

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON CHRISTOPHER MOON,

Defendant-Appellant.

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UNPUBLISHED

February 15, 2007

No. 266327

Wayne Circuit Court

LC No. 05-004078-01

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), possession of a firearm during the commission of a felony, MCL 750.227b, and two counts of contributing to the delinquency of a minor, MCL 750.145. We affirm.

Defendant first argues on appeal that the trial court violated his right to confrontation by admitting out-of-court statements made by defendant's mother to the police. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), citing MRE 103(a)(1). Defendant objected below to the admission of his mother's statements on the basis of hearsay, but he never raised a challenge on the basis of his right to confrontation. This issue is therefore unpreserved for appeal and is reviewed for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Confrontation Clause of the Sixth Amendment bars the admission of "testimonial" statements of a witness who did not appear at trial, unless the witness was unavailable to testify, and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Supreme Court in *Crawford* did not provide a comprehensive definition of what constitutes "testimonial" evidence but recognized various statements that have been considered testimonial, including pretrial statements that the declarant would reasonably expect to be used in a prosecutorial manner, and statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 51.

In this case, defendant's mother told a police officer that the southeast bedroom belonged to defendant without ever being questioned by the police. The statements were made at the scene of a police raid. While the police did not interrogate her, defendant's mother implicated her son in a crime and she could reasonably expect that her statements would be used in a prosecutorial manner. Under these circumstances, an objective witness would reasonably believe that the statement would be available for use at a later trial. We therefore conclude that defendant's mother's statements were testimonial and it was clear error for them to be admitted without a showing that she was unavailable to testify and that defendant had a prior opportunity to cross-examine her.

Admitting testimonial evidence in violation of a defendant's right to confrontation is not a structural error requiring automatic reversal. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). Defendant bears the burden of showing he was prejudiced by the error, i.e., that the error affected the outcome of the lower court proceedings. *Carines, supra*. In this case, defendant's mother stated that the southeast bedroom belonged to defendant. If that statement had not been introduced, the outcome of the lower court proceeding would have been the same. Defendant confessed that the drugs and guns found in the bedroom were his. Defendant's name was on documents found in the room. Defendant was found with a key to the padlock to the door. In light of the overwhelming evidence establishing that the southeast bedroom belonged to defendant, we conclude that defendant was not prejudiced by the admission of his mother's statements.

Next, defendant argues that the trial court abused its discretion by denying his motion for a mistrial on the basis of the admission of evidence of other bad acts. This Court reviews a trial court's denial of a motion for mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

In this case, the police officer's testimony regarding the alleged gang activity and shooting were only mentioned once and never connected with defendant. Defendant could have requested a limiting instruction but apparently chose not to. Moreover, the evidence against defendant was overwhelming and included a confession and items connecting him to the room where the drugs and guns were found. We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial because there was no irregularity prejudicial to the rights of defendant or impairing his ability to get a fair trial.

Next, defendant argues that he was denied a fair trial because of prosecutorial misconduct. To properly preserve a claim of prosecutorial misconduct, a defendant must promptly and specifically object to the offensive conduct. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant failed to object to the alleged offensive conduct thus this issue is unpreserved. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial right." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant claims that the prosecutor committed misconduct by stating during closing arguments that "[e]verything that happens in this courtroom is tactical, it's strategy. It's done for you to look away from the truth because I'm suppose to present you the evidence. They're

suppose to create the reasonable doubt.” A defendant’s opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). “A prosecutor may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof.” *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, a prosecutor is entitled to fairly respond to issues raised by a defendant. *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003). Under the “fair response” doctrine, unless the prosecutor’s comments burden the defendant’s right not to testify, or shift the burden of disproving an element of the offense to the defendant, the comments are not improper. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995).

In this case, it seems clear that the prosecutor committed misconduct by stating that “[t]hey’re suppose to create the reasonable doubt.” That argument implies that defendant has something to prove and tends to shift the burden of proof. The prosecutor was not fairly responding to issues raised by defendant and we conclude that the prosecutor’s statement was clear error. But, defendant bears the burden of showing he was prejudiced by the prosecutorial misconduct. *Carines, supra*. Here, while the prosecutor did imply that defendant had to create reasonable doubt, he also said “I have to prove to you the case beyond a reasonable doubt.” Defense counsel also discussed the presumption of innocence and the burden on the prosecution. The trial court specifically instructed the jury that defendant was presumed to be innocent and not required to prove anything. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In light of the closing arguments and jury instructions, we conclude that defendant cannot meet his burden of showing prejudice.

Defendant also argues that the prosecutor committed misconduct by stating several times that defense counsel was engaged in diversionary tactics. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, the prosecutor’s comments must be considered in light of defense counsel’s comments and “an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

In this case, the prosecutor was not responding to any argument. The prosecutor brought up the argument that defense counsel would try to divert the jury’s attention from the truth in anticipation of what he felt defense counsel would argue and not in response to any particular argument. Because the prosecutor suggested that defense counsel was intentionally trying to mislead the jury, we conclude that he committed plain error. But, again, defendant bears the burden of showing he was prejudiced by the prosecutorial misconduct. *Carines, supra*. The evidence against defendant was overwhelming in this case and he cannot meet his burden of showing that the prosecutorial misconduct prejudiced him. Defendant confessed to possessing the drugs and guns. The drugs and guns were found in a locked room and defendant had the key.

Defendant's documents were found in the room with the drugs and guns. Two scales were also found in the room, one of which had cocaine residue on it.

Next, defendant argues that he was denied the effective assistance of counsel. We disagree. Although defendant moved this Court to remand for a *Ginther*<sup>1</sup> hearing, his motion was denied and a hearing was not conducted. Therefore, this Court's review of defendant's claim is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To prevail on a claim for ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant first argues that trial counsel was ineffective for failure to investigate, present evidence favorable to defendant, call witnesses or present a defense. As discussed above, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, including decisions regarding whether to call witnesses. *Id.*; *Rockey, supra*. Nothing in the record indicates what investigating defense counsel did or what more he could have learned. Nothing in the record indicates what any of the witnesses defendant wanted called would have testified to and, while defendant takes issue with trial counsel's decision to rely on weaknesses in the prosecution's case, nothing in the record indicates anything more trial counsel could have done. This Court's review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record and defendant's argument on the basis of trial counsel's failure to act finds no support in the record.

Defendant also argues that trial counsel was ineffective for failing to file a motion to quash the search warrant on the basis of a lack of probable cause. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Garza, supra*. Here, trial counsel used the search warrant to argue that someone other than defendant was dealing drugs out of the house. The police officer's affidavit leading to the warrant described an unknown black male, age 20 to 25, medium complexion, 5'9" and 190 pounds engaging in practices the police officer believed, on the basis of his experience, to be drug deals. During the trial, the police officer conceded that defendant did not match the description of the unknown male dealing drugs. While trial counsel's strategy failed, we conclude that trial counsel's performance was not deficient on the

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

basis that he chose to use the search warrant to suggest that defendant was innocent instead of attempting to quash it.

Defendant next argues that trial counsel was ineffective for failing to file a motion to determine whether defendant's confession was voluntary after defendant informed his counsel that the police threatened to charge his mother and take away her kids if defendant did not confess. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Defendant's claim that he was threatened into confessing is without merit on the basis of the record because the police denied making any such threats and defendant read, signed, and initialed his rights form. Trial counsel is not required to make meritless objections and we conclude that defendant was not denied the effective assistance of counsel because trial counsel failed to challenge defendant's confession.

Defendant argues that he was denied the effective assistance of counsel because trial counsel failed to request the removal of juror number 11 despite the fact she had several close friends who were attorneys or police officers. Defendant argues on appeal that juror number 11 should have been removed for cause. MCR 2.511(D) provides, in part, that "[t]he parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person . . . (2) is biased for or against a party or attorney; (3) shows a state of mind that will prevent the person from rendering a just verdict." Juror number 11 showed no bias against defendant or a state of mind that would prevent her from rendering a just verdict. The mere fact that she is friends with police officers is insufficient to get her dismissed for cause where she indicated she could judge police officers' credibility just as any ordinary citizen. Trial counsel cannot be ineffective for failing to make a meritless motion, and we conclude that defendant was not denied the effective assistance of counsel for failing to have juror number 11 dismissed for cause.

Defendant argues that he was denied the effective assistance of counsel by trial counsel's failure to submit the police officers' preliminary complaint reports into evidence. However, because the reports helped establish the elements of the crime by use of hearsay observations made by police officers investigating the crime, the report could not be admitted under MRE 803(8), the public records and reports exception to hearsay rule. *People v McDaniel*, 469 Mich 409, 413; 670 NW2d 659 (2003). MRE 803(8) specifically excludes matters observed by police officers and other law enforcement personnel in criminal cases. Preliminary complaint reports are prepared by officers and the police department with knowledge of possible future litigation and thus lack the trustworthiness necessary to be admissible under MRE 803(6), the business records exception to the hearsay rule. *McDaniel, supra* at 413-414. Moreover, trial counsel impeached the police officers by questioning them regarding the omissions in the police reports and the lack of good reasons for the omission, so defendant was not prejudiced by any failure to admit the reports.

Defendant also argues that he was denied the effective assistance of counsel by trial counsel's failure to object to repeated acts of prosecutorial misconduct. As discussed above, the prosecutor did commit misconduct in his closing arguments and, in light of that misconduct, defendant may be able to show that trial counsel's performance was deficient. However, defendant must also show that the deficient performance prejudiced the defense by showing the

existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra*. In light of the overwhelming evidence against defendant, the instances of prosecutorial misconduct did not prejudice him and, therefore, trial counsel's failure to object to the misconduct also did not prejudice defendant.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ William B. Murphy  
/s/ Patrick M. Meter