STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CESAR AUGUST LINDO-MOLINA, a/k/a CESAR AUGUSTO LINDOMOLINA,

Defendant-Appellant.

UNPUBLISHED
March 31, 2000

No. 213635
Jackson Circuit Court
LC No. 98-086101-FH

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of between 225 and 650 grams of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii). The trial court sentenced defendant to 240 to 360 months' imprisonment. We affirm.

Defendant first argues that he was denied effective assistance of counsel because his trial attorney failed to present the defense of duress to the jury. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No separate evidentiary hearing was held below with regard to defendant's claim of ineffective assistance of counsel. Therefore, our review of this issue is limited to the lower court record. See *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998).

Defendant argues that his trial counsel was ineffective for failing to argue that defendant acted under duress. However, we are not persuaded that defendant was thereby denied the effective assistance of counsel. If, as a matter of trial strategy, counsel chooses an avenue of defense which he believes will be successful and effectively pursues that defense, neither the trial court nor this court should deem such representation to be ineffective because of a belief that a different avenue may have

been even more effective. *People v Gallagher*, 116 Mich App 283, 303; 323 NW2d 366 (1982). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Ineffective assistance of counsel will not be found merely because counsel's strategy backfires. *In re Ayres*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 216523, issued 12/7/99), slip op p 7.

Moreover, where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a difference in the trial's outcome. *Id*. Our review of the trial testimony indicates that defendant could not have proffered a successful duress defense. A mere threat of future injury is insufficient to support a defense of duress; the threatened danger must be present, imminent, and impending. *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998). Defendant never testified that anyone actually injured him or threatened to injure him. Defendant stated only that Milani "pull[ed]"on him, "touched" him, and told him to deliver the package. The conduct described by defendant was not sufficient to cause a reasonable person to fear death or serious bodily harm. See *People v Terry*, 224 Mich App 447, 453; 569 NW2d 641 (1997). Accordingly, defendant has not demonstrated that presenting the argument that he had acted under duress might have made a difference in the trial's outcome. See *Ayres*, *supra*.

II

Defendant next contends that his conviction should be reversed because of the improper conduct of the prosecutor during closing argument. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant claims that he was denied a fair trial when the prosecutor erroneously stated that the trial court had made a pretrial finding that no entrapment had occurred. In fact, defense counsel withdrew his motion for a hearing after determining that the facts did not support a finding of entrapment.

We conclude that review of this issue is unnecessary because a curative instruction could have eliminated the prejudicial effect of the statement, and the failure to consider the issue will not result in a miscarriage of justice. See *id*. Defendant argues that he was prejudiced because the jury may have confused the defense of entrapment with the defense of duress and concluded from the prosecutor's statements that the trial court had already determined that defendant did not act under duress. However, we find this argument to be entirely speculative, particularly as the defense of duress was not presented at trial.

III

Next, defendant asserts that he is entitled to a new trial because of the improper introduction of "bad acts" evidence. However, because defendant did not object to the admission of this evidence below, our review of this issue is only for manifest injustice. See *Ramsdell*, *supra* at 404.

After reviewing the record, we find no error requiring reversal. Officer Medina's testimony that defendant told her that he had traveled to the United States on three previous occasions for "Junior" and that Junior had once asked him to ingest drugs before a trip to the United States was offered for the proper purpose of casting doubt on defendant's testimony that he did not know that the substance in the package was cocaine.[1] The testimony that defendant admitted that he had been detained by customs officials in Miami because he was in possession of a counterfeit one hundred dollar bill appears to have been erroneously admitted because it is not relevant to any fact at issue in this case. However, in light of the substantial evidence that defendant knew that the substance in the package was cocaine, we conclude that the admission of the testimony did not lead to manifest injustice. See *id*.

IV

In his final issue, defendant argues that he is entitled to a new trial because of the admission of improper rebuttal evidence. Again, defendant did not object to the admission of this evidence below; consequently, our review of this issue is only for manifest injustice. See *id*.

Rebuttal evidence is evidence which explains, contradicts, or otherwise refutes an opponent's evidence. Its purpose is to undercut the opponent's case and not to merely confirm that of the proponent. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). A party may not introduce evidence during rebuttal unless it is properly responsive to evidence introduced or a theory developed by the opponent. *Id*.

Defendant maintains that Medina's testimony that he had traveled to the United States on three previous occasions for Junior and that Junior had once asked him to ingest drugs before a trip to the United States was not admissible as rebuttal evidence. With regard to the former, defendant testified on direct examination that he had only traveled to this country on one occasion on Junior's behalf. The trial court then allowed the prosecutor to rebut defendant's statement with evidence that defendant previously told Medina that he had traveled here three times for Junior. Because the testimony was responsive to evidence introduced by defendant, it was properly admitted as rebuttal evidence. See *id*.

However, Medina's testimony that defendant had told her that he once refused Junior's request that he ingest drugs did not constitute proper rebuttal testimony. On cross-examination, defendant merely testified that he did not remember making such a statement. Because Medina's testimony did not contradict or otherwise refute defendant's testimony, it was erroneously admitted as rebuttal evidence. See *id*. Nevertheless, considering the rest of the evidence

presented at trial, we cannot find that the admission of the testimony resulted in manifest injustice. Accordingly, reversal is not required. See *Ramsdell*, *supra*.

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

[1] In any case, it is questionable whether either of the two activities qualifies as a "bad act" for purposes of MRE 404(b). Neither action is per se illegal. Indeed, most people would consider refusing to ingest drugs in order to smuggle them into the country to be upright and ethical conduct.