

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD ALLEN WOODWARD,

Defendant-Appellant.

UNPUBLISHED

August 16, 2002

No. 231391

Iosco Circuit Court

LC No. 00-004008-FH

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle under the influence of intoxicating liquor, third offense (OUIL 3d), MCL 257.625(1), and operating a vehicle with a suspended license (DWLS), MCL 257.904(1). The court sentenced defendant to concurrent sentences of five years' probation for the OUIL 3d conviction, with the first nine months to be served in jail, and ninety days in jail for the DWLS conviction. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his convictions and that the verdicts were against the great weight of the evidence. We disagree. We review a challenge to the sufficiency of the evidence by considering the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). When, as here, a challenge based on the great weight of the evidence has not been raised in a motion for a new trial, we will reverse only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

In defendant's favor, there was evidence that the truck in which he was found by police had run out of gas; that his friend, who was allegedly driving, had begun walking back to a service station before the police arrived; and that the symptoms defendant displayed when questioned by the police – unsteadiness, disorientation, slurred speech – were a result of his diabetes. In the prosecution's favor, there was testimony by the arresting officer that he found the truck idling and in gear, and that defendant was slumped over on the seat with one foot on the brake. Also, the officer concluded that defendant was intoxicated because, in addition to the symptoms noted, defendant admitted he had been drinking, his body smelled of alcohol, and numerous empty beer cans were in the truck. Viewed in the light most favorable to the

prosecution, this evidence was sufficient for the jury to find the elements of OUIL and DWLS beyond a reasonable doubt.¹

Further, the jury was free to believe the officer's testimony, which conflicted with other witness' accounts, and reject other testimony. Conflicting testimony, even if impeached to some extent, is an insufficient ground for granting a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). We do not believe the evidence preponderated so heavily against defendant's convictions that it would be a miscarriage of justice to allow them to stand. Therefore, the court did not abuse its discretion when it denied defendant's motion for new trial. *Gadomski, supra* at 28.

Defendant next argues that three instances of prosecutorial misconduct deprived him of a fair trial. Again, we disagree. Because defendant failed to object to the challenged comments at trial, we review these claims for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record in context, to determine whether the defendant was denied a fair trial. *Watson, supra* at 586. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.*, quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

First, defendant asserts that the prosecutor committed misconduct when he stated in opening statement that a witness would testify that defendant was highly intoxicated, and stated in closing argument that this witness testified that he had smelled alcohol on defendant's breath. Both statements were erroneous because the witness actually testified that he did not form an opinion regarding whether defendant was intoxicated. However, the jury was instructed that "lawyers' statements and arguments are not evidence." The jury was further instructed that it must decide what the facts of the case were. Jurors are presumed to follow the instructions of the court, *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997), and defendant has presented no evidence to the contrary. Therefore, we conclude that the prosecutor's error did not prejudice defendant, and reversal is not required. *Carines, supra* at 763.

Second, defendant contends that two of the prosecutor's comments in rebuttal argument constituted misconduct. The arresting officer's credibility was challenged by defendant during the trial and in his closing argument. The comments in the prosecution's rebuttal argument which defendant challenges responded to the attack on the officer's credibility. "Otherwise improper prosecutorial remarks do not require reversal if they are responsive to issues raised by defense counsel."² *Schutte, supra* at 721. Furthermore, any error could have been cured by a

¹ Defendant stipulated that his license was suspended at the time of his arrest and did not contest the evidence introduced regarding his two prior OUIL convictions.

² Defendant relies on *People v Farrar*, 36 Mich App 294, 297-298; 193 NW2d 363 (1971), in which the Court held that the prosecutor's comment that police officers "don't bring these things into court unless they really happened" constituted error requiring reversal. However, *Farrar* is distinguishable from this case because in *Farrar* there was no evidence that the prosecutor was responding to an issue raised by the defense, and in this case, the prosecutor was not encouraging the jury to exercise its civic duty.

timely instruction, and the court's instruction to the jury that arguments are not evidence was sufficient to dispel any prejudice. *Id.* at 721-722.

Third, defendant asserts that the prosecutor committed misconduct when, on several occasions, he referred to or elicited testimony in regards to defendant's refusal to submit to a breathalyzer test. However, evidence of a defendant's refusal to submit to a test is permitted to show that the chemical test was offered, but not to show guilt; and the trial court must instruct the jury accordingly. MCL 257.625a(10). There is no indication that the prosecutor attempted to use this information for an improper purpose, and the jury was instructed that defendant's refusal was not evidence of guilt. Therefore, there was no error.

Defendant next argues that he was denied effective assistance of counsel. We disagree. Defendant filed a timely motion for new trial; therefore, this issue is preserved. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Ams VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, i.e., prejudice to the defendant. *Cronin, supra* at 657; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2001).

Defendant asserts that his counsel was ineffective when (1) he failed to support defendant's trial strategy of a diabetic reaction mimicking intoxication with expert medical testimony, (2) he failed to present medical testimony that defendant was taking Antibus on the day of his arrest, (3) he failed to establish that defendant's friend was present on the trip, and (4) he failed to object to three instances of prosecutorial misconduct.

There is a strong presumption that counsel's action constituted sound trial strategy under the circumstances. *Toma, supra* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). At trial, defendant did put forth his theory that he was not intoxicated, but rather had a diabetic reaction, through questioning of two witnesses and during closing argument. Defendant also presented evidence that his friend was driving the truck prior to it running out of gas. We cannot say that counsel's decision not to present additional evidence regarding these defenses constituted unsound trial strategy.

Furthermore, we conclude that defense counsel's decision not to present evidence regarding defendant taking the drug Antibus constituted sound trial strategy. Medical testimony regarding defendant's Antibus prescription would have directly informed the jury of defendant's alcoholism, and this could have favored the prosecution's theory of intoxication.³

³ Antibus is used for the treatment of alcoholism by causing the patient to become violently ill if he ingests alcohol while taking the drug. *People v Hoy*, 380 Mich 597, 613-614; 158 NW2d 436 (1968).

Furthermore, defendant himself was the only person who could confirm that he took the drug on the day of the incident.

Defendant's claim that his counsel was ineffective for failing to object to alleged instances of prosecutorial misconduct is also without merit. We concluded above that either the prosecutor's remarks were proper or that the remarks were not prejudicial. Counsel cannot be considered ineffective for failure to advocate a futile or meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant argues that he was denied a fair trial by the cumulative effect of the errors analyzed thus far, augmented by narrative testimony of the arresting officer. Again, we disagree. A defendant has a constitutional right to a fair and impartial trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Ramsey*, 422 Mich 500, 510; 375 NW2d 297 (1985). Errors that are individually harmless may nevertheless warrant reversal if their cumulative effect was so seriously prejudicial that the defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Thus, where no actual errors occurred, or where any arguable errors were of little consequence, reversal is not warranted. *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999).

Defendant objected to the officer's comment, the court sustained the objection, and instructed the jury that it could not consider excluded evidence. Jurors are presumed to follow the instructions of the court until the contrary is clearly shown. *Wolverton, supra* at 77. Defendant presents no evidence to indicate that the jurors abrogated their duty to follow the court's instructions. Because the only errors asserted were cured by the jury instructions, we conclude that defendant was not denied a fair trial and reversal is not required.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski