

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE G. VASQUEZ,

Defendant-Appellant.

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UNPUBLISHED

July 30, 1999

No. 205379

Saginaw Circuit Court

LC No. 97-013283 FH

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals of right from his jury trial conviction of entering without breaking with intent to commit larceny, MCL 750.111; MSA 28.306. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to six to fifteen years' imprisonment. We affirm.

Defendant first contends that he was deprived of the effective assistance of counsel by his trial counsel's failure to make timely objections to testimony indicating that Sarah Vasquez was his cousin and testimony concerning the discovery of a vehicle title with the name "Jesse Vasquez" during a search of Vasquez' house. Because defendant did not move for an evidentiary hearing, this Court's review is limited to mistakes apparent on the existing record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Effective assistance of counsel is presumed, and the defendant bears the heavy burden proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish his claim, defendant must show that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

The decision not to object to the testimony regarding Vasquez' alleged familial relation to defendant and to instead deal with that testimony through cross-examination was a matter of trial strategy. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Counsel's decision to refrain from objecting in the presence of the jury to the testimony regarding the vehicle title likewise was a matter of trial strategy. When counsel subsequently addressed this matter with the trial court, counsel specifically indicated that he did not want a curative instruction given because he did not want to draw the jury's attention to the testimony. Matters attributable to trial strategy will not be second-guessed on

appeal and will not support a finding of ineffective assistance of counsel unless the strategy is “outside the wide range of professionally competent assistance.” *Pickens, supra* at 330, quoting *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L E2d 2d 674 (1984). On the existing record, it appears that trial counsel’s strategy was within the wide range of competence demanded of trial attorneys handling criminal cases. Moreover, defendant has failed to demonstrate how he was prejudiced by counsel’s actions. Accordingly, defendant has failed to establish that he was deprived of the effective assistance of counsel. *Effinger, supra* at 69.

Defendant next contends that the trial court failed to afford his counsel the right to allocute. MCR 6.425(D)(2)(c). This Court reviews the record de novo to determine whether the trial court complied with the court rule. See *People v Lugo*, 214 Mich App 699, 711-712; 542 NW2d 921 (1995). Trial counsel addressed the court regarding corrections to the presentence report and the scoring of the sentencing guidelines. He then advised the court that defendant wished to read a statement to the court. There is no indication that trial counsel wished to say anything more and defendant has failed to indicate any additional information that his counsel was prevented from presenting. On this record, we find the court rule was not violated because defendant’s counsel was given the opportunity to allocute on defendant’s behalf.

Defendant next contends that the prosecutor’s reference in closing argument to the vehicle title and the trial court’s failure to give the jury a requested limiting instruction deprived him of a fair trial. This Court reviews the propriety of a prosecutor’s remarks in context to determine if the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995). Examined in context, the prosecutor’s comment did not deny defendant a fair and impartial trial. Defendant immediately objected to the prosecutor’s remark and the objection was sustained. Although the trial court declined to give a limiting instruction, it did instruct the jurors at the beginning and at the end of the trial that they had to decide the case on the evidence and that the remarks of counsel were not evidence. Given the nature of the prosecutor’s comment and its brevity, this Court concludes that the trial court’s general instruction was sufficient to eliminate any minimal prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Furthermore, given the evidence tying defendant to the crime, including eyewitness observations and defendant’s fingerprint, “[r]eversal on the basis of a single imprudent statement by the prosecutor is not warranted in this case.” *Minor, supra* at 689.

Defendant finally contends that the cumulative effect of the errors regarding the effective assistance of counsel and prosecutorial misconduct that he has raised on appeal denied him a fair trial even if, standing by themselves, they were not sufficient to justify reversal of his conviction. In determining whether defendant’s conviction should be reversed as a result of the cumulative effect of trial errors, this Court considers only the aggregated effect of actual errors. *Bahoda, supra* at 292-293 n 64. In making this assessment, “relevant factors include the extent to which the remarks may have misled the jury and prejudiced defendant, whether they were isolated or extensive, whether they were deliberately or accidentally injected, and the strength of other evidence against defendant.” *Id.*

The testimony that a vehicle title bearing the name of “Jesse Vasquez” was found at the same house as the computer that was stolen from the complainant’s residence did not mislead the jury or prejudice defendant. It was the subject of only a few questions asked of one witness and of one brief

comment in the prosecutor's closing argument. This comment did not attempt to directly draw a connection between the name on the vehicle title and defendant. Even assuming that the comment was deliberately injected, it was extremely brief, defendant immediately objected, the trial court sustained the objection, and the jury was subsequently instructed that the arguments of counsel were not evidence. Finally, there was significant evidence of defendant's guilt so that it is unlikely that the prosecutor's questions and his one brief comment in closing argument could have unfairly prejudiced defendant. Considering these factors, this Court concludes that the cumulative effect of defendant's claimed trial errors does not require reversal. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997).

Affirmed.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald