

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE DOUGLAS WILER,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 262080

Calhoun Circuit Court

LC No. 2004-002787-FH

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of third-degree child abuse, MCL 750.136b(5). The trial court sentenced defendant to twelve months in jail and four years' probation. We affirm.

Defendant was convicted of abusing his girlfriend's seven-month-old son. While under defendant's care, the victim suffered a wound to his forehead and multiple bruises resembling a handprint on the side of his face. Initially, defendant denied knowing what caused the victim's injuries, but later, defendant claimed the injuries were caused when he accidentally dropped the baby on the floor. A physician found, however, that defendant's explanation of the accident did not coincide with the type of injuries the victim sustained. The physician concluded that the bruises on the side of the victim's face were most likely caused by being slapped.

At trial, the prosecution moved to admit evidence of defendant's prior child abuse charges to establish a common plan or scheme and to rebut defendant's claim of accident. The trial court granted the motion in part and allowed one witness, the grandmother of defendant's son, to offer prior-acts evidence to rebut defendant's claim of accident. However, the trial court admonished the witness not to reference the fact that defendant had been criminally charged. The witness subsequently testified (1) that defendant previously told her that his 23-month-old son accidentally fell off of a rocking horse and (2) that later, when the witness examined defendant's son, she found bruises on his cheek resembling a hand print.

During cross-examination at trial, defense counsel asked the victim's mother whether she had any reason to suspect that defendant would mistreat her son. The following colloquy occurred:

Q [DEFENSE COUNSEL]. All right. All right, and prior to this incident then and even after you saw the bruising, you did not consider Mr. Wiler -

A. I trusted him.

Q. You trusted him.

A. Um-hm.

Q. Okay. There had been no evidence whatsoever up to this point that he might do anything like what you suspected?

A. New Year's Eve we went to Miller's Time Out to have a beer. He told me that he was charged with child abuse but the charges were dropped and I said if you ever lay a hand on my child -

Q. Okay. I'm - In terms of his behavior . . .

Defense counsel did not object to the witness's testimony or request that any portion of it be stricken from the record. After another witness testified, however, defense counsel moved for a mistrial, arguing that the disclosure of defendant's alleged prior child abuse charge "significantly impairs the ability for a fair trial in this matter, particularly in light of our earlier hearing on the 404b motion made by the prosecution." The trial court denied the motion because the testimony did not refer to a criminal conviction, the witness was apparently quoting defendant's own words, defense counsel made no contemporaneous objection, and a curative instruction could be offered to ensure that the jury would not draw an adverse inference from the testimony.

On appeal, defendant first argues that the trial court erred in denying the motion for a mistrial after the victim's mother disclosed defendant's alleged former child abuse charge. We review a trial court's decision to grant or deny a motion for a mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant asserts that the disclosure by the victim's mother of an alleged prior criminal charge constituted unfairly prejudicial other-acts evidence under MRE 404(b). "It is well settled that evidence of a prior conviction may be prejudicial to the accused, the danger being that the jury 'will misuse prior conviction evidence by focusing on the defendant's general bad character . . .'" *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988). Arguably, evidence of a prior criminal charge could, in some contexts, produce the same type of prejudice as evidence of a prior conviction.

In this case, the challenged testimony was not properly admitted under MRE 404(b) and arguably produced danger of unfair prejudice. "However, not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial." *Griffin, supra* at 36. Here, the trial court drew a distinction between a witness testifying about personal knowledge of the defendant's prior convictions and the victim reciting "defendant's own words according to her

wherein he mentions an arrest and a dismissal; in other words, if anything, an indication if there was an arrest, it was a mistake or improperly grounded” We agree with the distinction made by the trial court. Evidence that defendant reported the dismissal of his former child abuse charge does not create the same potential for prejudice as evidence of an actual conviction. Moreover, the jury was otherwise informed of a prior incident of alleged abuse perpetrated by defendant against a child through separate witness testimony properly admitted under MRE 404(b).

Further, this case does not involve a situation where the prosecutor elicited improper testimony or where a police witness provided prejudicial information in response to a prosecutor's question. Rather, the victim's mother gave a responsive answer to defense counsel's direct question. Accordingly, this case does not raise the same considerations that arise when a prosecutor or police witness ventures into forbidden areas of testimony. More importantly, a “[d]efendant cannot complain of admission of testimony which defendant invited or instigated.” *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982).

