

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD HARRIS,

Defendant-Appellant.

UNPUBLISHED

August 12, 2003

No. 239354

Wayne Circuit Court

LC No. 01-003007

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to two to thirty years' imprisonment for each conviction. Defendant appeals as of right. We affirm.

Defendant's first issue on appeal is that he was denied his Sixth Amendment right to counsel. We disagree.

Defendant failed to object to the trial court's order to not communicate verbally with his attorney during certain points of the trial. Thus, this issue is not properly preserved for appeal. *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). Questions of unpreserved constitutional law are reviewed, by this Court, for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). This Court "should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 774; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The Sixth Amendment directly guarantees the right to counsel in all criminal prosecutions. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). The right to counsel guaranteed by the Michigan Constitution is generally the same as that guaranteed by the Sixth Amendment, and absent a compelling reason to afford greater protection under the Michigan Constitution, the right to counsel provisions will be construed to afford the same protections. *Marsack, supra* at 372. The Sixth Amendment right to counsel attaches only to criminal prosecutions at the time judicial process is initiated and is invoked by a request for counsel, and extends to every critical stage of the proceeding. *People v Russell*, 254 Mich App

11, 18; 656 NW2d 817 (2002). A critical stage requiring counsel is one in which the defendant is confronted by the procedural system or his expert adversary, when counsel's absence might derogate from the defendant's right to a fair trial. See *People v Barnett*, 163 Mich App 331, 335; 414 NW2d 378 (1987).

The right to counsel does not require the state to provide the defendant with unlimited access to the attorney during trial. *People v Mitchell*, 454 Mich 145, 152; 560 NW2d 600 (1997), citing *Perry v Leeke*, 488 US 272; 109 S Ct 594; 102 L Ed 2d 624 (1989). In *People v Landrum*, 14 Mich App 237, 240; 165 NW2d 292 (1968), this Court held that the trial court did not deprive the defendants of their constitutional right to the assistance of counsel by prohibiting defense counsel from conferring with them, even in whispers, during the prosecutor's closing argument to the jury. Similarly, in this case, the trial court did not prevent defendant from verbally communicating with defense counsel throughout the entire trial, but rather, only when a witness was testifying or the prosecutor was speaking. The trial court did state, however, that defendant and his attorney could pass notes if they needed to communicate during these times. Thus, defendant was not denied his Sixth Amendment right to counsel.

Defendant's second issue on appeal is that he was denied the effective assistance of counsel. We disagree.

To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing before the trial court. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant failed to move for a new trial or request a *Ginther*¹ hearing below, this Court's review of the issue is limited to mistakes apparent on the record. *Davis, supra* at 368. If the record does not contain sufficient detail to support a defendant's ineffective assistance of counsel claim, then he has effectively waived the issue. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *LeBlanc, supra* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914, (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's

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

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Daniel, supra* at 58.

At sentencing, defendant alleged that his trial counsel was ineffective by failing to call a witness on his behalf, a seventy-plus year old woman. The decision whether to call witnesses is a matter of trial strategy. *Id.* This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. *Daniel, supra* at 58. The record does not indicate who this purported witness is or how this witness would have benefited defendant's case, and defendant has not provided this Court with an affidavit indicating what the proposed testimony of the witness would have been.² In any event, defendant was not deprived of a substantial defense because defense counsel cross-examined Officers Watkins, Rodriguez, Davis and Brown, attempting to attack their credibility. Therefore, defendant has failed to overcome the presumption that his counsel's decision not to call those witnesses was sound trial strategy. *Davis, supra* at 369.

Defendant's final issue on appeal is that the prosecutor's argument, that certain evidence was not contradicted, constituted plain error affecting defendant's substantial rights. We disagree.

Defendant failed to timely object to the prosecutor's, alleged, improper conduct during closing arguments. Thus, this issue is not properly preserved for appeal, and will be reviewed for plain error that affected defendant's substantial rights. *Carines, supra* at 761-764; *Snider, supra* at 420; *Stacy, supra* at 28. This Court “should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Carines, supra* at 774; *Schutte, supra* at 720. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra* at 721.

² MCR 7.211(c)(1)(a)(ii) requires that a motion to remand must show “that development of a factual record is required for appellate consideration of the issue. A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing.”

Defendant argues that his constitutional rights to a fair trial and to not have his silence used against him were violated when the prosecutor made a direct reference to and use of defendant's silence in closing argument. During closing argument, the prosecutor argued that certain evidence was uncontradicted: (1) defendant bent down into the undercover officers' vehicle and passed alleged illegal narcotics; (2) the material that defendant passed was cocaine; (3) the weight of the cocaine was less than fifty grams; and (4) defendant received money for the cocaine.

A prosecutor may not comment on a defendant's failure to testify or present evidence, but may argue that certain evidence is uncontradicted, even if defendant is the only one who could have contradicted the evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Here, defendant offered no evidence to contradict the testimony of the officers describing the events of this case, and thus, the evidence was, in fact, uncontradicted. Even if the prosecutor's statements during closing argument constituted error, the error was timely cured by the trial court's instruction: "Every defendant has the absolute right not to testify. When you decide the case, you must not consider the fact that he did not testify. It must not affect your verdict in any way." Additionally, defendant's argument that the prosecutor's statements shifted the burden of proof is without merit. The prosecutor merely argued that the evidence proved defendant's guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Moreover, the trial court instructed the jury that defendant is presumed innocent and that the prosecutor has the burden to prove each element of the crime. Thus, reversal is not warranted because the alleged error was not preserved and did not result in the conviction of an actually innocent defendant, or seriously affect the fairness, integrity, or public reputation of judicial proceedings independent of defendant's innocence. *Schutte*, *supra* at 720.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly