

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 19, 2013

v

JAMES TILLMAN,

Defendant-Appellant.

No. 307901
Wayne Circuit Court
LC No. 11-002363-FH

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (person at least 13 and under 16 years of age). He was sentenced, as a fourth habitual offender, MCL 769.12, to 10 to 20 years' imprisonment. We affirm.

This case arises out of events that transpired at a house located at 14834 Sussex Street in Detroit. Defendant first argues that his forehead tattoo was irrelevant and unfairly prejudicial "other acts" evidence, and it should have been hidden from the jury. We disagree.

"Generally, an issue is not properly preserved unless a party raises the issue before the trial court and the trial court addresses and decides the issue." *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Defendant's tattoo was the subject of discussion during jury selection, but defendant's trial counsel did not object to the court's refusal to permit defendant to conceal his tattoo with a bandage or makeup. Therefore, this issue is not preserved for appellate review.

"The effect of an unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights." *Pipes*, 475 Mich at 274. Under a plain error analysis, "defendant must establish (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights." *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). The third factor "requires a showing of prejudice—that the error affected the outcome of the trial proceedings." *Pipes*, 475 Mich at 279. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Kowalski*, 489 Mich at 505 (internal quotations omitted).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” MRE 404(b)(1); *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000). Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” MRE 403; *People v Mardlin*, 487 Mich 609, 616; 790 NW2d 607 (2010).

The trial court’s refusal to permit defendant to conceal his forehead tattoo from the jurors was not plain error. It was not an evidentiary decision, as neither party offered it into evidence. As the trial court pointed out, defendant’s trial counsel made no motion in limine for permission to alter her client’s appearance. Further, the court expressed its concern that jurors would unduly speculate about the origin of defendant’s apparent injury, stating “I’m not going to have these jurors thinking we did anything to this man.” Neither party mentioned the tattoo in the presence of the jury.

Defendant’s references to the Michigan Rules of Evidence are unavailing. MRE 403 discusses otherwise “relevant evidence,” but defendant’s tattoo was neither relevant evidence nor evidence; even if it was, no motion for its exclusion was made and denied. The proscription of “prior bad acts” in MRE 404(b)(1) does not apply because a tattoo is not an act. Defendant argues that the particular tattoo on his forehead, in the shape of a teardrop, constituted “other bad acts evidence” because the jurors could have inferred, with the assistance of their own references to popular culture, that defendant committed a prior bad act, namely murder. The tattoo was not “other bad acts evidence,” first, because it was not evidence, and second, because it was not an “act,” and the argument that jurors would have identified defendant as a murderer based on the tattoo is speculative. Both sources defendant cites on the subject of teardrop-shaped tattoos indicate that they have more than one meaning, including “that the bearer was owned by a fellow prisoner,” that “the wearer has killed someone,” “the number of years served in prison,” or “the loss of a loved one or fellow gang member.”

Likening this issue to cases discussing criminal defendants who were compelled to wear prison clothing and/or shackles during jury trials, defendant argues that the forced display of his tattoo violated his due process rights. Defendant cites *Estelle v Williams*, 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976), in which the United States Supreme Court said that a state may not compel a defendant to stand trial in prison clothes, because “the constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment.” *Id.* at 504-505. The Supreme Court clarified, in *Carey v Musladin*, 549 US 70, 76; 127 S Ct 649; 166 L Ed 2d 482 (2006), that “part of the legal test of *Williams* and *Flynn*—asking whether the practices furthered an essential state interest—suggests that those cases apply only to state-sponsored practices.” Further, no such pernicious effect exists in this case, where, as noted above, there is no indication that the jurors would have linked defendant’s tattoo to a prior murder. Even if the trial court’s decision was erroneous, the probability that defendant was unfairly prejudiced is minimal, as the record contains independent evidence of his guilt, including testimony of the then-14-year-old complainant and circumstantial evidence that defendant later admitted the offense to Ronsile Burns, the complainant’s older cousin, in telephone and in-person conversations.

Defendant next argues that the prosecutor violated defendant’s due process rights by eliciting unfairly prejudicial testimony about defendant’s prior incarceration, and by seeking to

inflame the jurors' passions by suggesting during closing argument that defendant infected the complainant with hepatitis. We disagree.

“Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Neither the testimony on defendant's prior incarceration nor the prosecutor's closing argument comments were objected to. Therefore, neither issue is preserved for appellate review.

“To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights.” *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). “Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights.” *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011).

TESTIMONY CONCERNING DEFENDANT'S PRIOR INCARCERATION

“A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence.” *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). “As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony.” *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). “A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.” *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999).

During the prosecution's case-in-chief, Burns was asked, “How did you get to know each other?”, referring to defendant. She responded, “We met each other working at Outback Steakhouse when I was seventeen, and we just got close from then. And we ended up losing contact because I think he went to jail or something.” To the extent that Burns speculated on why she and defendant stopped speaking, that answer did not respond to the prosecutor's question, and veered into narrative. It was not elicited by the prosecution, and defense counsel did not object. Any prejudicial effect could have been alleviated by way of curative instruction to jurors admonishing them to disregard that part of Burns's answer. Jurors are presumed to follow the trial court's instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011).

Defendant's citation of MRE 404(b), governing the admissibility of prior bad acts, is again misplaced, because the prosecution did not seek to admit evidence of defendant's incarceration. Front-loaded as it was with responsive information on the subject of how Burns and defendant met, Burns's answer contained no indication that it would take the turn that it did, affording defense counsel and the trial court little opportunity to anticipate it and prevent its disclosure.

THE PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT

“A defendant’s opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant’s guilt or innocence.” *Dobek*, 274 Mich App at 63-64. “A prosecutor’s comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial.” *Id.* at 64. “Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel.” *Id.*

During closing argument, defendant’s trial counsel said, “[W]hen you look at the medical records, you’ll see that [the complainant] has hepatitis A, and [defendant] could have been tested for that. So, there were plenty of things that could have been done to exonerate” defendant. In rebuttal, the prosecutor said:

There is absolutely no evidence on this record . . . for you to consider about the defendant’s hepatitis status; whether he has it, whether he doesn’t. Her telling you he doesn’t have it is not evidence. There is nothing for you to consider. . . .

On page 30 of the medical records there is a blood work [sic] done where some testing of the complainant was done. Some testing shows some type of reaction for either hepatitis A, hepatitis B. A confirmation for B shows that it’s negative.

There was no medical testimony in this case. If you have any common sense and reason about this type of hepatitis A or B, and whether you think that’s important or not in this case [sic].

Defense counsel implied that, had defendant been tested for hepatitis, the result may have been negative; therefore, following an ambitious inferential leap,¹ defendant had no sexual contact with the complainant. On appeal, defendant changes course, now arguing that the prosecutor improperly suggested that he had hepatitis A, and infected the complainant with it. The prosecutor made no such suggestion. The only argument discernible from the prosecutor’s brief mention of hepatitis A is in rebuttal to defense counsel’s suggestion that, had defendant been tested, he would have tested negative. Even if this were independently improper, “[o]therwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel.” *Dobek*, 274 Mich App at 63-64.

¹ According to WebMD, “Hepatitis A spreads via fecal-oral contact, which can occur if there is direct oral-anal contact or contact with fingers or objects that have been in or near the anus of an infected person.” Hepatitis and Sex: Frequently Asked Questions, WebMD, available at <http://www.webmd.com/hepatitis/hepatitis-and-sex-frequently-asked-questions>. Last accessed December 20, 2012.

Defendant next argues that his trial counsel was ineffective for failing to move in limine for an order to cover defendant's facial tattoo, failing to object to testimony about defendant's prior incarceration, and failing to object to the prosecutor's suggestion that defendant infected the complainant with hepatitis. Again, we disagree.

To preserve for appellate review a claim of ineffective assistance of counsel, a defendant must object to his counsel's performance at the trial court level and establish a record of facts by way of a *Ginther* hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). That was not done in this case. Accordingly, defendant's three claims of ineffective assistance of counsel are unpreserved.

"Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court's findings of fact. We review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012). An unpreserved claim of ineffective assistance of counsel is limited to the facts apparent in the lower court record. *Fike*, 228 Mich App at 181.

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Vaughn*, 491 Mich at 670, and is given "wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "[D]eclining to raise objections . . . can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. "A failed strategy does not constitute deficient performance." *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Defendant argues that his trial counsel was ineffective for failing to move in limine for permission to conceal the tattoo on his face. Defense counsel's performance did not fall below "an objective standard of reasonableness under the prevailing professional norms," *Uphaus*, 278 Mich App at 185, because, as discussed above, the several accepted meanings of defendant's teardrop tattoo make speculative the contention that defendant was prejudiced by its exposure to the jury.

Further, there is no "reasonable probability" that defendant would have been acquitted had defense counsel moved for permission to conceal the tattoo. See *Uphaus*, 278 Mich App at 185. Had a motion been filed in advance, it is possible that it would have been granted. The trial court's refusal to grant a continuance to allow defendant to apply makeup to his tattoo seems to

have been motivated more out of procedural concerns, including defense counsel's affront to the court by asking security officers about makeup instead of the court itself,² and remaining on schedule,³ than out of disagreement with the substance of defendant's worry that the tattoo would unfairly prejudice him. However, more doubtful is the argument that the motion would have affected the outcome of the trial. Even if the jurors did not see his tattoo, they would still have heard the complainant testify that defendant "forced" her to perform oral sex on him, and that he later admitted as much to Burns in two conversations. As the trial court instructed the jury, the complainant's testimony, by itself, was sufficient to convict defendant if they believed it. Defendant therefore cannot show that his trial counsel's failure to seek advance permission to conceal his tattoo would have changed the outcome of the trial.

Defendant also argues that his trial counsel was ineffective for failing to object to testimony about defendant's prior incarceration, and failing to object to the prosecutor's suggestion that defendant infected the complainant with hepatitis. In neither of these instances did counsel's performance fall below an "objective standard of reasonableness." *Uphaus*, 278 Mich App at 185. "[D]eclining to raise objections . . . can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. Defense counsel may have declined to object to Burns's volunteered testimony about defendant's prior incarceration because to have done so would have drawn undue attention to it.

During rebuttal, the prosecutor responded to defense counsel's theory that the police inadequately investigated the case, by, for instance, failing to have defendant tested for hepatitis. Defense counsel had no basis for objecting to the prosecutor's rebuttal. Contrary to defendant's argument on appeal, the prosecutor was not suggesting that defendant passed the virus on to the complainant; she was rejecting defense counsel's theory that testing negative for hepatitis A would have exonerated defendant. Not objecting to this portion of the prosecutor's rebuttal was within an "objective standard of reasonableness under the prevailing professional norms." *Uphaus*, 278 Mich App at 185.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad

² "So, you weren't even going to tell me about the makeup, were you?"

³ "I'm not going to take one more second with this. We're going to bring our jurors out."