

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN MARK SANGER,

Defendant-Appellant.

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UNPUBLISHED

February 9, 2010

No. 288877

Kent Circuit Court

LC No. 07-009621-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial conviction for capturing or distributing the image of an unclothed person, MCL 750.539j. Defendant was sentenced to 180 days in jail and two and one-half years of probation. We affirm.

Defendant first alleges that reversal of his conviction is required because the trial court abused its discretion when it admitted evidence under MRE 404(b). This Court reviews a trial court's decision to admit or exclude other-acts evidence for abuse of discretion. *People v Dobek*, 274 Mich App 58, 84-85; 732 NW2d 546 (2007). When the decision to admit evidence "involves a preliminary question of law, such as whether a rule of evidence precludes the admission," our review is de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "Because an abuse of discretion standard contemplates that there may be more than a single correct answer, there is no abuse of discretion when the evidentiary issue is a close one." *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). Further, even the erroneous admission of bad-acts evidence does not require reversal unless "it is more probable than not that the error was outcome determinative." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001) (citation omitted).

Defendant initially argues that the trial court failed to apply the *VanderVliet* test in deciding the admissibility of the "upskirt" photographs that were found on a media card in defendant's possession. We disagree. In order for evidence to be admitted under MRE 404(b), a four-part test must be satisfied. The evidence must be: 1) offered for a proper purpose; 2) relevant; 3) the probative value must not be outweighed by the danger of unfair prejudice, and; 4) a limiting instruction must be given upon request that the evidence must only be considered for the proper purpose for which it was admitted. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The trial court properly applied the *VanderVliet* test in deciding that the photographs were admissible. The trial court determined

that the photographs were admissible for the proper purposes of showing defendant's common plan or scheme and to prove the absence of mistake or accident. The trial court specifically determined that the photographs were relevant and that their probative value outweighed any prejudice. The trial court acknowledged that it would give a limiting instruction at trial if defendant requested one. It is clear from this record that the trial court properly analyzed the admissibility of the evidence in accordance with *VanderVliet*.

Defendant next argues that he is entitled to a new trial because his trial counsel was ineffective. Our review is limited to mistakes that are apparent on the lower court record because no evidentiary hearing was held. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

To justify a reversal of defendant's convictions for ineffective assistance of counsel, defendant must show that his trial counsel's performance fell below an objective standard of reasonableness and that the performance prejudiced defendant to the point that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To show this prejudice, defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* at 312.

Defendant first alleges that his trial counsel was ineffective for failing to object to the prosecutor's reference to pornographic images found on the media card in her opening statement. Defendant also claims that counsel was ineffective for failing to object to the admission of those same images into evidence. However, the decision to not raise an objection may constitute sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Defendant denied that the media card belonged to him and testified at trial that he never knew what was on the media card until this charge was filed. Defendant testified, albeit incorrectly, that he did not even own any computer equipment that was compatible with the media card. Trial counsel's decisions not to object to the references to the pornography and the admission of the pornography into evidence comprised sound trial strategy. Defendant could have effectively destroyed his own defense by objecting to the admission of the photographs and highlighting their nature when his claim was that they were not his. This Court will not substitute its judgment for that of trial counsel on matters of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Because this Court "court cannot conclude that effective assistance of counsel is denied merely because a certain trial strategy backfired," *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987), defendant has not met his burden of proving that defense counsel's conduct fell below an objective standard of reasonableness. *Pickens, supra* at 302.

In addition, defendant raises several instances of prosecutorial misconduct. Claims of prosecutorial misconduct that are not preserved by a "contemporaneous objection or request for a curative instruction" are reviewed for plain error. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Under plain error review, this Court reviews whether: "1) error [] occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "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 the proceedings." *Unger, supra* at 235 (citation omitted).

