STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXANDER M. GARDNER,

Defendant-Appellant.

UNPUBLISHED
April 22, 1997

No. 192275
Genesee Circuit Court
LC No. 95-053065

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted by a jury of arson of a dwelling house, MCL 750.72; MSA 28.267, and assault with a deadly weapon, MCL 750.82; MSA 28.277. He was sentenced to a term of ten to twenty years' imprisonment for the arson conviction, and a term of two to four years' imprisonment for the assault conviction. Defendant now appeals as of right. We affirm.

Defendant first argues on appeal that the prosecutor committed misconduct by not instructing her witness to refrain from referring to defendant's prior incarceration. Because defendant did not object at trial to the prosecutor's questioning, appellate review of the prosecutor's alleged misconduct is precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US ___; 115 S Ct 923; 140 L Ed 2d 802 (1995).

We find no error requiring reversal. The defense requested that the trial court instruct the prosecution to caution her witnesses not to refer to defendant's prior incarceration, and the trial court did so. On direct examination, the prosecutor asked Lavern Onstott how long he had known defendant, and Onstott replied "first time he got sent away." Defendant did not object. The prosecutor asked the question again, and Onstott replied "I don't know, four or five years."

Defendant argues that the reference to the "first time he got sent away" was unfairly prejudicial and denied him a fair trial. However, we find no prosecutorial misconduct because the reference to defendant's incarceration was a nonresponsive, volunteered answer to a proper question. See *People*

v Stegall, 102 Mich App 147, 151; 301 NW2d 473 (1980). Moreover, we conclude that a curative instruction would have eliminated any prejudice. Accordingly, no miscarriage of justice will result from this Court's failure to review the issue further.

Defendant next argues that he was denied the effective assistance of counsel by trial counsel's failure to object to both Onstott's reference to defendant's prior incarceration and the prosecutor's reference to the fact that defendant was incarcerated pending trial. We disagree.

To prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct is not sound trial strategy. *Stanaway*, *supra* at 687-688. Because defendant did not move for a *Ginther*[1] hearing or a new trial on the basis of ineffective assistance of counsel, appellate review is limited to mistakes apparent on the record. See *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Failure to object to the prosecution's questioning is not necessarily ineffective assistance of counsel. See, e.g., *Stanaway*, *supra* at 687-688; *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). Defense counsel may properly refrain from objecting to questions where an objection might have emphasized the testimony in the minds of the jurors and where no further reference was made to the testimony. *Id*. We conclude that defendant has not overcome the presumption that trial counsel's failure to object was sound trial strategy. Had defense counsel objected in front of the jury to the references to defendant's incarceration, it might have unduly emphasized the incarceration. Accordingly, defendant has not met his burden of proving that he was denied the effective assistance of counsel.

Defendant next argues that the trial court abused its discretion by denying his motion for a new trial on the grounds that the verdict was against the great weight of the evidence.[2] This Court reviews a denial of a motion for a new trial based on a great weight of the evidence argument under an abuse of discretion standard. The question is whether the verdict was manifestly against the clear weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). To determine whether a verdict is against the great weight of the evidence, or has worked an injustice, a judge necessarily reviews the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). While a judge may grant a new trial after finding the testimony of witnesses for the prevailing party not to be credible, his exercise of judicial power is to be undertaken with great caution, mindful of the special role accorded juries under our constitutional system of justice. *Id*. at 477.

Defendant's brief does not specify to which of his two convictions he refers, or in what manner the evidence was insufficient, but merely states that "the evidence adduced at trial as to identification was the entirely discredited testimony of the prosecution witnesses." However, the prosecution's witnesses testified that defendant assaulted Onstott with a tire iron and later set the house on fire with gasoline. The jury chose to credit the prosecution's version of events over

defendant's. The record does not demonstrate that defendant's convictions were manifestly against the clear weight of the evidence. Therefore, defendant is not entitled to a new trial.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh

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

[2] Defendant argued in the trial court and in his statement of questions presented that his convictions were against the great weight of the evidence, but his argument on appeal appears to be based on the sufficiency of the evidence. Defendant did not preserve the issue of the sufficiency of the evidence because he did not raise it in his statement of the issues presented. *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). Therefore, we will address the issue under the great weight of the evidence standard.