Even where the potential for prejudice exists, “the declaration of a mistrial should not be made lightly The trial judge must always consider the possibility of curing error with a warning.” *People v Johnson*, 396 Mich 424, 438; 240 NW2d 729 (1976). Here, the trial court instructed the jury as follows:

You may not consider the evidence of other possible wrong conduct in the defendant's past to conclude that he is a bad person or that he is likely to commit crimes. You must not convict the defendant in this case because you believe he is guilty of bad conduct in the past for which he is not on trial in this case.

Because the trial court gave a limiting instruction, and jurors presumably follow their instructions, the trial court succeeded in curing any potential for prejudice to defendant. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (stating that jurors are presumed to follow instructions). Therefore, a mistrial was simply not warranted. See *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992), where this Court held that “[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way.”

In reaching our conclusion, we note that defendant asserts that, because the prosecution presented primarily circumstantial evidence at trial, it is likely that defendant would have been acquitted but for the testimony regarding the prior child abuse charge. We disagree. A person is guilty of third-degree child abuse “if the person knowingly or intentionally causes physical harm to a child.” *People v Sherman-Huffman*, 466 Mich 39, 40; 642 NW2d 339 (2002). At trial, it was undisputed that the seven-month-old victim suffered physical injuries while under defendant's care. The jury heard evidence of a past, similar instance where a child suffered injury in defendant's care and defendant alleged an accident. The trial court thereafter cautioned the jurors with regard to how they should consider evidence of defendant's wrong conduct in the past. The jury then found that defendant knowingly or intentionally harmed the victim. On the record before us, defendant cannot establish that the complained-of disclosure was outcome-determinative.

Defendant also argues on appeal that the prosecutor offered an impermissible civic duty argument during his closing argument by suggesting that the jury was responsible for protecting the victim. Alternatively, defendant argues that his trial counsel was ineffective for failing to object to the prosecutor's closing argument.

Because defendant did not object to the prosecutor's argument in the trial court, the issue of prosecutorial misconduct is not properly preserved and will be reviewed for plain error affecting substantial rights. See *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id.* at 448-449. Where a curative instruction could have alleviated any prejudicial effect, reversal is not warranted. *Ackerman, supra* at 449.

The test for prosecutorial misconduct is whether the prosecutor's statements, taken in context, denied defendant a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002). "Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Defendant argues that it is likely that the jury, based on the prosecutor's references to protecting the victim, convicted defendant based on a societal duty to protect the victim from potential future abuse, rather than determining whether the prosecution proved the elements of the charged crime.

Contrary to defendant's assertions, however, our review of the record reveals that the prosecutor did not present an impermissible civic duty argument. Rather, the prosecutor's closing argument, viewed as a whole and in relationship to the evidence admitted at trial, asked the jury to find defendant guilty based on the facts. Although the prosecutor made an emotional appeal to the jury by referring to protecting the victim, the complained-of remarks were a small and innocuous part of the prosecutor's argument. They did not encourage the jurors to suspend their powers of judgment. Moreover, the trial court cured any potential for error by instructing the jury to base a verdict only on the evidence and the court's instructions as to the law, and not on sympathy or prejudice. Defendant cannot establish that the prosecutor's remarks affected the outcome of the trial, and reversal is not required. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant alternatively claims that his trial counsel was ineffective for failing to object to the prosecutor's closing argument. Because defendant failed to move for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review of this issue is limited to the existing record. *Rodriguez, supra* at 38.

To establish ineffective assistance of counsel, trial counsel's performance must be so deficient that it fell below an objective standard of reasonableness and denied defendant a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, there must be a reasonable probability that, but for counsel's errors, the proceeding's outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *Id.*

Considering that the prosecutor's references to protecting the victim were innocuous and do not require reversal, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Furthermore, an objection would have led to a curative instruction. In this case, the trial court actually gave an instruction to the jury that effectively eliminated any prejudice by directing the jury not to base a verdict on sympathy or prejudice. Thus, defendant cannot establish that an objection by defense counsel would have changed the outcome of the case. *Id.* Therefore, defendant has failed to overcome the presumption of effective assistance of counsel.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Alton T. Davis