Defendant first argues that the prosecutor committed misconduct when she referenced the pornographic images in her opening statement and sought their admission in her case in chief. “The test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *Dobek, supra* at 63. The purpose of an opening statement is to explain what the party making that statement intends to show at trial. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). The prosecutor’s remarks about the pornography in her opening statement were made with a good faith belief that those pornographic images would be admitted as evidence at trial. Reading the prosecutor’s comments as a whole, and given the fact that the evidence referenced was admitted at trial, the prosecutor’s remarks cannot be deemed to be improper. *Brown, supra* at 135.

Defendant also contends that the prosecutor impermissibly shifted the burden of proof in her closing statement. This court must evaluate the prosecutor’s comments in context when deciding an issue of prosecutorial misconduct. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may comment in closing argument that a defendant’s presence at trial provides the defendant with an opportunity to conform his testimony to the evidence presented. *People v Buckey*, 424 Mich 1, 14-16; 378 NW2d 432 (1985). The prosecutor’s relevant comments, in their entirety, were:

Didn’t provide a defense until trial. There was no opening statement in the beginning. There was no real opening statement even before they presented evidence. And I ask you, you know, they have the right to remain silent, that’s not a problem. But isn’t it curious that the defense isn’t provided until the last – actually the day after we expected to close trial. Was he waiting to see what we knew about what we had?

When the prosecutor’s comments are read in context, it is clear that she was referencing defendant’s opportunity to conform his testimony to the prosecution’s evidence. Contrary to defendant’s assertion, this does not constitute an attempt to improperly shift the burden of proof.

The prosecutor also commented in her opening statement that the “skirt shots” would “disprove any defense of accident or mistake.” These comments were made in conformity with the trial court’s ruling at the motion in limine that the media card photographs were admissible under MRE 404(b) to prove an absence of mistake or accident. This Court will not “assume bad intent where the conduct of the prosecutor is, at least, equally consistent with a good faith effort to comply with the court’s order.” *People v Tyson*, 133 Mich App 318, 321; 350 NW2d 248 (1984), rev’d on other grounds 423 Mich 357 (1985). Because the prosecutor’s remarks were consistent with the trial court’s ruling on the evidence at the motion in limine, the prosecutor’s comments did not constitute misconduct.

Although we find that defendant’s claim that the prosecutor’s comments shifted the burden of proof is without merit, we further note that any alleged prejudicial effect of the prosecutor’s comments was cured by the trial court’s instructions to the jury. The trial court instructed the jury on the burden of proof and that the attorneys’ arguments were not evidence. “[N]o error requiring reversal will be found if a curative instruction could have alleviated any prejudicial effect.” *People v Moorner*, 262 Mich App 64, 78; 683 NW2d 736 (2004). “Jurors 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) (citation omitted).

Defendant's final claim of misconduct is that the prosecutor argued facts that were not in evidence. Defendant contends that the prosecutor's statement that the photographs on the media card showed defendant's classroom and defendant's desk was improper because it was never established that the desk and classroom in the picture were actually defendant's. We disagree.

A prosecutor may not make a statement of fact to the jury that is not supported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). When a prosecutor states that the evidence will show or prove something and it later does not, reversal is not warranted if the prosecutor did not act with bad faith. *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1997); *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Defendant is correct that it was never conclusively established that the desk and classroom in the photograph belonged to defendant. However, from the facts of the case and the evidence that was admitted at trial, it was reasonable to infer that the photograph depicted defendant's classroom, poster and desk. A prosecutor may draw all reasonable inferences from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). See *Moss, supra* at 32. Consequently, defendant was not denied a fair and impartial trial because of these inferences. *Dobek, supra* at 63.

Defendant also alleges that defense counsel was ineffective for failing to object to the multiple instances of alleged prosecutorial misconduct. Defendant contends that defense counsel should have objected when the prosecutor shifted the burden of proof in her opening and closing statements, and when the prosecutor argued facts not in evidence. We find that defense counsel was not ineffective for failing to object because defendant's claims of prosecutorial misconduct are without merit. Because no prosecutorial misconduct occurred, an objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *Thomas, supra* at 457.

Affirmed.

/s/ Michael J. Talbot  
/s/ William C. Whitbeck  
/s/ Donald S. Owens