STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2003
v	No. 241088 Kalkaska Circuit Court
DAVID ALLEN SNYDER, Defendant-Appellant.	LC No. 01-002172-FH

Before: Talbot, P.J., and Owens and Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a. Defendant was sentenced as a third habitual offender to consecutive terms of imprisonment of thirty-four months to thirty years for the delivery conviction and thirty-four months to thirty years for the conspiracy conviction. We affirm.

I. Prosecutorial Misconduct

Defendant alleges two instances of prosecutorial misconduct in the prosecutor's cross-examination of defendant. This Court reviews preserved claims of prosecutorial misconduct de novo to determine whether the alleged prosecutorial misconduct denied defendant a fair and impartial trial, but reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant asserts that he was unfairly prejudiced and denied a fair trial because the prosecutor questioned defendant about his prior criminal history. We disagree. In the prosecutor's case in chief, the police informant testified that he had previously purchased marijuana from defendant and he believed that defendant sold crack cocaine because he accompanied defendant to Lansing where defendant purchased the controlled substance. The informant also testified that defendant told him that he had been "busted" for delivering marijuana. On direct examination, defendant testified that he never sold crack cocaine to anyone and he denied having sold marijuana to the informant. When defendant repeated these denials on cross-examination, the prosecutor asked defendant whether he had pleaded guilty in Ithica, Michigan, to selling marijuana. Defendant stated that he pleaded guilty only to possession of marijuana. He denied that the guilty plea involved possession with intent to deliver marijuana.

The prosecutor then asked defendant whether the guilty plea was possession with intent to deliver "as of 12/15, of 1998, in the Circuit Court in 29th Circuit Court, in Ithica, Michigan." Defendant denied the statement and against asserted that he pleaded guilty only to possession of marijuana.[1]

A witness' credibility may be impeached with prior convictions, MCL 600.2159; but only if the convictions satisfy the criteria set forth in MRE 609; *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Pursuant to MRE 609, a witness may be impeached with a prior conviction if 1) the crime contained an element of dishonesty or false statement, or 2) the crime contained an element of theft, the crime was punishable by imprisonment for more than one year, and the court determines that the evidence has significant probative value on the issue of credibility. MRE 609(a); *People v Allen*, 429 Mich 558, 591; 420 NW2d 499 (1988). Evidence of a conviction of a non-theft crime that does not contain an element of dishonesty or false statement should not be admitted into evidence. *Id*. at 596. The offense of possession with intent to deliver marijuana does not contain an element of dishonesty, false statement or theft. In light of the holding in the decision in *Allen* which amended MRE 609, the prosecutor's impeachment of defendant with this prior conviction was inadmissible.

However, we hold that the error, if any, was harmless. Evidence of a prior conviction may be admissible for purposes other than impeaching the credibility of a witness, such as to rebut a defendant's claims or statements. "[E]vidence of prior convictions is *always* admissible to show perjured testimony of the defendant regarding the existence or nature of prior convictions." *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985) (emphasis added). In *Taylor*, this Court held that evidence of the defendant's prior conviction for assault with intent to rob while armed was admissible to rebut his testimony that he became hysterical at the sight of a gun being pointed at him. *Id*. at 416-417. This Court held that MRE 609 is not applicable and that the evidence was admissible to rebut specific testimony of the defendant. *Id*.

Further, the trial court gave a cautionary instruction, directing the jury to only consider defendant's prior offense as bearing on defendant's credibility and not for any other purpose. The court also instructed the jury that the attorneys' questions did not constitute evidence. While we agree with defendant that the prosecutor was required to move the trial court for admission of evidence of the prior conviction, *Taylor, supra* at 414-415, we conclude that the evidence did not deny defendant a fair and impartial trial where it addressed issues raised by defendant and where a curative instruction that the lawyers' questions are not evidence was provided. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Similarly, we find no merit to defendant's claim that the prosecutor improperly asked him whether the police had found marijuana in his children's diaper bag. The record establishes that the informant met defendant and defendant's girlfriend, Christina Sanchez, at defendant's house

[1] Defendant contends that the prosecutor knew that he had not been convicted of possession with intent to deliver marijuana. However, the lower court record is not developed to allow our review of defendant's cursory claim that the prosecutor lacked a factual basis for implying that defendant pleaded guilty to a drug delivery offense. Even on appeal, defendant provides nothing to support his assertion that the prosecutor's cross examination lacked a factual basis.

to arrange for the crack cocaine sale at issue. The sale was scheduled to take place at a park later that evening. The prosecutor presented evidence that defendant, Sanchez and two small children arrived at park at the allotted time. Defendant stayed with the children as Sanchez accompanied the informant and the undercover officer for a walk. An undercover agent testified that defendant was looking around, appearing nervous, while he played with a small child. Defendant walked twice to the edge of the park and then drove twice to the edge of the park as if he were watching out for police surveillance. Defendant did not take the small child with him the first time he drove to the edge of the park.

