STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN J. TYLER,

Defendant-Appellant.

UNPUBLISHED
April 25, 1997

No. 180800
Oakland Circuit Court
LC No. 94-132359

Before: Fitzgerald, P.J., and MacKenzie and A.P. Hathaway*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced to life in prison on the murder conviction, and to five to ten years' imprisonment on the assault conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. We disagree. Because there was no *Ginther*[1] hearing in this case, our review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US ___; 115 S Ct 923; 130 L Ed 2d 802 (1995). In order to prove that he was denied the effective assistance of counsel, defendant must show both that his trial attorney's conduct was unreasonable, and that the conduct prejudiced defendant. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994)

Defendant's argument centers around a 911 tape introduced by the prosecution at trial. The prosecution did not provide a copy of the tape to defendant before trial. Defendant contends that his trial counsel should have requested a discovery order before trial, or should have made a motion to suppress the tape at trial. Defendant does not argue that a copy of the tape would have aided his

* Circuit judge, sitting on the Court of Appeals by assignment.

defense. Instead, defendant claims that his counsel could have had the tape suppressed and thus eliminated a damaging piece of prosecution evidence.

We find that defense counsel had little to gain from a discovery order, and his failure to request one was reasonable. In any event, defendant also cannot show any prejudice stemming from this failure. Had there been a discovery order, the prosecution would simply have turned over a copy of the tape, and it would still have been used against defendant at trial. Defendant's contention that the prosecution would have violated the discovery order, making the tape excludable, is entirely speculative. Thus, defendant cannot show that his trial counsel's failure to request a discovery order was unreasonable, or that the failure to request a discovery order prejudiced him in any way.

Defendant's contention that his trial counsel was ineffective for failing to request suppression of the tape is also without merit. Even assuming that the prosecution was required to provide the tape to defendant, suppression of the tape would not have been the proper remedy. Instead, defendant would have been entitled to a reasonable amount of time to review the tape and prepare a defense. Here, the trial court gave defendant adequate time to review the tape and prepare a defense. Consequently, defendant has failed to demonstrate prejudice as a result of counsel's failure to request suppression of the tape. *Pickens*, *supra* at 338. Therefore, we find that defendant was not denied the effective assistance of counsel.

Defendant next argues that the prosecutor committed misconduct in his examination of a witness, and in his closing argument. However, defendant did not object to the prosecutor's alleged misconduct at trial.[2] Absent an objection at trial, we may not review a prosecutor's improper remarks unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Stanaway*, *supra* at 687. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). While we agree that some of the prosecutor's comments were inappropriate, we find that defendant was not denied a fair trial.

First, defendant alleges that the prosecutor improperly asked a police officer to testify regarding the veracity of defendant's statement after the offense occurred. However, the questions were whether defendant was telling the truth during his interview with the officer. The prosecutor simply asked for the officer's opinion on whether defendant was telling the truth during his interview with the officer. Thus, the question properly asked the officer for an opinion based on his own perception, and his opinion was helpful to the jury's understanding of this issue. MRE 701.

Defendant next argues that the prosecutor improperly vouched for his guilt by suggesting that he would only have been charged with second-degree murder if the facts had not warranted the first-degree charge. A prosecutor should not express his personal opinion of a defendant's guilt. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). However, a prosecutor's ill-advised or improper comments do not necessarily require reversal. *Id.* at 287. A prosecutor's comments should be reviewed in context to determine whether "the jury suspended its power of judgment in favor of the 'wisdom' or 'belief' of the prosecutor's office." *Id.* at 286-287.

Here, the prosecutor suggested that the evidence of premeditation and deliberation was sufficient to convict defendant of first-degree murder. While the prosecutor's comments could have been more carefully phrased, his other remarks and the court's instructions made it clear that the question of premeditation and deliberation was for the jury to decide. The prosecutor's final remark in closing, that "the evidence in this case on premeditation and deliberation is just unreal," was arguably improper. However, taken in context, this remark was not enough to cause the jury to suspend its power of judgment, and does not require reversal.

Finally, defendant argues that the prosecutor improperly suggested that the jury form was flawed because it allowed the jury to consider the lesser included offense of manslaughter. The prosecutor argued that the jury should not use the presence of two lesser included offenses on the jury form to reach a compromise verdict. While it may be appropriate to discourage compromise verdicts, the prosecutor should not have suggested that the presence of the manslaughter offense on the jury form was improper. However, we believe that this comment does not require reversal. This was not an improper attempt to wrest a guilty verdict from the jury. Instead, the prosecutor attempted to discourage jurors from compromising. Where, as here, the defense attorney did not object to these comments, he deprived the trial court of the opportunity to give an appropriate curative instruction. "[A] well tried, vigorously argued case ought not to be overturned due to isolated improper remarks which could have been cured had an objection been lodged." *People v Duncan*, 402 Mich 1, 17; 260 NW2d 58 (1977). In this case, an instruction from the court would have cured any error.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Amy Patricia Hathaway

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

[2] While defendant did object to the evidence as irrelevant, this objection did not preserve the issue of prosecutorial misconduct. See *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994).