

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN MICHAEL EDWARDS,

Defendant-Appellant.

UNPUBLISHED

June 4, 2002

No. 233274

Dickinson Circuit Court

LC No. 97-002104-FH

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault and battery, MCL 750.81(1), and one count of malicious destruction of personal property over \$100, MCL 750.377a. He was sentenced to thirty days in jail for each of the assault convictions, which was stayed pending his compliance with a sentence of eighteen months' probation for the malicious destruction of property conviction. Defendant appeals as of right. We affirm.

This case arises from a confrontation that took place on Turner Grade Road between defendant and the three complaining witnesses. The latter testified that they had been traveling by truck and stopped to take a closer look at an animal that crossed the road in front of them, and that defendant then drove up behind them and started hurling insults. Defendant maintained that the confrontation began when the complaining witnesses drove through his property and insulted his wife, and he thus pursued them in his own truck mainly for the purpose of discerning the trespassers' license-plate number. The prosecution presented evidence that defendant threatened the complainants, repeatedly struck their truck with a piece of hardware, and rammed their truck with his while pursuing them. Defendant admitted striking the complainants' truck with a socket and ratchet, and showing the latter at least defensively in response to confrontation, but denied ramming the complainants' vehicle.

I

On appeal, defendant alleges several instances of prosecutorial misconduct. However, as defendant admits, none of the remarks of which defendant makes issue on appeal was challenged below by an appropriate objection. "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless

manifest injustice would result from failure to review the alleged misconduct.” *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996); see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (unpreserved issues are reviewed for plain error affecting substantial rights).

Among defendant’s claims of error is the assertion that the prosecutor improperly urged the jury to discredit defendant’s credibility on the basis of defendant’s status as a criminal defendant. At issue is the following statement:

Who does have a motive to maybe not be honest with you, to maybe try and mislead you a little bit, try and make you think some other things were going on that maybe weren’t? The Defendant, ladies and gentlemen. He’s the one on the hook here. He’s the one on trial. He is a criminal Defendant in this case.

The prosecutor further stated, “Does he have any reason to maybe mislead you? Try and make you believe some other things were going on there that maybe weren’t?” We agree with defendant that this was improper argument.

The presumption of innocence is at the core of our criminal process. *People v Saffold*, 465 Mich 268, 276; 631 NW2d 320 (2001). It is likewise fundamental that the presumption of innocence can be overcome only by proof beyond a reasonable doubt of every element of each offense. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

In this instance, the prosecutor improperly implied that defendant’s incentive to lie stemmed from his status as a criminal defendant. Reminding jurors that a defendant stands before them as a criminal accused is at best gratuitous; doing so in close conjunction with argument that the defendant has an incentive to lie is urging the jury to look upon the defendant with suspicion simply because he is a defendant.

Had there been an objection to the prosecutor’s remarks, the trial court would have been justified in sustaining it and providing an immediate curative instruction, leaving the jurors with the benign impression that the prosecutor only stated the obvious by reminding them that defendant was accused of a crime. Because a curative instruction would have remedied the improper prosecutorial argument, this unpreserved error is not grounds for reversal. *Launsbury, supra* at 361. Moreover, the trial court instructed the jury that defendant was presumed innocent, that the prosecution was obliged to prove every element of every crime beyond a reasonable doubt in order to establish defendant’s guilt, that defendant himself was not obliged to prove anything, and that the statements of counsel were not evidence. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). In light of the instructions given, we conclude that the prosecuting attorney’s improper argument did not affect defendant’s substantial rights. *Carines, supra* at 763.

We find no merit to any of defendant’s remaining claims of prosecutorial misconduct, including his assertions that the prosecutor improperly expressed personal opinion, vouched for the complaining witnesses’ credibility, and suggested that a police officer was inherently credible. The alleged errors, if any, could have been cured had a timely objection been raised. Moreover, the trial court averted any possible unfair prejudice in the matter with its instructions to the jury regarding evaluation of the witnesses’ testimony and further instructions to decide the

case solely on the basis of the evidence, not including the statements of counsel. In light of the court's instructions, we hold that there was no miscarriage of justice.

II

Next, defendant argues that he was convicted without the benefit of the effective assistance of counsel. We disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). A defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

First, defendant notes that applicable records show the complaining witnesses called 911 at 4:34 p.m. and defendant called the police from his home at 4:36 p.m. Defendant argues that defense counsel was ineffective for failing to point out that such timing militates strongly against the suggestion that, at the time the 911 callers were engaging the 911 operator, defendant was ramming their truck from behind.

