

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

EDWIN GREGORIO LARIO-MUNOZ,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

January 15, 2009

No. 275509

Kent Circuit Court

LC No. 05-012474-FC

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault of a pregnant person causing death or great bodily harm to an embryo or fetus, MCL 750.90a, assault with intent to commit murder, MCL 750.83, and assault with intent to rob while armed, MCL 750.89. The trial court sentenced defendant to concurrent prison terms of 23 to 80 years for the murder conviction, seven to 15 years for the assault against a pregnant individual conviction, 12 to 25 years for the assault with intent to murder conviction, and 17 to 30 years for the armed assault with intent to rob conviction. After filing his appeal in this Court, defendant timely moved for a new trial in the trial court pursuant to MCR 6.431(B), claiming that the prosecutor's use of inadmissible evidence denied him his right to a fair trial, constituted prosecutorial misconduct, and resulted from the ineffective assistance of counsel. Almost a year later, the trial court issued an opinion and order granting defendant's motion for a new trial, finding that the admission of hearsay evidence at trial amounted to plain error, or alternatively, finding that defense counsel's failure to object to the use of the hearsay evidence constituted ineffective assistance of counsel. Plaintiff then timely filed a cross-appeal in this Court pursuant to MCR 7.208(B)(5)(b), claiming that the trial court erroneously granted defendant a new trial. We reverse the trial court's order granting a new trial, and reinstate and affirm defendant's jury convictions and sentence.

We review a trial court's decision to grant a motion for a new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). This standard acknowledges "that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Id.* While our review of a trial court's ultimate decision to grant a new trial is for an abuse of discretion, to the extent a

trial court's decision is based on findings of fact or issues of law, we apply separate standards of review. We review a trial court's findings of fact for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Questions of constitutional law, including whether a defendant was denied the effective assistance of counsel, are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). All other questions of law are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

The evidence at issue involves testimony by Laurie Tibble, a program director at Bethany Christian Services. Tibble testified that Gloria Solis, defendant's foster mother, informed her that defendant had been sitting and staring at the victim through a glass bedroom door. Solis became aware of defendant's alleged behavior after the victim or the victim's husband informed the landlord, and the landlord informed Solis.

Because defendant did not make a contemporaneous objection to the admission of Tibble's testimony, he failed to preserve the issue for review. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Therefore, defendant's claim of evidentiary error will be reviewed under the standard for unpreserved, nonconstitutional error as set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture of an unpreserved, nonconstitutional error, a defendant must show the following: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*

Defendant has carried his burden with respect to the first two factors in *Carines*, *supra*. Both parties agree, as do we, that Tibble's testimony contained multiple levels of hearsay as defined in MRE 801(c) and, consequently, was inadmissible under MRE 802. Thus, defendant has shown that an error occurred at trial and that error is plainly obvious. Defendant has failed to show, however, that the improper evidence affected his substantial rights in that it affected the outcome of the trial.

The trial court found that the hearsay testimony affected defendant's substantial rights because in its view the evidence allowed the jury to infer that there was "a motive by defendant to strangle the deceased" and that the motive was a "powerful motive: sex." The trial court explained that the testimony gave the impression that defendant "was lusting after the deceased" and that defendant had "come on to" the victim and was "rebuffed or persisted, and either to subdue her or out of anger, strangled her." Essentially, the trial court found that the evidence allowed the jury to infer that defendant had killed the victim during an attempted sexual assault.

The trial court's conclusions are unsupported by the record. The prosecutor did not place significant emphasis on the hearsay evidence and never argued the attempted sexual assault inference during trial. In fact, the prosecutor never referenced defendant's sexual interests or motives during trial. The prosecutor only mentioned the hearsay evidence once during rebuttal argument, in which he stated that defendant's actions provided motive for the jury's consideration. The prosecutor also informed the jury, however, that motive is not an essential element of second-degree murder. Furthermore, and perhaps more importantly, there was a significant amount of evidence linking defendant to the murder. Testimony placed the victim's husband, the only other person linked to the killing, away from the crime scene at the time expert medical testimony established the killing most likely occurred. There was also evidence

introduced at trial of bad blood between defendant and the victim. Perhaps the strongest evidence establishing defendant's guilt came from defendant's own statements. Defendant admitted to police that he had fabricated a story about seeing the victim's husband strangle the victim, yet defendant had previously stated that he had watched the victim's feet "twitch" while her husband suffocated her. Pursuant to expert medical testimony, this "twitching" is consistent with death by strangulation, and defendant's statement suggests that he was present at the time of the victim's death. Defendant also admitted that it was fair to assume either he or the husband had killed the victim, and he later admitted that the husband had not killed the victim.

