 17 years old and working in the bag drop area at the Red Hawk Golf Course in Wilbur Township. Her duties included carrying golfers' clubs to and from their vehicles, and cleaning clubs and golf balls for golfers. Although Red Hawk paid Mochty hourly wages, she relied on tips from golfers as well. Mochty testified that around 5 o'clock on August 4, 2007, a group of about 20 golfers came off the course at about the same time. She approached defendant and his friend, Kim Gross, and offered to clean their clubs. They agreed, and she cleaned their clubs. Gross then gave her a five-dollar tip, which she put in her pocket. Defendant then told Mochty, "Let me see that." Mochty gave the bill to him, and defendant inserted the bill into Mochty's brassiere. She testified that Gross told defendant that "that was a little uncalled for." Defendant and Gross then went to play more golf, and Mochty became upset and started to cry. Defendant was charged with fourth-degree criminal sexual conduct, contrary to MCL 750.520e.

Defendant had two main theories of defense. First, that one of the elements of the crime was not satisfied, because the prosecutor presented no evidence that defendant had "used force or coercion to commit the sexual act." This issue was not raised on appeal. Defendant's second theory was that Mochty had misidentified defendant as her assailant. Defendant submitted evidence that he and Gross had not been golfing together in the large golf outing early that day. Therefore, according to defendant, Mochty's testimony that her assailant had been with Gross cast doubt on her testimony that her assailant was defendant.

The jury returned a verdict of guilty. Defendant, retaining new counsel, moved for a new trial or for a *Ginther*[1] hearing. Following a hearing, the trial court denied the motion. This appeal followed.

II. Prosecutorial misconduct

Defendant first argues that the prosecutor committed misconduct, depriving defendant of his right to a fair trial. Defendant did not object to any of the alleged misconduct, and the issue is therefore unpreserved.[2] *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). We review unpreserved nonconstitutional issues under the plain error doctrine. *Id.* at 763. To avoid forfeiture, defendant must show three things: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* Even if defendant can make these three showings, we will not reverse unless the error "resulted in the conviction of an actually innocent defendant or . . . '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* We decide prosecutorial misconduct issues on a case-by-case basis, by examining the record and evaluating the prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant argues that the prosecutor committed misconduct in questioning Gross about a conversation the two of them had on the day of defendant's preliminary examination:

> *Q*. You indicated you discussed with me the testimony that you just gave; is that correct?
>
> *A*. Yes.
>
> *Q*. And that would have happened on the day of the preliminary examination, October 16th, 2007; is that correct?
>
> *A*. Sounds about right.
>
> *Q*. And you disclosed all the information that you have testified to today to me; is that correct?
>
> *A*. Yes.

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] Although defendant objected at one point to the prosecutor's questioning, it was on a different ground than that raised on appeal. An objection at trial on one ground is not sufficient to preserve a different issue on appeal. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Q. Was this Trooper [Michigan State Trooper Montie, who later testified] present when you and I had that conversation?

A. A Trooper was. I guess I'll take your word for it that it was the same one.

Defendant asserts that the prosecutor was attempting to show some special knowledge of whether Gross was telling the truth, by pointing out to the jury that he had personally spoken with Gross previously. A prosecutor may not imply "that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Placing the comments in context, however, this was not the prosecutor's goal. The prosecutor was planning to call Montie to impeach Gross's testimony by introducing Montie's testimony of Gross's prior inconsistent statements. Defense counsel and Gross had already had the following exchange:

Q. I guess Mr. Gross, so we're clear you—number one, how many times have you spoken to the prosecutor about what you were going to testify to here today?

A. Once.

Q. Okay. And how long ago was that?

A. About—seems like about a year ago.

Q. Okay. And that was the only time that you've actually explained to him what it is that you remember from that day; right?

A. Correct.

The prosecutor was providing a context for Gross's statements, and at the same time laying a foundation for the coming impeachment of Gross through the testimony of Montie. Nothing in the prosecutor's statements indicates that he had any special knowledge of whether Gross was telling the truth. The prosecutor did apparently have special knowledge of whether Gross was being consistent, but did not share that knowledge with the jury. This questioning did not constitute misconduct.

Defendant next argues that the prosecutor committed misconduct in questioning Montie. The following exchange occurred:

Q. Now, on the date of the preliminary examination, October 16th, 2007, you were present *in my office* when Mr. Gross was there; is that correct?

A. That's correct.

Q. Did you hear anything from him at that date, similar to what he just got done testifying to?

A. No, I did not.

Q. Did you ever hear him tell *us* that he was golfing with someone else other than Mr. Crosthwaite?

A. No.

Q. Did you ever hear him say that he picked up his bag up from the bag drop and carried it up to the clubhouse?

A. No.

Q. You heard him say he tipped her five dollars? Did you hear him say that?

A. Not in your office, no.

Q. In fact did he even say that he remembered talking to you on August 4th, 2007?

A. No. He said he did not remember talking to me.

Q. He didn't remember talking to you. And on the date of the preliminary examination he didn't tell you *and me* anything similar to what he just testified to here today.

[Defense counsel]. Objection, Judge. Anything similar. It sounded very similar to me. That's a mischaracterization of what's been testified to.

Q [The prosecutor]. You heard him—you just heard him testify; didn't you?

A. I heard him testify.

Q. All right. Did he tell you that *or me that* on August 16th, 2007?

A. No. He didn't tell you anything on that day. [Emphasis added]

Defendant argues that the prosecutor's injection of "me," "my," and "us" into the questioning was another attempt of the prosecutor to imply to the jury that he had some special knowledge of whether Montie was telling the truth. Certainly the prosecutor did know whether Montie was telling the truth, because he was present when Gross made the statements Montie said he made. But the prosecutor never said or implied to the jury that it should believe Montie because the prosecutor knew Montie was telling the truth. The prosecutor simply presented the argument that Montie's testimony cast doubt on Gross's veracity. Taking the remarks in context, defendant has not shown that a plain error occurred that affected the result of the proceedings.

Finally, defendant argues that the prosecutor committed misconduct during his closing argument. The prosecutor said:

> And that's where Mr. Gross came into the cart. And they approached her. She cleaned their clubs. Gave the five-dollar tip, which you get to weigh the credibility of Mr. Gross and whether you believe him or not based upon some of

> the inconsistent statements that he made, for instance to trooper Montie. Told him he rode with him. Told him he gave a five-dollar tip. Got up here and said nope, didn't make the statement, you know, that that was uncalled for. And you get to weigh the credibility. And again, this is his friend that's on trial here.

Defendant argues that this amounts to the prosecutor calling Gross a liar and accusing him of changing his story. All of the prosecutor's statements were arguments from the evidence and reasonable inferences therefrom. A prosecutor is "free to argue the evidence and all reasonable inferences arising from it as it relates to [his] theory of the case, *Bahoda*, 448 Mich at 282, and "need not confine argument to the blandest possible terms," *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Here, the prosecutor was not saying the jury should find Gross less credible because the prosecutor heard Gross give inconsistent statements; he was saying the jury should find Gross less credible because Montie testified that Montie heard Gross give inconsistent statements. The statements were proper.

Taking each of the statements objected to in context, defendant has not shown that any of them constituted prosecutorial misconduct that might have affected the outcome of the proceedings. Additionally, had there been any prejudice, it could have been cured with an appropriate instruction given after a timely objection. See *Thomas*, 260 Mich App at 455.

III. Ineffectiveness of counsel.

Defendant next argues that his trial counsel was ineffective for failing to object to the prosecutor's misconduct, for failing to offer certain pieces of exculpatory evidence, and for failing to investigate the case properly. In order to show counsel was constitutionally ineffective, a defendant must show three things: (1) counsel's performance was defective in that it fell below an objective standard of reasonableness, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), (2) it is reasonably probable that counsel's deficiency affected the outcome of the proceedings, *id.*, and (3) counsel's deficiency caused a result that was "fundamentally unfair or unreliable," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). In making this showing, a defendant must overcome a strong presumption that counsel was effective in matters of trial strategy. *Id.*

Because we hold that there was no prosecutorial misconduct, trial counsel cannot have been constitutionally ineffective for failing to object to the prosecutor's statements and questions.

Defendant argues that his trial counsel was ineffective for failing to offer a photograph of defendant on the day in question wearing a T-shirt. Mochty testified that defendant was "probably" wearing a polo shirt. Defendant argues that showing the picture would have cast doubt on Mochty's reliability, an important consideration when the defense is misidentification. But we find that the decision not to offer the photograph may have been one of trial strategy. The photograph depicts defendant holding hands with another young female employee of Red Hawk. Given the nature of the accusations, counsel might understandably have been wary about putting a photograph before the jury that showed defendant as a man who was comfortable engaging in familiar physical contact with young women employed at Red Hawk. Nor is this a matter of pure speculation. Before trial, plaintiff moved to admit testimony of defendant's

interactions with two other young women at Red Hawk on the day in question, including the woman in the photograph. Defense counsel opposed the admission of the testimony as inadmissible propensity evidence, and the trial court denied plaintiff's motion on that basis. It is therefore apparent from the record that defense counsel was concerned about the jury seeing defendant as having a propensity to touch the young women who worked at Red Hawk. As a matter of trial strategy, the decision not to admit the photograph was a reasonable one, and we do not find counsel ineffective on this basis.

Defendant also argues that trial counsel was ineffective in failing to offer evidence to show that defendant and Gross were not golfing together early in the day. Ample evidence was introduced on this point. Because it is not reasonably likely that more evidence on this point would have had an effect on the outcome of the proceeding, we do not find counsel constitutionally ineffective on this basis.

Defendant next argues that trial counsel was ineffective for failing to offer Mochty's criminal history. Because Mochty had no criminal convictions that would have been admissible as impeachment or character evidence, counsel was not ineffective on this basis.

Finally, defendant argues that trial counsel was ineffective for failing to offer a police report that he claims documents Mochty's making a false accusation of sexual assault in 2002. At the hearing on defendant's motion for new trial, the trial court said that it would not have admitted the police report. The police report was redacted beyond usefulness, and what it appeared to show was that Mochty made an accusation of inappropriate touching of another person that was in fact based on a reasonable, although perhaps mistaken, interpretation of what she observed. The trial court held that this evidence would not have satisfied any of the requirements of admissibility under MRE 404(b), and we agree. Counsel was not ineffective for failing to offer inadmissible evidence.

IV. Motion for new trial or for *Ginther* hearing.

Finally, defendant argues that the trial court abused its discretion in denying his motion for new trial or for *Ginther* hearing. We review a trial court's denial of a motion for new trial for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). We review a trial court's denial of an evidentiary hearing for an abuse of discretion. See *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999). A trial court abuses its discretion only when it "chooses an outcome falling outside the principled range of outcomes." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

Defendant first argues that the prosecutorial misconduct required the grant of his motion for new trial. As discussed above, the conduct of the prosecutor defendant complains of was not misconduct. The trial court's denial of defendant's motion was therefore not an abuse of discretion.

Defendant next asserts that the trial court abused its discretion in denying his motion for a *Ginther* hearing, but he does not cite any authority or make any argument supporting this assertion. When the trial court dismissed the motion for a *Ginther* hearing, it stated that it did not know what would be gained from such a hearing. Defendant's *present* counsel agreed on the

record with the trial court. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We find no error in the trial court's denial of defendant's motion for a *Ginther* hearing.

Defendant's conviction is affirmed.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Donald S. Owens