Defendant characterizes these indications concerning when the 911 call was made and when defendant called the police from his home as "crucial exculpatory evidence." However, that characterization is inapt. The question whether defendant in fact rammed the complainants' truck was decided in defendant's favor, in that the jury eschewed convicting defendant of assault with a dangerous weapon after being instructed to regard his alleged use of his truck as resort to such instrumentality. Further, defendant plainly admitted to striking his adversaries' truck with both a socket and a ratchet, and to showing the ratchet as a potential weapon in the event; at issue was *how* and *why*, not *whether*, defendant did those things, rendering his alleged presence at home two minutes after the sheriff's-log entry of secondary concern. Thus, instead of being exculpatory in nature, the timing of defendant's and the complainant's respective phone calls pertained only to the witnesses' credibility. Although this evidence might have been of some use to the defense, because the jury evidently rejected the allegations of truck ramming it is far from apparent that the result would have been different. Further, it is possible that development of these evidentiary particulars at trial would have given rise to doubts concerning the accuracy of the precise times indicated on the phone company's records, or in the sheriff's log. For these reasons, defense counsel's failure to make capital out of the records of those phone calls does not rise to the level of ineffective assistance.

Next, defendant reports that the tape of the 911 call originating from the complainants' truck was eleven minutes long, but that about 4-1/2 of those minutes are marred by some conflation of a radio broadcast with the 911 conversation. The trial court heard evidence and entertained a motion to dismiss or suppress, pursuant to the assertion that the prosecutor had

intentionally altered that evidence. The trial court observed that the police officer who would have been in a position to alter the tape had no reason to do so, and concluded there was no intentional tampering but, at most, “culpable negligence.” The court added that, if requested, it was prepared to instruct the jury “something like ‘because fault in the tape was caused through the fault of the prosecution, you may consider inaudible portions of the tape which occur during the interfering broadcast, against the prosecution.’”

For purposes of this appeal, defendant does not challenge the trial court’s conclusions, but instead asserts that defense counsel was ineffective for failing to present the theory that the prosecution tampered with the evidence and argues that counsel should have presented its expert, who had opined that the tampering could not have been an accident. Such testimony would not have been proper, however, because the trial court heard evidence on the issue and determined that the distortions in the tape were the result of “culpable negligence,” not deliberate tampering. The reasons for the condition of the tape were not themselves germane to the question of defendant’s guilt, but rather to a threshold question of evidentiary admissibility. Because the trial court properly issued its finding in this regard, it would have properly sustained an objection had the defense wished to relitigate that collateral issue before the jury.

Further, because the trial court offered to instruct the jury that it was free to presume that anything obscured by the alteration of the tape went against the prosecutor’s theory of the case, it is difficult to see what defendant could have gained by presenting a witness to imply something similar. Defense counsel, however, never requested the instruction that the court offered, a failure which defendant also asserts as ineffective assistance of counsel. Although such an instruction could have benefited defendant, we conclude that it would have done so with only minimal effect. As previously noted, the jury evidently rejected the allegations of truck ramming, and so the question concerning the corruption of the 911 tape did not prevent defendant from repelling that charge. Because defendant admitted to striking the complaining witnesses’ truck with both a socket and a ratchet, and to showing the latter in response to confrontation, the underlying reasons for the obscured portion of the 911 tape had little bearing on the outcome of the case. *Poole, supra* at 718. Consequently, defendant’s related argument that it was error not to object to the court’s instruction regarding the unintelligible portion of the 911 tape is likewise without merit.

Finally, defendant suggests that defense counsel was inadequately prepared for trial. However, our review of the record leads us to conclude that the alleged errors, if any, on the part of trial counsel were of *de minimis* consequence to the outcome and certainly not of sufficient magnitude as to suggest that counsel’s performance fell below reasonable norms. Defendant’s argument in this regard is therefore without merit.

For these reasons, we are persuaded that neither a new trial is warranted because of ineffective assistance of counsel nor a *Ginther*¹ hearing is warranted to develop the issue further.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Affirmed.

/s/ Richard Allen Griffin

/s/ Harold Hood

/s/ David H. Sawyer