

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 18, 2012

v

JAMES CARL AMSDILL,

Defendant-Appellant.

No. 306310
St. Clair Circuit Court
LC No. 11-000620-FH

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of larceny of a tractor valued at \$1,000 or more, but less than \$20,000, MCL 750.356(1)(a), (3)(a). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to a term of 13 months to 25 years in prison. For the reasons set forth below, we affirm.

Defendant's conviction arose from his theft of the complainant's tractor in June 2009. The investigating officer testified that defendant confessed that he stole the tractor, but the investigation stopped when defendant agreed to work as an informant for the Saint Clair Drug Task Force (DTF). However, according to the officer, defendant did not fulfill his obligations to the DTF and the investigation was reopened approximately two years later.

Defendant argues that the prosecutor engaged in misconduct. Because defendant failed to preserve this issue, we review it for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64.

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Although prosecutors may not make statements of fact that are not supported by the evidence, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), they can "argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case," *Unger*, 278 Mich App at 236. In addition, "[a] prosecutor's comments are to be evaluated in light of defense

arguments and the relationship the comments bear to the evidence admitted at trial.” *Dobek*, 274 Mich App at 64.

Defendant argues that the prosecutor told the jury in her closing argument that defendant cooperated with the DTF despite a court order excluding references to that issue. However, the record does not reflect that the trial court ordered the parties not to refer to defendant’s involvement with the DTF. Further, defendant’s theory at trial was that he was only charged and prosecuted for the theft of the tractor because he could not produce a high-level drug dealer for the task force. Indeed, defense counsel relied on this theory during his opening and closing statements and during his cross-examination of the investigating officer. The prosecutor merely responded to defendant’s theory of the case, and her response was supported by reasonable inferences from the evidence presented. Therefore, the prosecutor did not engage in misconduct.

Defendant also argues that he was denied the effective assistance of counsel. We disagree. Our review is “limited to mistakes apparent from the record” because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request an evidentiary hearing as required by *People v Ginther*, 390 Mich 436, 442-43; 212 NW2d 922 (1973). *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

To prove defendant received ineffective assistance of counsel, he must show: (1) “that counsel’s performance was deficient in that it fell below an objective standard of professional reasonableness,” and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel’s performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). There is a presumption of effective assistance of counsel and the burden is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant claims defense counsel should have subpoenaed insurance records to show that the tractor he stole was not worth more than \$1,000. However, defendant has not shown that this would have aided his defense. At trial, the complainant testified that she received an insurance check for the tractor in the amount of \$4,282.19. It was not necessary for defense counsel to subpoena the insurance records because they would have bolstered the prosecutor’s assertion about the value of the tractor. Accordingly, counsel did not provide ineffective assistance to defendant.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio