

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL JAMES ELLIOTT,

Defendant-Appellant.

UNPUBLISHED

May 13, 2008

No. 274131

Isabella Circuit Court

LC No. 06-000516-FH

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

Defendant Paul Elliot appeals as of right his conviction following a jury trial of aggravated stalking¹ and two counts of resisting arrest.² The trial court sentenced Elliot to concurrent jail terms of 12 months and five years probation on each of the three counts. We affirm.

I. Basic Facts And Procedural History

In the summer of 2004, Elliot met Candace Baldwin at an Amish dinner. At some point, they both became students at Central Michigan University (CMU). Baldwin testified that the relationship “started out just being friends . . . and then we lost touch for a couple months, then we were friends again for about three to four months,” and finally the relationship ended in June 2005, when she broke their engagement and attempted to returned her ring to Elliot. However, Elliot did not want the ring back. Baldwin then tried to give the ring back a second time with a neighbor as a witness, but discovered a few days later that Elliot had left the ring inside her apartment.

On October 3, 2005, Baldwin told Elliot that she wanted him to leave her alone. Baldwin testified that Elliot then threw her on the ground and held her down. Not surprisingly, Elliot gave a somewhat different version of the incident, stating that after Baldwin had walked away from him without speaking, the following occurred:

¹ MCL 750.411i.

² MCL 750.81d(1).

I said why won't you talk to me and I just kind of followed her for a while and I said why don't you talk to me and then I just stupidly, ignorantly grabbed her backpack, uh, spun her around and knocked her to the ground and I don't know how much I pushed or how much—I mean she lost her balance, how much I pushed, I don't know, just, it was just a horrible moment. She started screaming and I just, I just, at that point, I just dropped to my knees cause I knew exactly what she was thinking. . . .

Baldwin and Elliot both stated that this was the only incident of physical aggression that Elliot had engaged in against her.

On October 4, 2005, Baldwin took out a personal protection order (PPO) against Elliot that required him not come within sight of her, not have telephone contact with her, and not contact her through third parties. Elliot knew of the PPO. Baldwin stated that she initially felt safe with the PPO until Elliot continued to contact her.

Baldwin testified that approximately three to four weeks after the PPO was issued, Elliot said "Hi" to her and asked how she was doing as she was walking to class at CMU. As a result, Baldwin testified, she was unable to concentrate and subsequently erred in a class presentation she had to do that day. For a few days, Elliot also emailed her pretending to be Melissa Williams, a friend of Baldwin's. Because Baldwin believed the emails were from Williams, she responded to them. Baldwin indicated that she would never have opened the emails if she had known they were from Elliot. One of the emails indicated that Williams was trying to get Baldwin to talk with Elliot. Baldwin responded, "no, I can't talk to [Elliot], it would totally defeat the purpose of having a PPO against them [sic]." Although there was nothing overtly threatening in the emails, when Baldwin found out the emails were from Elliot she "freaked right out" and wondered "what he was going to come up with next" to try and contact her.

Baldwin also received text messages from Elliot between September 2005, and January or February 2006. Although the content was "[j]ust silly things," Baldwin testified that she was fearful. Elliot admitted to sending Baldwin a text message saying "Happy Halloween" because he missed her and her son. Baldwin changed her cell phone in February or March of 2006, to prevent receipt of future messages.

According to Baldwin, after the text messaging stopped, Elliot still spoke to her on the CMU campus. In February 2006, when the PPO was still in effect, Elliot approached her as she stood in front of the bookstore and said, "Hi, how are you doing?" Baldwin did not respond, but testified that this incident made her fearful and caused her heart to pound "really hard" because of Elliot's previous attack.

Baldwin also recounted an incident where she was leaving CMU's Brooks Hall and noticed Elliot "just standing at the library looking around." She "darted back" into the building to avoid him and hoped he had not seen her. Baldwin testified that Elliot watched Brooks Hall the entire time he was walking along, before "dart[ing] behind a bush or something." She said that this incident caused her to constantly watch over her shoulder because she was worried Elliot would come up behind her and "throw [her] on the ground again." Baldwin indicated that it was possible that Elliot was at the library because he worked there, and she did not know his

working hours. Elliot, however, testified that he was not pursuing Baldwin on campus and that he only said "Hi" on previous occasions because he was nervous when he walked past her.

After the incident at Brooks Hall, Elliot contacted Baldwin twice by phone on March 15, 2006. According to Baldwin, Elliot first called around 9:00 p.m. as she was putting her son to bed. Baldwin initially did not recognize Elliot's voice, but when she realized it was him, she asked what he was doing calling her, at which time Elliot's tone became hostile and he asked her why she was "trying to start trouble." Baldwin hung up on Elliot, called the police, and told them about the conversation. Elliot testified that this call to Baldwin was a mistake because he was actually trying to call Ronald McKay, Baldwin's neighbor. However, although he realized his mistake, he still talked with her.

That same evening, CMU Police Department Officers Scott Malloy and Sergeant Christopher Pryor were dispatched to Elliot's apartment regarding a possible PPO violation. They arrived simultaneously in separate marked vehicles, and both were in full uniform. Elliot let them into the apartment. Elliot initially denied violating the PPO but, according to Pryor's testimony, later admitted to calling Baldwin because he wanted Baldwin to quit harassing him. At trial, Elliot maintained that the call was an accident, but admitted that he never told the officers the call was an accident because they did not ask.

Sergeant Pryor arrested Elliot, but because Elliot was in his pajamas, the police permitted him to go upstairs to change, accompanying him for their own safety to make sure he did not get a weapon. Once upstairs, Elliot "passively resisted" by lying down on his bed and telling the officers he was not going to go with them but would "take care of this it tomorrow." The officers told Elliot that he had to come with them, but he continued to lie on the bed. According to Elliot, he was tired, upset, not thinking, and just needed a minute to collect his thoughts. Elliot described his statement as a request to handle things later and said that after the officers said no, he stood up as they ordered.

According to the officers, however, they physically grabbed Elliot, and he began to actively resist. After the officers pulled him off the bed, Elliot clenched his arms up in front to keep himself from being handcuffed. Elliot admitted he made a brief motion like that, but explained that he thought his muscles tightened from an involuntary muscle response when they grabbed him. Malloy "applied the pressure point," and the officers were eventually able to cuff Elliot's hands behind his back. Once Elliot was cuffed, he stopped resisting. He told the officers that he wanted to change his clothes, but Pryor told him that was no longer an option and had him transported to the Isabella County Jail.

Around 11:30 p.m. that evening, Baldwin received a call from a "1-888" number asking if she would accept a collect call from Elliot, but she hung up without accepting the charge. Thomas Recker, jail administrator for Isabella County, provided phone records showing a call from a jail cell occupied exclusively by Elliot to Baldwin's landline at 11:27 p.m. lasting one minute and ten seconds. At trial, Elliot admitted to making this call.

Baldwin also testified that she and William Comer began dating around August or September 2005, and that Elliot sent emails to Comer to try and break them up. Baldwin stated that at one time she had a hotmail email account but she had shut it off in early 2006. An email sent from that account, purporting to be Baldwin professing her love for Elliot, was sent to

Elliot's account on February 13, 2006. The e-mail was then forwarded it to Comer. According to Comer, the contents of the emails from Elliot to him illustrated both the adverse affect Elliot was having on Baldwin and Elliot's knowledge of them. They included statements from Elliot such as: "I couldn't believe the things she said especially . . . saying how she's so afraid of me. That explains so much why she has been behaving so irrationally the last few months . . ." and that he should not "have been sneaky in trying to e-mail her and text-mex [sic] her in November no matter how harmless it seemed. I know it unnerved her and made her more afraid of me. I saw the fear on campus and it scared me back."

McKay testified that in September 2005, he had a telephone conversation with Elliot about Baldwin. According to McKay, Elliot got angrier and angrier the more he talked, ultimately threatening to kill Baldwin. McKay told Elliot he was going to call the sheriff, and Elliot told McKay to go ahead and call. McKay testified that when he hung up and contacted the sheriff, Elliot was on another line speaking with a different deputy. After talking with the sheriff, McKay told Baldwin about the conversation "so that she could protect herself." Although Elliot admitted that he told McKay he was going to kill Baldwin, he also said that he was just hurt and did not mean it. Elliot testified that he called McKay back and also called Baldwin because he was "horrified," presumably by what he said.

In March or April 2006, McKay had another telephone conversation with Elliot during which he threatened to sue McKay, Baldwin, Comer and "anybody else that he could sue" and threatened to hurt Baldwin so that she could not marry anyone else. McKay eventually informed Baldwin about this conversation, about four days after it occurred. After initially denying that he said he was going to hurt Baldwin, Elliot later testified that he might have said something like that to McKay.

Elizabeth Pilling, a friend of Baldwin's who was an apartment manager at Elliot's apartment complex also testified at trial. Pilling considered Elliot her friend initially, but that changed after he indicated that there was a PPO he was breaking. Pilling testified that Elliot told her that he was sending emails to Baldwin by posing as Williams to get information from Baldwin because he could not contact her under the terms of the PPO. Pilling's impression was that Elliot thought the PPO "was kind of a joke" and did not think it was important for him to follow it. Elliot also sent emails to Pilling with statements indicating that he knew he was having an adverse affect on Baldwin. An email dated March 17, 2006, stated, "I hate that she feels so fearful and anxious around me." Another email, dated January 27, 2006, stated, "I'm sure she is wondering just who I am, the one full and sweet friend she once loved and considered marrying or the angry, jealous and selfish person who . . . selfishly hurt her so badly that she can't stand to be around me for her own peace of mind."

After the jury returned its guilty verdicts, Elliot filed a motion for new trial alleging the same errors now claimed on appeal. The trial court denied all of Elliot's claims of error, and this appeal ensued.

II. Amending The Information

A. Waiver

Elliot claims that the trial court erred by amending the date on the information at the end of trial from March 15, 2006, to the time period between September 2005 and March 2006. Elliot contacted Baldwin by telephone twice on March 15. Other contacts occurring during the expanded time frame include text messages, email messages, indirect communication through third parties, and direct personal contact on the CMU campus. Elliot argues that while he was prepared to defend based on the two March 15 phone calls, he was not prepared to defend against the other alleged instances of stalking occurring during the expanded time frame. There was discussion on amendment of the information during a sidebar bench conference that was not transcribed. However, the trial court gave an amended jury instruction with the expanded time frame immediately after the conference. Thereafter, defense counsel indicated that he had no objections to the jury instructions. We conclude that under these circumstances, the issue has been waived.³

B. The Amendment

In any event, we see no error in the amendment of the information. Under MCL 767.76, a trial court has the discretion to amend an information before, during, or after a trial so long as the amendment does not unduly prejudice the defendant.⁴ A defendant is unduly prejudiced by an amendment to an information if it unfairly surprises the defendant, causes the defendant to have insufficient notice of the charges, or deprives the defendant of a sufficient opportunity to present a defense.⁵

Our review of the record indicates that defense counsel was fully aware that contacts other than the two phone calls were going to be presented at trial and that Elliot had a sufficient opportunity to defend. Defense counsel specifically referred to the email communications in his opening statement and his cross-examination of the various witnesses focused on the contents of the other contacts and whether there was anything threatening about them. At no time did defense counsel ever object or indicate any type of surprise from the evidence being presented. Moreover, defense counsel argued the following in closing:

[T]here was a lot of contact and I, and we're not going to hide that. We didn't try to hide that yesterday. *We knew that, we knew that there was going to be plenty of evidence showing several instances of contact.* We're, we're just saying that the contact happened, yes. Should it have caused her or a reasonable person to suffer emotional distress, that's questionable, okay. There may be room for doubt there. [Emphasis added.]

³ *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

⁴ *People v McGhee*, 268 Mich App 600, 629; 709 NW2d 595 (2005).

⁵ *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Consequently, we conclude that there was no surprise, there was sufficient notice, and Elliot was not deprived of his opportunity to present a defense.⁶

C. Effect On Plea Bargaining

Elliot argues that he was prejudiced because had he known other contacts would be used at trial, he would have accepted a plea bargain. We need not address this issue because we have been provided no evidence that a plea was offered or rejected for the reason cited. “Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.”⁷ Furthermore, Elliot has not shown that trial would not have proceeded even if he had agreed to the alleged plea, as there is “no absolute right to have a guilty plea accepted.”⁸

D. Prior Bad Acts

Elliot also argues that the evidence of other unconsented contacts was improperly admitted “prior bad acts” evidence under MRE 404(b). Consistent with our conclusion that the information was properly amended, it follows that the evidence of other unconsented contacts was properly admitted as conduct alleged to constitute the charged offense of aggravated stalking and that there was no failure to provide notice under MRE 404(b)(2).

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Elliot claims ineffective assistance of counsel based on the defense counsel’s following alleged failures: (1) failure to object to prior bad act evidence or alternatively develop free speech arguments as to third parties; (2) failure to object to the amendment of the information or alternatively to request a continuance; (3) failure to offer the amended PPO; (4) failure to object to the admission of the original PPO; (5) failure to object to leading questions; (6) failure to object to the prosecution’s closing arguments; and (7) failure to request a unanimity jury instruction. Our review of this issue is limited to errors apparent on the existing record.⁹

B. Legal Standards

For trial counsel’s performance to be deemed constitutionally ineffective, it must fall below an objective standard of reasonableness and, but for counsel’s errors, there must be a

⁶ *Id.*

⁷ *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted).

⁸ *People v Grove*, 455 Mich 439, 461; 566 NW2d 547 (1997) (citation omitted).

⁹ *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

reasonable probability that the outcome of trial could be different.¹⁰ This Court does not assess counsel's competence based on hindsight and will not second-guess matters of trial strategy.¹¹

C. Applying The Standards

Because there was no error in amending the information, defense counsel cannot be faulted for failing to challenge the amendment or for failing to raise an other-acts objection to the admission of evidence regarding the additional contact.¹² Elliot's alternative position that defense counsel should have raised a free speech claim regarding the contacts with third parties is also without merit. We have previously held that Michigan's anti-stalking laws do not violate a defendant's right to free speech under the United States and Michigan Constitutions,¹³ and that communications sent to third parties that were intended to reach the person protected by a PPO constituted a violation of the PPO and did not infringe on violator's freedom of speech.¹⁴ Accordingly, defense counsel was not ineffective for failing to advocate this meritless position.¹⁵

Elliot also asserts that counsel should have offered the amended PPO into evidence to refute one of the unconsented contacts and should have objected to the admission of the original PPO. Even assuming that if the amended PPO had been offered it would have refuted one of the alleged contacts, Elliot has failed to show that there was a reasonable probability that the outcome of trial could be different. Evidence of conversations at the campus bookstore, emails, text messages, and telephone calls in violation of the PPO could form the basis of the stalking conviction.¹⁶

We also conclude that the original PPO was properly admitted. Elliot has not provided a copy of the PPO and none was found in the lower court record, so we are unable to determine what statements were contained in the PPO to determine whether they constituted hearsay.¹⁷ Even so, the admission of the PPO was proper under MCL 600.2106, which provides that "[a] copy of any order . . . of any court of record in this state . . . shall be admissible in evidence in any court in this state, and shall be prima facie evidence of . . . all facts recited therein" Because the PPO was properly admitted, defense counsel did not err by failing to object to its admission.¹⁸

¹⁰ *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

¹¹ *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

¹² *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

¹³ *People v White*, 212 Mich App 298, 309; 536 NW2d 876 (1995).

¹⁴ *Brandt v Brandt*, 250 Mich App 68, 73-74; 645 NW2d 327 (2002).

¹⁵ *Snider, supra* at 425.

¹⁶ *Knapp, supra* at 385.

¹⁷ See *Traylor, supra* at 464.

¹⁸ *Fike, supra* at 182.

Elliot asserts that counsel should have objected to questions posed by the prosecutor to Baldwin that Elliot characterizes as leading. While all of the challenged questions asked Baldwin whether she possessed a certain emotional state at a given time, they did not necessarily suggest the desired answer. Most of the questions begin with interrogatory words like “when” and “were” and “did,” which suggest that the prosecutor was seeking information as opposed to suggesting an answer.¹⁹ In fact, more than one of the responses coming from Baldwin went beyond mere acquiescence to a proposition proposed in the question, which indicates that she was not simply parroting back an answer suggested by the question. Moreover, the context in which some of the questions were posed shows that they were follow-up questions designed to develop her testimony in terms of the requirements of the statute.²⁰ Finally, we note that MRE 611(c)(1) indicates that leading questions “should not be used on . . . direct examination,” which is short of a categorical statement that such questions “shall not be used.” Accordingly, we conclude that Elliot has failed to establish that he was denied the effective assistance of counsel with respect to the alleged leading questioning by the prosecutor. Again, counsel cannot be faulted for failing to raise a futile objection.²¹

Elliot asserts that defense counsel failed to object to the prosecutor’s conduct during closing arguments and that this constituted ineffective assistance of counsel. We address the propriety of the prosecutor’s actions below and conclude that no misconduct occurred in this respect. Accordingly, defense counsel was not ineffective for failing to raise futile objections.²²

Elliot also argues that defense counsel should have requested a jury instruction regarding unanimity. Elliot’s separate challenge to the failure to provide such an instruction was waived.²³ Nevertheless, our analysis of this issue through the ineffective assistance rubric shows that the instruction was not required under the circumstances. Criminal defendants are entitled to unanimous jury verdicts, and the trial court must properly instruct the jury accordingly.²⁴ Elliot received a general unanimity instruction, and the jurors were polled after the verdict. A more detailed unanimity instruction is not required simply because a single charge could be based on more than one underlying event.²⁵ When there is evidence of multiple acts used to establish a single charged offense, a general unanimity instruction is sufficient unless:

- 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs

¹⁹ Imwinkelried, *Evidentiary Distinctions* (1993), p 102.

²⁰ See MCL 750.411i(1)(d). This is allowed under MRE 611(c)(1).

²¹ *Fike, supra* at 182.

²² *Id.*

²³ *Carter, supra* at 215.

²⁴ MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994).

²⁵ *Id.* at 512.

regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt.^[26]

We note that in *People v Cooks*,²⁷ a second-degree criminal sexual conduct case, the Michigan Supreme Court rejected the need for a specific unanimity instruction, noting that the defendant had not presented a separate defense for the multiple acts presented to the jury or offered materially distinct evidence of impeachment regarding any particular act. In the present case, Elliot admitted each contact, and the testimony was generally consistent regarding the content of the communications. Elliot's defense was that those contacts should not have caused a reasonable person to suffer emotional distress. In other words, Elliot presented the same defense for each of the acts and did not offer any impeachment of the acts, having admitted that each of the contacts occurred. Accordingly, no unanimity instruction was necessary²⁸ and defense counsel cannot be faulted for failing to request one.²⁹

IV. Prosecutorial Misconduct

A. Standard Of Review

Elliot claims various actions by the prosecutor constituted prosecutorial misconduct that, both individually and cumulatively, deprived him a fair trial. Because Elliot did not object to any of these issues during trial, we review for plain error affecting substantial rights.³⁰ "Review . . . is precluded . . . except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice."³¹

B. The October 3, 2005 Incident

Elliot claims that the prosecutor improperly referred to a physical altercation occurring between him and Baldwin on the CMU campus on October 3, 2005, and mischaracterized the facts of the incident. As noted above, the incident led to Baldwin obtaining the PPO. The factual circumstances surrounding the October 3 incident not only addressed why the PPO was issued in the first place and the obligation of Elliot not to have contact with Baldwin, but were also relevant to the issues of whether Elliot acted purposefully and employed a common plan or scheme with respect to the stalking charge. Indeed, the trial court instructed the jury that evidence regarding the October 3 incident should only be used for these purposes. "It is well established that jurors are presumed to follow their instructions."³²

²⁶ *Id.* at 524.

²⁷ *Cooks, supra* at 528.

²⁸ *Id.* at 512

²⁹ *Fike, supra* at 182.

³⁰ *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

³¹ *Id.*

³² *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

The record also does not support Elliot’s claim that, in stating that he had beaten Baldwin up on October 3, the prosecutor was mischaracterizing the evidence. Baldwin described the incident as an attack where Elliot threw her on the ground and held her down. Elliot described the incident as grabbing the Baldwin’s backpack, spinning her around, and knocking her to the ground. “[P]rosecutors may use ‘hard language’ when it is supported by evidence.”³³ Accordingly, the prosecutor committed no misconduct.

C. Facts Not In Evidence

Elliot argues that the prosecution argued facts not in evidence during its closing arguments. The prosecutor argued in relevant part as follows:

The one point I will touch on is . . . what [defense counsel] says—[that] [Elliot]’s conduct was insufficient to cause emotional distress. If I show up outside your classroom every day staring in the window smiling at you and just keep doing it, even after you told me not to. I show up at your restaurant and sit and have my cup of coffee and just sit there and smile at you. If I show up to your place of employment, the post office, and just stand out in the lobby and mention a few things that are personal to you and just sit there and smile or your factor [sic] or whatever. And you tell me to go away. You get a court order to tell me to stay away and I still come back to see you—is that going to creep you out? Is that going to cause you—what do I have to do to get away from [the prosecutor]? What is it going to take for him to leave me alone. Is that going to cause you emotional distress—yes, it would. I don’t suspect I’d ever do something like that but use your position as jurors, as that group of reasonable people, and decide whether or not this continuous course of conduct, when considered in its totality would cause you, as reasonable people, putting on the shoes of . . . [Baldwin] and say would this have caused her to have emotional distress?

Elliot rightly points out that there is no evidence in the record of the conduct described by the prosecutor. However, the prosecutor was not arguing the specific evidence at this point. The prosecutor clearly created a hypothetical where he, not Elliot, was the purported stalker. Moreover, the argument was made in response to defense counsel’s repeated statements that the Elliot’s various individual contacts did not rise to a level as to create emotional distress.

Although the distinction between when the hypothetical ended and when the prosecutor returned to the present case is unclear, it is highly unlikely that any jurors thought the prosecutor was actually indicating that Elliot had done the hypothesized events. The jurors were also instructed that the closing arguments were not evidence, and again jurors are presumed to follow their instructions.³⁴

³³ *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

³⁴ *Graves, supra* at 486.

D. Hearsay

Elliot asserts that the prosecutor committed misconduct by eliciting hearsay testimony regarding why Baldwin decided to obtain a PPO. The prosecutor asked, “Why did you feel it was necessary to get a PPO?” to which she responded, “Well, because on Labor Day weekend of that year, [Elliot] had called up my neighbor and had threatened to kill me . . . and that scared me and my neighbor was scared for me.” This statement is not hearsay, as it was intended to show its effect on Baldwin (taking out a PPO), and not for the truth of the matter asserted. Accordingly, it was not error for the prosecution to elicit the testimony.³⁵

E. 404(b) Evidence And Leading Questions

We have previously found no error on Elliot’s claims regarding leading questions and failure to provide prior notice of 404(b) evidence; therefore, his claim of prosecutorial misconduct predicated on these events is without merit.

F. Denigration

Elliot’s final claim of prosecutorial misconduct is an alleged denigration of defendant during closing arguments. Specifically, Elliot asserts that the prosecutor called him “bupkis” during the following argument:

If you were unjustly being arrested for something, don’t you think you would pipe up, ladies and gentlemen, and say, hey, wait a minute, I know what it looks like, but it was an honest mistake. I accidentally hit the redial button or I accidentally hit the wrong button on my menu or whatever the case may be—bupkis (sp)—didn’t say a word. That does not make sense.

Bupkus, also spelled bupkes or bubkes, has three definitions: “the least amount,” “beans,” or “nothing,” each of which refers to a quantity.³⁶ These definitions are consistent with the prosecutor’s representation to the trial court that the reference was to Elliot’s failure to take action. Although not a particularly elegant turn of phrase, the prosecutor’s statement does not denigrate Elliot and, therefore, does not rise to the level of prosecutorial misconduct.

G. Cumulative Effect

We conclude that Elliot’s claim of cumulative effect of prosecutorial misconduct must also fail. Although the cumulative effect of several errors may warrant a new trial,³⁷ only actual

³⁵ MRE 801(c).

³⁶ Meriam-Webster, <http://www.merriam-webster.com/dictionary/bupkus>.

³⁷ *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

errors are utilized to determine their cumulative effect.³⁸ As Elliot has failed to establish any misconduct, there is nothing to aggregate to create a cumulative effect.

Similarly, Elliot's claim that the numerous instances of prosecutorial misconduct coupled with the ineffective assistance of counsel by trial counsel combined to deny him a fair trial must also fail. Reversal on the ground of cumulative error requires errors of consequence that are so seriously prejudicial that the defendant was denied a fair trial.³⁹ Absent a determination that prejudicial error occurred, there can be no cumulative effect of errors that requires reversal.⁴⁰ Because we found no prejudicial error, reversal is not required.⁴¹

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

³⁸ *Rice, supra* at 448.

³⁹ *Knapp, supra* at 387-388.

⁴⁰ *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (2000).

⁴¹ *Id.*