

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY ALFRED HART,

Defendant-Appellant.

UNPUBLISHED

February 1, 2007

No. 265952

Shiawassee Circuit Court

LC No. 04-001589-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of receiving or concealing a stolen firearm, MCL 750.535b, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The prosecution alleged that defendant stole a small pistol from an apartment occupied by the girlfriend of one of defendant's friends. Defendant then asked another friend, Jamie Nichols, to help him trade the gun for drugs. Defendant and Nichols persuaded another man, Travis DeVilbiss, to drive them to a party store, where Nichols traded the gun for cocaine.

On appeal, defendant maintains that prosecutorial misconduct deprived him of a fair trial. He challenges the prosecutor's opening statement and elicitation of other acts evidence during questioning that painted defendant as "a theft-inclined drug addict." He maintains that this character evidence was not admissible under MRE 404(a) because he did not first present evidence of his good character to the jury. See *People v Hammond*, 394 Mich 627, 631; 232 NW2d 174 (1975). He further maintains that the prosecutor improperly bolstered the testimony of prosecution witnesses. Finally, defendant claims that trial counsel provided ineffective assistance because he did not object to these improper statements and testimony.

Defense counsel did not object to either the prosecutor's opening statement or closing comments about defendant's drug use, or his questioning of prosecution witnesses concerning defendant's drug use. Because these claims are unpreserved, defendant must demonstrate plain error affecting his substantial rights in order to obtain relief. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if plain error did occur and affected a defendant's substantial rights, we must exercise our discretion and reverse the conviction only if the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness,

integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.* The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first claims that the prosecutor impermissibly introduced character evidence, namely that he was a drug user, to show that he acted in conformity with that character by stealing the gun to sell for cocaine. Defendant also challenges the prosecutor's statements concerning this past drug use. We have held that a "prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). In judging the propriety of a prosecutor's comments, we review the remarks in context, giving the prosecutor substantial leeway in the manner he chooses to argue the evidence. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant argues that the evidence of his drug use violated MRE 404(a). To the extent that the evidence of drug use related only to defendant's reputation, we agree. Defendant did not assert at trial that he did not use controlled substances, and the admission of reputation evidence related to defendant's alleged drug problem was improper to the extent the prosecutor sought to show that defendant, because he was a drug user, acted in conformity with his bad character when he stole the gun. See e.g., *People v Johnson*, 409 Mich 552, 557-561; 297 NW2d 115 (1980); *People v Golden*, 121 Mich App 490; 492; 328 NW2d 667 (1983).

However, the evidence of defendant's drug use here served two purposes, as both specific acts evidence and reputation evidence. We find that the specific act evidence related to the trading the gun for cocaine was admissible for a number of purposes. MRE 404(b) precludes the use of specific acts, crimes, or wrongs to prove character in order to show action in conformity therewith, but such evidence can still be used for other purposes, such as proof of a motive to commit the crime. MRE 404(b); *People v Knox*, 469 Mich 502, 508-509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In addition, evidence of the *res gestae* of a crime is admissible without regard to MRE 404(b). *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996). "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Id.* at 742 (internal citation and quotation marks omitted).

The testimony that defendant planned to trade the gun for drugs was a part of the *res gestae* of the offense; it was part of the "complete story," *id.* at 741, and also helped explain why the police were unable to find the gun in defendant's possession. In addition, this specific evidence could properly be used to demonstrate a motive for the robbery, given Nichols' testimony that defendant had asked for his help in trading the gun for drugs. *VanderVliet, supra* at 74-75. Because we find the evidence that defendant intended to trade a gun for drugs was properly admissible here, we further find that the less damaging insinuation that defendant might have a drug problem does not rise to the level of reversible error.

Defendant also argues that the prosecutor's arguments compounded the error and stigmatized defendant. We find that the prosecutor's closing argument does not support defendant's contention. The prosecutor reviewed his arguments, but did not suggest that defendant's status as a drug user caused him to have the propensity to commit the theft. Conversely, we agree with defendant that portions of the prosecutor's opening statement,

including that the case was “going to be an example of . . . the lengths that people . . . will go to in order to acquire drugs,” and that “the Defendant has a drug problem,” were improper.

However, we find again that the error is not outcome determinative, because here the trial court provided a number of limiting instructions that cautioned the jury about the proper use of evidence of defendant’s drug use and the fact that he traded the gun for cocaine. The trial court admonished the jury that it could use defendant’s alleged drug use as evidence of a possible motive for the theft, and not for the determination that defendant was a “bad person” who was likely to commit crimes. The jury was also instructed that it could not convict defendant because it thought he was guilty of other bad conduct. In addition, the trial court cautioned the jury that it must base its decision on the evidence presented, and that the attorneys’ comments were not evidence. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, under these circumstances, we hold find that defendant cannot show that he is entitled to relief due to prosecutorial misconduct.

Defendant also argues that the prosecutor improperly vouched for the credibility of prosecution witnesses by encouraging them to emphasize that they were telling the truth during redirect examination. We disagree.

A prosecutor may not vouch for a witness’ credibility or suggest that the government has some special knowledge that a witness’ testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, the prosecutor’s remarks, viewed in context, do not suggest any special knowledge of the witnesses’ credibility. During the questioning of DeVilbiss, the prosecutor attempted to rehabilitate the witness in response to defendant’s assertion that DeVilbiss had changed his testimony concerning the color of the velvet bag that contained the gun. During the questioning of Nichols, the prosecutor explored why Nichols had initially claimed that he did not see any portion of the gun during the exchange. The prosecutor also questioned Nichols about his interaction with the investigating officer in response to defendant’s inference during cross-examination that the officer had pressured Nichols to lie on the stand. None of these exchanges showed any special knowledge on the part of the prosecutor; moreover, the prosecutor did not personally vouch for the credibility of the witnesses.

Defendant also maintains that defense counsel rendered ineffective assistance when he failed to object to the prosecutor’s misconduct. Defendant did not move for a new trial or a *Ginther*¹ hearing below; thus, he has failed to preserve this issue. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1992). Our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim of ineffective assistance of counsel a defendant must show: (1) that trial counsel’s performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant has not shown that

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

the prosecutor impermissibly bolstered the prosecution's witnesses. Therefore, defendant cannot show that counsel acted unreasonably when he failed to object to the prosecutor's questioning. *Snider, supra* at 425 (counsel is not required to advocate a meritless position). Also, because the testimony concerning the trade of the gun for cocaine was admissible, defendant cannot show that counsel erred in failing to object to the introduction of this evidence. *Id.*

Counsel arguably acted unreasonably by failing to object to the introduction of the additional propensity evidence and the prosecutor's use of it. However, under the circumstances, defendant cannot show that any error was outcome determinative. The more damaging evidence would still have been properly admitted, and the trial court's instructions are presumed to have cured any improper inference made by the prosecutor. Under the circumstances, defendant cannot show that, but for counsel's errors, the result of his trial would have likely been different.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper