

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP LUKE HAMM,

Defendant-Appellant.

UNPUBLISHED

May 6, 2004

No. 245799

Wayne Circuit Court

LC No. 02-003778-01

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob while armed, MCL 750.89, and first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to ten to twenty years in prison for the assault with intent to rob while armed conviction and ten to thirty years in prison for the first-degree home invasion conviction. The trial court sentenced defendant as a second habitual offender, MCL 769.10. Defendant received 135 days credit for time served. Defendant challenges the admission of evidence contrary to MRE 404(b), prosecutorial misconduct, instructional error, ineffective assistance of counsel, and a sentencing error. We are not persuaded by defendant's arguments on the substantive issues. However, we find defendant's sentencing error warrants appellate relief. We affirm defendant's convictions, and remand for resentencing.

Defendant first contends that the trial court improperly allowed a police officer to testify regarding a description given in a separate crime occurring in the same apartment complex as this crime. We disagree. Defendant failed to object to this evidence at trial. Therefore, this issue is not preserved for appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). An unpreserved claim regarding the admission of evidence is reviewed for plain error affecting defendant's substantial rights. *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000).

During the police officer's direct testimony the following questioning occurred:

Q. [Prosecution] After getting this information from the officers and from the complainant in this case, did you have an idea of a potential suspect in this case?

A. [Police Officer] Possibly one, yes.

Q. And what gave you any idea of a possible suspect?

A. I had a robbery I had been investigating several weeks ago at the same complex of a citizen from a parking lot.

Q. Okay. Was there anything unusual or distinctive about any of the suspects involved in this case?

A. In this particular case, yes, the white male.

Q. What was unusual or distinctive about the white male?

A. His physical make up, his height and weight, as well as having been described having a distinct tattoo [sic] on his right side of his neck.

Q. When you first approached [the victim's] residence, did you [know] that? Did you [have] the descriptions of the suspects?

A. No, not at that time.

Q. After you gathered information from the officer who was already there, Officer Krol, and the sus - - [sic] and the victim in that case. Did you present a photo identification or line up to the victim?

A. Some time [sic] after my initial contact with her, yes.

Q. Some time [sic] after the say [sic] day or another - -

A. The same day, approximately maybe forty-five minutes to an hour later.

Defendant claims this exchange was evidence of other crimes or prior bad acts used to prove defendant's character. Defendant contends that the evidence is inadmissible pursuant to MRE 404(b), which states, in part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Taken in context, the prosecution was not offering this evidence to prove defendant's character. Defendant ignores the testimony about the photo lineup immediately following the testimony regarding the description received following the other crime. This completely robs the testimony of its context. This evidence is not offered by the prosecution to show that defendant committed similar bad acts in the past. In fact, defendant's name never comes up during this exchange. The prosecution did not offer the evidence to prove that defendant committed this other crime or even to accuse him of it. The evidence was offered to explain why the police were able to produce the

photo array so quickly. Given that the evidence was not offered to show character, MRE 404(b) is inapplicable, and admission of this testimony does not amount to plain error.

Additionally, substantial evidence existed to convict defendant. This evidence consisted mainly of the eyewitness account and identification by the victim. Given this substantial evidence, it is unlikely that the police officer's testimony affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant next contends that the prosecutor committed misconduct by mentioning the above-discussed identification from a separate crime during closing argument. Defendant failed to object to the prosecution's statements during closing argument. Thus, this issue is unpreserved. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). When a defendant fails to object to alleged prosecutorial misconduct, the issue is reviewed for plain error. *Aldrich, supra*, 246 Mich App 110. The case warrants reversal only when the plain error results in a conviction of an innocent defendant or seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. No error requiring reversal exists where a curative instruction could have alleviated any possible prejudicial. *Ackerman, supra*, 257 Mich 448-449.

Alleged prosecutorial misconduct arising from the prosecutor's arguments must be taken in context. The record must be read as a whole and the allegedly impermissible statements judged in the context they were made. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). This Court must especially judge the statements in light of the defendant's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Reading the statement together with the rest of the prosecution's closing, it is apparent that the prosecutor did not mention this other possible crime in order to show defendant had a propensity for crime or to comment on defendant's character. The prosecution was merely explaining why the police officers were able to have a photo array available so quickly. Further, the prosecutor does not even state that defendant committed the separate crime. He merely implied that this other crime gave the police an opportunity to get a jump on creating a photo array. Taken in context and reading the case as a whole, these comments do not amount to plain error. *Reed, supra*, 449 Mich 398; *Aldrich, supra*, 246 Mich App 110.

Further, defendant pursued an alibi and misidentification theory at trial. From opening statement, defense counsel stated that this was a case of "gross misidentification." The prosecutor's comments about the photo array were made in response to this contention. The prosecution offered an explanation of why the lineup was created so quickly in order to show that it was reliable and that it was not created in an attempt to frame defendant. Taken in context of defendant's arguments, the prosecution's statements do not amount to prosecutorial misconduct. *Messenger, supra*, 221 Mich App 181. Once defendant opened the evidentiary door on this issue it was open to a full discussion by both parties. *People v Allen*, 201 Mich App 98, 103-104; 505 NW2d 869 (1993).

Finally, reversal based upon an unpreserved claim of prosecutorial misconduct is only warranted where a curative instruction could not have alleviated the prejudicial effect. *Ackerman, supra*, 257 Mich App 448-449. This Court has stated a trial court's careful and explicit instructions to a jury that it is required to decide the case only on the evidence and that the lawyer's arguments are not evidence would cure any prosecutorial misconduct in closing

arguments. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). The trial court gave such instructions. Defendant is not entitled to relief on this issue. *Id.* at 693.

Defendant next contends that the trial court gave an unwarranted flight instruction to the jury. Both counsel expressed satisfaction with the instructions as given. “By expressly approving the instructions, defendant has waived this issue on appeal.” *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). A defendant who waives his or her right under a rule may not seek appellate review of a claimed deprivation of that right. The waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

Defendant next contends that he did not receive the effective assistance of counsel because his trial counsel failed to object to the three claimed errors dealt with above. Given our conclusion that none of the claimed issues amounted to errors or prejudiced defendant, any objections by trial counsel would have proven futile and meritless. Refusal to make such objections is not ineffective assistance. *People v Thomas*, __ Mich App __; __ NW2d __ (Docket No. 243817, issued February 3, 2004), slip op, p 4.

Finally, defendant claims the trial court worked under a misapprehension of the law when it imposed his sentences. Typically, issues concerning the proper application of the sentencing provisions, including MCL 777.1 *et seq.* and MCL 769.34, are reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

At sentencing, the trial court stated:

. . . . count one, Assault With Intent to Rob While Armed. The Court is going to sentence the defendant to no less than ten, no more than twenty years. On home Invasion First Degree [sic], the Court is going to give the defendant a sentence of no less than ten, no more than thirty. The Court is also going to sentence the defendant on the habitual, but I’m not going to enhance on the habitual.

The judgment of sentence also states under court recommendations: “Sentence as a Habitual 2nd with no enhancement.” Defendant contends these statements mean the sentencing court was not sentencing defendant as a habitual offender. Defendant argues this Court should remand for resentencing because if the sentencing court had considered the un-enhanced guidelines instead of the guidelines enhanced as a second habitual, the minimum terms of imprisonment may have been lower. From this record, we cannot divine the trial court’s intent. The court’s comments are not clear, and we cannot discern the trial court’s sentencing intentions when viewing the court’s statements in the context of the court’s actions. For this reason, we remand for resentencing.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio