

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DIONTO-DELANO THOMAS,

Defendant-Appellant.

UNPUBLISHED

March 24, 2004

No. 252596

Wayne Circuit Court

LC No. 03-008511-01

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent twenty-three to fifty years in prison for the second-degree murder conviction and three to five years in prison for the felon in possession of a firearm conviction, and a consecutive term of two years in prison for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant first argues that he was denied his state and federal constitutional rights to due process of law and a fair trial by the prosecutor's misconduct and by the admission of the "other act" testimony of Officer Anthony Delgreco. We disagree.

The test for 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). A fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice, supra*, at 438. When a claim of prosecutorial misconduct is not preserved by objection at trial, or an evidentiary issue regarding "other acts" is not objected to at trial, the issues are reviewed for plain error which affected the defendant's substantial rights. Reversal is warranted only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show" that he acted in conformity with it, but may "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," whether the "crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue." MRE

404(b)(1) The purpose of the limitation on the admissibility of other acts evidence is to avoid convicting a defendant based on his bad character rather than on evidence that he is guilty beyond a reasonable doubt of the crime charged. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The list of proper purpose exceptions in MRE 404(b) is nonexclusive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). A proper purpose is any purpose other than one establishing the defendant's character to show his propensity to commit the charged offense. *People v VanderVliet*, 444 Mich 52, 65-66; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); MRE 404(b).

Here, defendant objects to two references to the fact that defendant was in jail on a separate charge when he was arrested for the murder charge at issue. The first reference was in Delgreco's response to a question by defense counsel regarding whether Delgreco had something to do with defendant's arrest. Delgreco responded: "I'm not sure if I went and picked him up from the jail because he was currently lodged at the Wayne County Jail on a separate charge." The second reference was made in response to a question by the prosecutor: "Obviously the defendant was at that time in custody; is that correct?" Delgreco responded, "Yes, on an unrelated charge."

It was not plain error for the trial court to fail to sua sponte strike Delgreco's initial reference to defendant's being in custody or provide the jury with a curative instruction. The court may have concluded that defense counsel chose not to object or to ask for an instruction so as to avoid calling the jury's attention to the testimony. While the prosecutor's subsequent reference to defendant's status when arrested was unnecessary, the officer's response did not refer to any specific offense for which defendant was being held in custody, and, as relevant to the felon-in-possession charge, the jury was otherwise properly provided with a certified document showing that defendant was previously convicted of a felony. Thus, the jury was not only otherwise aware that defendant had been previously arrested, but was aware that he had been previously convicted of a felony. The additional information that defendant was in custody on an unrelated matter at the time of his arrest for the instant offense did not provide additional information that was so prejudicial as to influence the jury. We conclude that defendant's substantial rights were not affected by the presentation of "other act" evidence.

Defendant also asserts that he was denied his constitutional right to effective assistance of counsel when counsel failed to object to, and seek a curative or limiting instruction regarding, the references made by the prosecutor and Delgreco to defendant's unrelated charge, and to the trial court's refusal to reread testimony that the jury requested to hear. We disagree.

In reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the

strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Counsel was not ineffective for failing to object to, and seek a curative or limiting instruction with respect to, references made about an unrelated charge of defendant. Counsel's failure to object to the references could be deemed sound trial strategy under the circumstances. Counsel might have held back an objection in an effort to prevent further attention being brought to the fact that defendant was in jail on an unrelated charge when he was arrested. Since defendant has done nothing to overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances, his claim of ineffective assistance of counsel on this ground must fail. *Toma, supra*, at 302. Moreover, we are satisfied that the references did not affect the outcome of the trial.

Counsel was also not ineffective for failing to object to the court's refusal to reread testimony sought by the deliberating jury. The decision whether to allow the jury to rehear testimony is discretionary with the trial court. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000), citing MCR 6.414(H).

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed. [MCR 6.414(H).]

Here, the trial court responded to the jury's request by stating that "it would take considerable time to do and so what I'm going to ask you to do . . . is go back and review your recollection more and see if you can come up with what you need I'm asking you to go back and try harder. Okay. It would take considerable time also to get that together." Nothing in the court's response suggested that review of the requested materials at a later time would be foreclosed. Therefore, there was nothing for counsel to object to, and thus, counsel was not ineffective for failing to object. *Ackerman, supra* at 455.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White