

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL STEVEN MACK,

Defendant-Appellant.

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UNPUBLISHED

November 25, 2008

No. 280195

Oakland Circuit Court

LC No. 2007-214261-FH

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of third-degree fleeing or eluding a police officer, MCL 750.479a(3), and driving with a suspended license, second offense, MCL 257.904(3)(b). The trial court sentenced defendant to concurrent terms of 2 to 7-½ years' imprisonment for the fleeing and eluding conviction, and 90 days for the driving with a suspended license charge. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

Early on April 13, 2007, a Farmington police officer on traffic patrol noticed an oncoming tan Toyota Camry missing a headlight. The officer u-turned intending to make a traffic stop, but the Camry had increased its speed and quickly turned onto a side street. According to the officer, the Camry initially had been traveling in excess of 45 miles an hour in a 40-mile-an-hour zone, and after turning onto the residential side street was traveling much faster than the posted 25-mile-an-hour speed limit. Despite that the officer had activated the lights and sirens of his marked police car, the Camry kept driving away from him, turned another corner, and then made a sharp right-hand turn through a shallow ditch and onto the front yard of a residence.

The officer recalled that when he pulled into the driveway of the residence and illuminated his spotlight on the Camry, the driver got out of the car and ran away into the pitch black back yard. At trial, the pursuing officer identified defendant as the Camry's driver, who at the time had worn a dark jacket, dark pants, and white tennis shoes. The officer sought assistance from a canine unit, which tracked defendant through a wet and muddy area until deep water in a swamp halted the track. The canine handler observed from the lone, muddy trail of the Camry driver's footprints that he had fallen in the mud more than once.

The pursuing officer ascertained that the 2001 Toyota Camry was registered to Steven Mack, defendant's father, and that Mack resided in the house near which defendant eventually had stopped the Camry. Mack told the police officers that defendant had left with the Camry earlier that evening and had not yet returned home. Mack admitted the pursuing officer into defendant's bedroom, in which the officer noticed a crack pipe resting on a television, and inside the Camry the officer spotted a residue-coated spoon, which he described as "drug paraphernalia." Within a couple days, the police returned to Mack's residence and retrieved a mud-stained black leather jacket from the kitchen, and a pair of mud-stained pants and dirty white tennis shoes from defendant's bedroom.

Defendant contends that the prosecutor engaged in several instances of misconduct that deprived him of a fair trial. This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1371; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

But appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, *supra* at 720. No error requiring reversal exists if a timely instruction could have cured the prejudicial effect of the prosecutor's remarks. *Id.* at 721.

Defendant first complains that the prosecutor improperly referred to "drugs" in his opening argument, and that this reference violated the trial court's pretrial ruling in limine prohibiting any evidence or mention of drugs found in the Camry during a subsequent, June 2007 traffic stop. Because defendant did not object at trial to the prosecutor's remark, we consider this alleged claim of error only to determine whether any plain error affected defendant's substantial rights. *Watson*, *supra* at 586.

Our review of the record reflects that the prosecutor repeatedly referenced drug *paraphernalia* during his brief opening statement, attempting to connect the drug paraphernalia, namely the residue-coated spoon inside the Camry, with defendant's motivation for attempting to flee from the pursuing officer in April 2007. In an isolated portion of the opening statement, the

transcript of the prosecutor's challenged statement reads, "Defendant had motive to flee, the drugs, paraphernalia, the suspensions." The transcription simply appears to have inserted a comma where one does not belong, especially when one compares the remaining, consistent opening statement references of the prosecutor to "drug paraphernalia." But even assuming that the transcription properly recorded the prosecutor's improper reference to "drugs," the prosecutor plainly was not making reference to the June 2007 traffic stop in contravention of the trial court's order in limine. And given the isolated nature of the remark, we detect no likelihood that any error affected defendant's substantial rights.<sup>1</sup> *Watson, supra* at 586; *Schutte, supra* at 720.

Defendant next maintains that the prosecutor purposefully and improperly elicited from the police officer who pulled him over in June 2007 testimony that the residue he observed on a spoon in the Camry had tested positive for cocaine. The record reveals the following relevant direct examination by the prosecutor:

*Prosecutor:* Was a search of his vehicle done?

*Officer:* Yes, sir, it was.

*Prosecutor:* Was there—did you find any, any utensils inside the vehicle?

*Officer:* Yes, sir, I did.

*Prosecutor:* What is it that was located?

*Officer:* I recovered a, a spoon, from, it was located near the shifter in kind of like a little compartment in front of the car.

*Prosecutor:* Was there any residue on the spoon?

*Officer:* Yes, sir.

*Prosecutor:* Describe—

*Officer:* Tested positive for cocaine residue. [Emphasis added.]

The record plainly reflects that the prosecutor did not purposefully seek to present or suggest any forbidden testimony about the presence of cocaine residue in the Camry. *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007) (focusing "on whether the prosecutor elicited the testimony in good faith"). Instead, immediately after the prosecutor mouthed the word, "Describe," the officer blurted out that the spoon bore cocaine residue. Given the absence of any indication that the prosecutor sought to accomplish the interjection of improper testimony, the isolated nature of the reference to cocaine residue inside the Camry in June 2007, defense

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<sup>1</sup> Because the prosecutor's allegedly improper opening statement reference to "drugs" did not affect defendant's substantial rights, he similarly cannot demonstrate "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original).

counsel's immediate objection, and the trial court's directive, "When I sustain an objection, it means don't consider the evidence," we conclude that no misconduct by the prosecutor deprived defendant of his right to a fair trial. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008) (observing that "instructions are presumed to cure most errors").<sup>2</sup>

Defendant additionally asserts that the prosecutor committed misconduct by asking Steven Mack and a police officer whether defendant had a drug problem. After the prosecutor inquired of the officer who pursued the Camry in April 2007, "And did you find anything of significance in the defendant's bedroom[.]" the officer's somewhat lengthy reply included his recollections that he had asked Mack "if he knew why [defendant] would run or whatnot. And he had indicated he had a drug problem." The trial court sustained defense counsel's hearsay objection to the officer's recitation of Mack's statement. When Mack took the stand at trial, the prosecutor inquired whether Mack recalled "tell[ing] that officer that evening that the reason your son would run from the police is because he doesn't have a license and he has a drug problem[.]" to which Mack replied, "I only told him [the officer] I know that he [defendant] has a drug problem." Even assuming some impropriety arising from the prosecutor's elicitation of hearsay testimony from the police officer suggesting that defendant had a "drug problem," Mack's testimony regarding defendant's "drug problem," to which defendant lodged no objection, rendered cumulative and harmless the officer's hearsay recollections to the same effect. Every indication appears that the prosecutor in good faith elicited Mack's testimony, and defendant did not object to Mack's statement of belief. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). In summary, we detect neither prosecutorial misconduct that deprived defendant of a fair trial, nor any plain error that affected defendant's substantial rights.

With respect to ineffective assistance of defendant's trial counsel, he claims that his counsel failed to object to the prosecutor's use of leading questions on direct examination. However, defendant gives no elaboration of this appellate contention, thus abandoning our review of the claim. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

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<sup>2</sup> Defense counsel diligently sought relief from the trial court on this basis, although he did not specifically frame the issue in terms of a "mistrial." As discussed, the officer's unresponsive announcement concerning cocaine residue on the spoon found inside the Camry in June 2007 occurred only once and in a very brief fashion. The trial court sustained defense counsel's immediate objection to the officer's prohibited mention of cocaine, and shortly thereafter instructed the jury, "When I sustain an objection, it means don't consider the evidence." The trial court conceivably could have more carefully attempted to ascertain any potential effect the mention of cocaine had on the jury. But in light of the abbreviated nature of the mention of cocaine, we cannot conclude the trial court's refusal to grant a mistrial constituted an abuse of discretion. *Horn, supra* at 36 (reiterating that a "trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way"); *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005) (noting that the abuse of discretion standard applies to a mistrial ruling, and that the trial court "should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial") (internal quotation omitted).

Defendant next avers that his counsel was ineffective for repeatedly referencing his alleged drug use. At trial, defendant, through his counsel, challenged his identity as the Camry's driver, theorizing that he had loaned the Camry to a friend. Because defendant did not stand trial for a drug-related crime, defense counsel, faced with evidence linking defendant to a crack pipe and a residue-covered spoon, reasonably elicited in a minimally prejudicial manner to defendant in this case the testimony of police officers that possessors of drugs or drug users, like defendant, frequently loan their vehicles to others in exchange for personal use quantities of drugs. From the police officer testimony then, and the absence of a concrete identification of defendant at the time the Camry's driver fled from the scene, defense counsel constructed the reasonable hypothesis that someone other than defendant had driven the Camry and fled from the scene in April 2007. Defendant has failed to overcome the heavy presumption that trial counsel's performance amounted to sound trial strategy, which this Court will not second guess on appeal. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

Defendant lastly insists that his counsel was ineffective for failing to object when the trial court imposed a maximum sentence that exceeded by 2-½ years the statutory maximum. Any error or prejudice arising from the heightened sentence disappeared, however, when the trial court amended the judgment of sentence to reflect the correct statutory maximum term of 7-½ years. Consequently, defendant cannot establish ineffective assistance of counsel in this regard. *Rodgers, supra* at 714.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Michael R. Smolenski  
/s/ Elizabeth L. Gleicher