After reviewing the trial record in its entirety, we find that defendant failed to show how the hearsay testimony affected his "substantial rights" in that it "affected the outcome" of the proceedings. *Carines, supra* at 763. Therefore, the trial court abused its discretion in granting defendant's motion for a new trial on the basis of plain error.

Similarly, defendant was not denied his right to effective assistance of counsel when his counsel failed to object to the inadmissible hearsay evidence. In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court set forth the requisite test for determining whether a defendant has been denied the effective assistance of counsel under either the federal or state constitutions. The Court stated, "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* at 600, quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (internal citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Carbin, supra* at 600, quoting *Strickland, supra* at 694. Even if counsel's failure to object constitutes deficient performance, as discussed above, the introduction of the evidence did not affect the outcome of the proceedings and, therefore, defendant fails to establish the requisite prejudice to sustain his claim. Therefore, the trial court abused its discretion in granting defendant a new trial on the basis of ineffective assistance of counsel.

We now turn to defendant's claim that evidence of his prior misconduct was improperly introduced at trial. Defendant claims that the admission of the evidence denied him of his right to a fair trial, amounted to prosecutorial misconduct, and stemmed from the ineffective assistance of counsel.

During defendant's final recorded interview with police, Detective Greg Griffin accused defendant of lying about multiple unrelated issues, such as "rape" stemming from an apparent groping complaint, the cause of death of his parents, and various acts of misconduct at Kellogsville schools, including "grabbing" a female classmate's buttocks and asking another girl for sex. At the evidentiary hearing, both the prosecutor and defense counsel agreed that the evidence was improper and that the portion of the compact disc containing the statements should not have been played before the jury. Defense counsel testified that she believed the prosecutor had redacted any prejudicial information from the compact disc, and the prosecutor stated that he was under the false impression that all prejudicial information had been redacted. The trial court found that both the prosecutor and defense counsel's actions were improper, but that the court's curative instruction was sufficient to overcome any improper prejudice toward defendant.

Defendant failed to timely object to the improper evidence admitted during trial, and thus, the issue of whether the evidence denied him a fair trial was not preserved for appellate review. *Knox, supra* at 508. Defendant also failed to preserve for review the issue of prosecutorial misconduct because he did not make a contemporaneous objection and request for a curative instruction when the prosecutor introduced the police interview. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant preserved his claim of ineffective assistance of counsel for appellate review when he moved for a new trial and evidentiary hearing before the trial court. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). We review unpreserved evidentiary issues for plain error affecting substantial rights, *Knox, supra* at 508, as we do unpreserved claims of prosecutorial misconduct, *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). We review a trial court's findings of fact associated with a finding of ineffective assistance of counsel for clear error, while we review the trial court's constitutional determination de novo. *Dendel, supra* at 124.

Defendant has carried his burden of showing an error occurred at trial and that error is plainly obvious on the record. On appeal, the prosecutor does not dispute his own negligence in allowing the improper portions of the police interview to be played before the jury. We agree that the evidence was erroneously admitted. See MRE 401; MRE 403.

However, as with the hearsay evidence discussed above, defendant has failed to show that the recorded statements affected his substantial rights in that they affected the outcome of the trial. As discussed above, there was a significant amount of evidence establishing defendant's guilt. In addition, the trial court gave a thorough curative instruction that served to minimize any prejudice the improper evidence had on the trial. In fact, the trial court went beyond merely instructing the jury to disregard the inadmissible evidence by also informing the jury that it had researched the issue and discovered the allegations in the recording were completely false. The instruction essentially informed the jury that the police had lied during the interrogation. Coupling the instruction with Detective Griffin's admission during cross-examination that he lied on multiple occasions during the interview, the impact of the accusations diminished significantly. Ordinarily, "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Under these circumstances, we find that the introduction of the evidence did not adversely affect defendant's substantial rights.

Defendant's claims of prosecutorial misconduct and ineffective assistance of counsel also fail under the same analysis. Defendant has failed to demonstrate the requisite degree of prejudice to sustain his claims.

In light of the foregoing, we vacate the trial court's order granting defendant a new trial. We reinstate defendant's convictions and sentence, and affirm his convictions because he was not denied his right to a fair trial on the basis of evidentiary error, prosecutorial misconduct, or ineffective assistance of counsel.

Reversed in part, affirmed in part.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly