

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADLEY SCOTT LASCO,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2003

No. 239278

Ionia Circuit Court

LC No. 01-012020-FH

Before: Donofrio, P.J., and Fort Hood and Schuette, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He was sentenced to concurrent terms of seven months' imprisonment. Defendant appeals as of right, and we affirm.

Defendant first alleges that he was denied the effective assistance of counsel because of the late appointment of substitute counsel and the trial court's "refusal" to allow an adjournment. We disagree. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant alleges that trial counsel was ineffective for failing to move to bifurcate the cases into separate trials, failing to remand for a preliminary examination, failing to request discovery of potential defense witnesses, and failing to raise pretrial motions in limine in writing. These blanket assertions of inadequacy fail to meet defendant's high burden of demonstrating ineffective assistance of counsel. *Effinger, supra*. Review of the record reveals that trial counsel expressly stated that there was no objection to the joinder of the cases at trial and there would be no motion to sever trials. Additionally, trial counsel represented that the preliminary examination was waived by defendant against the advice of counsel. Defendant was present for this hearing, and although questioned by the trial court, did not dispute counsel's representation regarding the waiver of the preliminary examination. Defendant fails to identify the pretrial

motions or the defense witnesses that should have been filed or would have been discovered if an adjournment had been *requested* and granted.<sup>1</sup> Accordingly, the claim of error is without merit.

Defendant next alleges that reversal is required based on improper statements by the prosecutor during opening argument. We disagree. A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We decide issues of prosecutorial misconduct on a case by case basis, reviewing the pertinent portion of the record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). While the prosecutor may not make a statement of fact unsupported by the evidence, the prosecutor may argue the evidence and all reasonable inferences arising from the evidence as related to the theory of the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Watson, supra*. To avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *Id.* Error requiring reversal will not be found where the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.*

While a litany of alleged improper comments were raised by defendant, only two were preserved for appellate review. In any event, examining the statements in context, the challenge based on prosecutorial misconduct is without merit. The argument by the prosecutor was supported by the evidence admitted at trial or reasonable inferences arising from the evidence. Furthermore, the trial court repeatedly advised the jury that the arguments of counsel were not evidence. The challenge to the convictions on this basis is without merit.

Lastly, defendant alleges that the trial court erred by refusing to adjourn the deliberations due to the medical emergency of a juror, or in the alternative, in failing to declare a mistrial based on inaccurate information offered by the juror at voir dire.<sup>2</sup> We disagree. Although

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<sup>1</sup> At the hearing regarding the prosecutor's motion to revoke bond, defense counsel moved to withdraw based on a breakdown in the attorney-client relationship. Defendant expressly stated that he wished to be represented by one attorney and wanted the attorney handling a different criminal case to be assigned to handle these delivery charges. Defendant did not withdraw his request when the trial court expressed its reluctance to adjourn the trial date that was scheduled to occur approximately two weeks later. However, we note that newly appointed trial counsel never sought an adjournment, orally or by motion. Furthermore, the order appointing new counsel contained three dates for the jury trial: December 13, 2001, January 10, 2002, and January 24, 2002. Thus, it is speculative whether the trial court would have denied any request for an adjournment by newly appointed counsel.

<sup>2</sup> While defendant characterized the situation as a medical emergency, the juror initially asked for a "smoke" break. After that did not alleviate the juror's anxiety, a police officer was sent to the home of the juror to retrieve her medication. The juror told the trial court that she did not believe that her medical condition would have any impact on her service at the time of voir dire.

(continued...)

defense counsel asserts in his brief on appeal that the trial court abused its discretion by failing to grant a continuation, defense counsel did not request a continuance or a mistrial. Therefore, no discretion of the trial court was invoked for this Court to review. *People v Leonard*, 224 Mich App 569, 585 n 6; 569 NW2d 663 (1997). Furthermore, a defendant may not acquiesce to the trial court's handling of a jury request, then raise objection as error before the appellate court. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). To hold otherwise would allow defendant to harbor error as an appellate parachute. *Id.* Accordingly, defendant's claim of error is without merit.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Karen M. Fort Hood  
/s/ Bill Schuette

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(...continued)

Thus, the allegation that the juror provided inaccurate information is not supported by the record.