On direct examination, defendant testified that he had not planned on going to the park that day and he did not know that Sanchez intended to sell cocaine that day or that she ever sold cocaine. He testified that he was merely driving by the park when Sanchez spotted the informant and asked defendant to stop so that she could talk to him. Defendant testified that, while he was waiting for Sanchez to return, his baby woke up in the vehicle and he drove his vehicle back and forth to help the infant fall asleep. On cross-examination, defendant denied that he was performing a counter-surveillance that day. The prosecutor asked whether defendant used his children as a camouflage for drug deals. Defendant asserted that he would not put his children in such a situation. The prosecutor then asked whether defendant engaged in drug activities with his children present in the house. When defendant denied that question, the prosecutor asked whether the police found marijuana in the diaper bag of defendant's children. In response to a written question by the jury, defendant testified that the diaper bag incident occurred about two months before the park incident.

We agree with the prosecutor's assertion on appeal that defendant's direct testimony opened the door for the prosecutor to question defendant about whether he was engaging in counter-surveillance. Once defendant volunteered that he would not place his children in such a situation, the prosecutor was allowed to counter this testimony to impeach defendant's credibility. It was permissible under MRE 608(b) which provides that the trial court has discretion to permit inquiries into specific instances of the conduct of a witness for the purpose of attacking the witness' credibility if the conduct is probative of truthfulness or untruthfulness. *People v Brownridge*, 459 Mich 456, 463-464; 591 NW2d 26 (1999). Defendant does not establish prejudice, particularly in light of the cautionary instruction provided to the jury.

II. The Effective Assistance of Counsel

Defendant's argument that he was denied the effective assistance of counsel by counsel's failure to object to the alleged prosecutorial misconduct must also fail. To prevail on a claim of ineffective assistance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors. *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001). To establish a claim of ineffective assistance of counsel meriting reversal of a conviction, a defendant must show that counsel's deficient performance prejudiced the defense. *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003). As discussed above, defendant cannot show prejudice because the prosecutor's cross examination of defendant was proper.

Defendant also claims counsel was ineffective for not requesting a cautionary instruction to inform the jury that the *prosecutor's* questions were not evidence. Because defendant did not

move for a *Ginther*[2] hearing, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Contrary to defendant's argument on appeal, the trial court specifically instructed the jury that "[t]he lawyers' statements and arguments are not evidence." Because the trial court instructed the jury that the lawyers' statements and arguments were not evidence, defendant suffered no prejudice. *Bahoda, supra.*

Defendant next claims that counsel was ineffective for failing to prove that defendant did not have a prior conviction of possession with intent to deliver marijuana. The record is insufficient for our determination into this claim and defendant does not even on appeal provide anything to establish that the prosecutor presented false information. Therefore, we do not address this issue.

Defendant next claims that counsel was ineffective for failing to move for a mistrial for the introduction into evidence of (1) the possession with intent to deliver marijuana conviction, (2) the diaper bag evidence, and (3) testimony allegedly implying that defendant had exercised his right to remain silent and refused to submit to questioning by the police.

A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Defendant cannot establish prejudice or impairment of his right to a fair trial. As previously discussed, the prosecutor's questioning of defendant's prior guilty plea and the diaper bag incident was proper. We disagree with defendant's assertion that testimony by Deputy Richard Thompson implied that defendant had exercised his right to remain silent by refusing to submit to police interrogation. Read in context, the record actually implies that defendant was subject to an interrogation. Because a motion for a mistrial would have been meritless, defense counsel was not ineffective for not raising such a motion. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant finally claims that counsel was ineffective for failing to object to the language of the trial court's cautionary instruction with respect to the informant's testimony. The court instructed the jury that the evidence contained in the informant's testimony, specifically (1) defendant's involvement with a prior offense of possession with intent to deliver marijuana and (2) the three trips the informant made with defendant to Lansing for the purchase of crack cocaine, was to be considered only for the limited purpose of determining the informant's credibility.

Defendant asserts that evidence of defendant's involvement with a prior drug offense was not evidence but merely questioning by the prosecutor and that evidence of the trips to Lansing were irrelevant. We disagree. The record establishes that the informant testified that defendant had told him that he had been "busted" for delivering controlled substances in Lansing. The record also establishes that the informant indicated his belief that defendant was dealing in crack cocaine. When asked about the reasons for such a belief, the informant stated that he drove defendant to Lansing on three different occasions where defendant purchased the controlled

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

substance. Defendant's argument that the instruction was improper is without merit. In light of the above, defendant's claim of ineffective assistance of counsel fails.

III. Notice of Intent to Seek an Enhanced Sentence

Defendant finally argues that the trial court erred in sentencing him as a third habitual offender because the prosecutor failed to file a notice of intent to seek an enhanced sentence as required by MCL 769.13 and MCR 6.112(F). The record does not support defendant's argument. The prosecutor filed the notice of intent to seek an enhanced sentence about two weeks before defendant was arraigned on the information, which satisfies MCL 769.13(1) and MCR 6.112(F). Accordingly, defendant is not entitled to be resentenced.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood