STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ALAN HECK,

Defendant-Appellant.

UNPUBLISHED
August 20, 2020

No. 348959
Monroe Circuit Court
LC No. 18-244824-FH

Before: GLEICHER, P.J., and STEPHENS and CAMERON, JJ.

PER CURIAM.

A jury convicted Keith Alan Heck of possession of a controlled substance analogue, Suboxone (buprenorphine), MCL 333.7403(1). Defendant raises several challenges to the prosecutor's conduct at trial, the effectiveness of defense counsel, and the court's jury instructions. We discern no prejudicial error and affirm.

I. BACKGROUND

On September 11, 2018, Heck's probation officer, a probation supervisor, and a police officer came to Heck's home to conduct a "compliance check." Heck was at work and his wife, Shauna, allowed the officers entry. The officers searched the Heck home and found two packs of Suboxone on the couple's bedside table—one opened and partially used. No one in the home had a valid prescription for the substance. Shauna claimed that the substance belonged to her and that Heck did not know it was in the house. However, Heck contradicted Shauna when he arrived home. Moreover, the next day, Heck told his probation officer that the Suboxone belonged to him and that he had been using Suboxone and cocaine.

II. PROSECUTORIAL MISCONDUCT

Heck raises a series of challenges to the prosecutor's conduct at trial. Heck preserved only one of his challenges by raising a contemporaneous objection. See *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Generally, "[i]ssues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "Where a defendant fails to object to

an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

A

Heck contends for the first time on appeal that the prosecutor improperly used a peremptory challenge to remove the only African-American individual from the jury venire, in contravention of *Batson v Kentucky*, 476 US 79, 106 S Ct 1712, 90 L Ed 2d (1986). "To establish a prima facie case of discrimination based on race," the defendant must establish that (1) the subject venire member was "a member of a cognizable racial group"; (2) the prosecutor exercised "a peremptory challenge to exclude a member of a certain racial group from the jury pool"; and (3) "all the relevant circumstances raise an inference that" the prosecutor "excluded the prospective juror on the basis of race." *People v Knight*, 473 Mich 324, 336; 701 NW2d 715 (2005).

Because Heck failed to develop the record, we cannot confirm that the subject juror was African American or that the prosecutor was driven by a discriminatory motive. Heck thereby forfeited his challenge. See *People v Jackson*, 313 Mich App 409, 430; 884 NW2d 297 (2015). In any event, it is clear on this record that the prosecutor excused the subject juror because of his answer to the following hypothetical:

> [L]et's say that you're hypothetically chosen as a juror on a speeding ticket case and the judge instructs you that it is against the law to go even one mile per hour over the speed limit and you as a juror listen to the witnesses and it is proven to you beyond a reasonable doubt that the defendant in that case was traveling 56 miles per hour in a 55 mile per hour speed zone. So, you're convinced that they were going at least one mile per hour and the judge tells you that's against the law. In that type of situation, do you think you'd be able to follow the law and find that person guilty?

Two jurors stated they would not follow the law and find the defendant guilty in the above scenario; the prosecutor excused both. On this record, we cannot find plain error affecting Heck's substantial rights and Heck is not entitled to relief.

B

Heck next asserts, for the first time on appeal, that the prosecutor denied him a fair trial by repeatedly eliciting testimony that he was on probation at the time of his offense. "A prosecutor's remarks must be examined in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor's remarks do not require reversal if they are responsive to issues raised by defense counsel. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

The prosecutor presented no evidence that Heck was on probation in her case-in-chief. The first mention of Heck's probation status occurred during *defense counsel's* direct examination of Shauna. Shauna took the stand to claim that the Suboxone belonged to her and to explain how she

secured it. Shauna testified that on the day of Heck's arrest, "they came to the window and startled me . . . ." Defense counsel sought to clarify who "they" referred to, and Shauna responded, "I don't know, *his probation* - - policeman, I don't know." (Emphasis added.) Shauna opened the door and "the[y] asked for a well check." This testimony opened the door for the prosecutor's questions on cross:

> *Q*. Did you know the people who came to your door?
>
> *A*. I don't know them by name. I mean obviously I knew who they were. They were - - they were dressed in - - the one cop had a vest on and then they had their little emblems on their - - they said who they were, *but I only know his probation officer*. I didn't know that anybody could come in. I guess I misunderstood all that.
>
> *Q*. So his probation officer was one of the individuals that came to the house?
>
> *A*. I don't think he was there that minute.
>
> *Q*. Well, were there probation officers there?
>
> *A*. I don't know who was a probation officer and who wasn't. I don't know them people. [Emphasis added.]

Judy Laberdee was part of the team that visited Heck's home. On direct examination, the prosecutor did not elicit testimony from Laberdee regarding Heck's probation status. Defense counsel recalled Laberdee after Shauna testified. In a two-question interrogation, defense counsel elicited Laberdee's testimony that Shauna claimed on the scene that the Suboxone belonged to her, but that Heck then stated that the drugs actually belonged to him. The prosecutor cross-examined Laberdee as follows:

> *Q*. Ms. Laberdee, what's your line of work?
>
> *A*. I work for the Michigan Department of Corrections. I'm a supervisor with the Monroe Probation and Parole Office.
>
> *Q*. Okay. And what were you doing at the defendant's residence on that day?
>
> *A*. We were conducting compliance checks on offenders we have under supervision.

The prosecutor then inquired further into Shauna's statements on the scene.

The prosecutor then presented rebuttal witnesses. She called Travis Sharp to the stand, who testified that he was Heck's supervising probation agent. Sharp further testified that he went to Heck's home on September 11, 2018 for a probation compliance check.

In closing argument, the prosecutor urged that the evidence established that Heck possessed Suboxone. One piece of that evidence, the prosecutor indicated, was that Heck admitted to possession "multiple times" to Laberdee and "to his probation agent." Shortly thereafter, the prosecutor repeated, "[H]e owned up to it and said it's mine. I admit it. And he did the same thing to his probation agent." Defense counsel also admitted Heck's status in his closing: "Everybody knows that they were there for a wellness check or a compliance check. So, that's not hidden . . . ."

While the prosecutor elicited testimony that Heck was on probation, defense counsel elicited such testimony first. Any unfair prejudice that arose from the prosecutor asking Laberdee's occupation or calling Sharp as a rebuttal witness was minimal considering that the jury was already aware that Heck was on probation. The prosecutor's statements in closing argument were based on the evidence. And the court later instructed the jury that the attorney's statements were not evidence. "Jurors are presumed to follow the court's instructions, and instructions are presumed to cure most errors." *People v Mullins*, 322 Mich App 151, 173; 911 NW2d 201 (2017). On this record, we discern no ground to grant relief.

C

Heck next contends that the prosecutor improperly elicited testimony that Heck admitted to using Suboxone and cocaine, which was not relevant to the charged possession offense. Again, the subject testimony was responsive to arguments raised by the defense and was relevant to prove an element of the offense.

To convict a defendant of violating MCL 333.7403(1), the prosecutor must prove that the defendant knowingly or intentionally possessed a controlled substance. *People v Hartuniewicz*, 294 Mich App 237, 246; 816 NW2d 442 (2011). Defense counsel's theory of the case was that Heck did not knowingly possess the Suboxone because it belonged to Shauna and Heck was unaware the substance was in his home. Defense counsel asserted in opening that Heck "knew nothing about these Suboxone strips." Later, Shauna testified that her friend "Mike" came to her home on the day in question and gave her the Suboxone. Shauna asserted that Heck was at work the entire time and did not know the substance was in the home. The prosecutor responded with evidence that Heck did know that the substance was in his home. This included evidence that Heck admitted ownership of the Suboxone on the day in question. It also included Sharp's testimony that Heck came to his office the following day, admitted ownership of the Suboxone, submitted to a drug screen, and then admitted to using Suboxone and cocaine. Evidence that Heck used Suboxone around the time in question was relevant to establish his knowledge that Suboxone was in his house and was directly responsive to the defense claims. Although Heck's cocaine use was not relevant, this brief comment did not render Heck's trial unfair. Relief is not warranted.

D

On cross-examination, the prosecutor asked Shauna "Now, there was other contraband located in your home that day, wasn't there?" Defense counsel objected, the trial court sustained the objection, and Shauna did not answer the question. Heck contends that the prosecutor

improperly attempted to elicit this irrelevant and prejudicial information.[1] As the trial court immediately sustained defense counsel's objection and the evidence was not admitted, there is no relief to grant.

E

Finally, Heck contends that the prosecutor improperly stated during closing, "we know from Agent Sharp that he also tested positive for Buprenorphine [aka Suboxone] the day after this incident occurred." "[A] prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. . . ." *People v Ericksen*, 288 Mich App 192, 199; 793 NW2d 120 (2010) (quotation marks and citation omitted). Sharp testified that Heck submitted to a drug screen; however, Sharp never testified about the results. The prosecutor's statement was clearly improper. However, this brief mischaracterization of the evidence could have been cured had defense counsel raised a timely objection. "[B]ecause a timely objection and curative instruction could have alleviated any prejudicial effect of the improper prosecutorial statement, we cannot conclude that the error denied defendant a fair trial or that it affected the outcome of the proceedings." *Unger*, 278 Mich App at 238. In any event, the court later instructed the jury to focus on the evidence presented during the questioning of the witnesses and informed the jury that the attorneys' statements were not evidence. This instruction cured any resulting prejudice.

F

In his reply brief on appeal, Heck contends that the cumulative effect of the prosecutor's errors requires relief. "[T]he cumulative effect of a number of minor errors may in some cases amount to error requiring reversal." *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999). However, "[a]bsent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Dobek*, 274 Mich App at 106. The prosecutor improperly elicited testimony that Heck admitted to using cocaine and incorrectly asserted in closing argument that Sharp testified that Heck had tested positive for Suboxone. These errors were isolated and do not merit reversal. On this record, Heck cannot establish that cumulative errors prejudicially infected his trial.

III. DEADLOCKED JURY INSTRUCTION

Heck also challenges an instruction the trial court gave to the jury when they claimed to be deadlocked. The jury began deliberations at 2:16 p.m., but informed the court they were deadlocked at 3:53 p.m. The trial court gave the following instruction:

> As you deliberate, keep in mind the guidelines that I gave you earlier including not letting us know what the numbers are. Remember it's your duty to consult with your fellow jurors and to try and reach an agreement if you can do so without violating your own judgment. To return a verdict, you must all agree and the verdict must represent the judgment of each of you. As you deliberate, you

[1] Heck further asserts that defense counsel was ineffective in failing to object to the prosecutor's question. The record contradicts that claim.

> should carefully and seriously consider the views of your fellow jurors. Talk things over in the spirit of fairness and frankness. Naturally, there's going to be differences of opinion. You should each not only express your opinion, but also give the facts and the reasons on which you base that opinion. By reasoning the matter out, jurors can after reach an agreement.
>
> If you think it would be helpful you may submit to the bailiff a written list of issues that are dividing or confusing you. It will then be submitted to me and I'll attempt to clarify or amplify those instructions in order to assist you in your further deliberations.
>
> When you continue your deliberations, don't hesitate to rethink your own views, change your opinion if you decide it was wrong; however, none of you should give up on your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching an agreement.

Heck failed to preserve his challenge by raising a contemporaneous objection in the trial court. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Generally, we review de novo preserved claims of instructional error. *Dobek*, 274 Mich App at 82. Our review of unpreserved claims is limited, however, and we may "grant relief only when necessary to avoid manifest injustice." *Sabin*, 242 Mich App at 657.

In *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974), the Supreme Court adopted a standard instruction to be read to deadlocked juries to ensure that trial courts do not improperly coerce the jury into rushing to a judgment. The Supreme Court has advised trial courts not to deviate substantially from that standard instruction's language with statements including "pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion." *People v Hardin*, 421 Mich 296, 315; 365 NW2d 101 (1984) (quotation marks and citations omitted). "Also relevant is whether the court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Id*. at 316. Another factor for consideration is the length of jury deliberations following the supplemental instruction. *People v Bookout*, 111 Mich App 399, 403; 314 NW2d 637 (1981).

The trial court's instruction was almost identical to M Crim JI 3.12, with one exception. M Crim JI 3.12 states: "By reasoning the matter out, jurors can *often* reach an agreement." (Emphasis added.) Here, the trial court stated: "By reasoning the matter out, jurors can *after* reach an agreement." This one-word alteration was insignificant and in no way coerced or threatened the jury to reach a unanimous verdict. Even if this seemingly accidental word change could be deemed coercive, the remainder of the court's instruction rectified any prejudice. Specifically, the court advised the jury, "none of you should give up on your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching an agreement."

Immediately after the trial court gave the deadlocked jury instruction, the court stated "[n]ow, because of the lateness of the hour, I'm going to send you home. I'm going to let you

sleep on it. I'm going to ask that you be back at 8:30 sharp." Heck challenges this statement as well.

In *Hardin*, 421 Mich at 303-307, the trial court gave supplemental instructions to the jury on three separate occasions when they could not reach a verdict. During the third instruction, the court stated, "Perhaps after a night's sleep and breakfast in the morning, you will be able to come back and reach a verdict[.]" *Id*. at 319. Our Supreme Court reasoned that although the court's statement departed from the standard deadlocked jury instruction, the court "did not require or threaten to require the jury to deliberate for an unreasonable length of time or unreasonable intervals. Indeed, immediately after the third instruction, the jury was sent home for the night." *Id*. Likewise, the trial court's instruction in this case did not constitute a substantial departure because the court "did not require or threaten to require the jury to deliberate for an unreasonable length of time or unreasonable intervals." *Id*. Sending the jury home at the end of the day is not coercive.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Heck next contends that his trial counsel was constitutionally deficient in failing to object to multiple instances of prosecutorial misconduct and to challenge the deadlocked jury instruction. Heck preserved his claim of ineffective assistance of counsel for appellate review by filing in this Court a motion to remand to the trial court for a *Ginther*[2] hearing. See *Sabin*, 242 Mich App at 658-659. This Court preliminarily denied his motion, pending review by the case call panel. *People v Heck*, unpublished order of the Court of Appeals, entered November 12, 2019 (Docket No. 348959). We also discern no need to remand for an evidentiary hearing and will review the issue on the existing record.

A claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish that counsel's performance was deficient, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664.

Heck contends that defense counsel should have raised a *Batson* challenge when the prosecutor exercised a peremptory challenge to excuse the only African-American juror from the venire. As noted, however, the prosecutor excused another juror along with the subject individual because of their answers to a particular question during voir dire, and not because of any discriminatory motive. Any objection would have been meritless and counsel cannot be deemed ineffective for failing to raise this challenge. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Heck further contends that defense counsel should have objected when the prosecutor elicited testimony regarding and made statements in closing about Heck's probation status. Any objection would have been futile as defense counsel opened the door for this evidence. And Heck does not challenge counsel's potentially accidental introduction of this information into the record in the first instance. Accordingly, relief is again unwarranted.

Heck asserts that defense counsel should have objected when the prosecutor elicited testimony from Sharp that Heck admitted to using Suboxone and cocaine. Evidence that Heck used Suboxone was relevant to challenge Heck's defense that he did not know the Suboxone was in his home. Any objection would have been futile and counsel could not be deemed ineffective for failing to object. Counsel should have objected when the prosecutor elicited irrelevant testimony regarding Heck's cocaine use. However, reference was brief and isolated, and Heck cannot establish the necessary prejudice to warrant relief.

Finally, counsel was not ineffective for failing to object to the court's deadlocked jury instruction. The instruction was nearly identical to the standard instruction and there was nothing to object to. Moreover, the court did not coerce the jury by sending them home to "sleep on it." The court gave this instruction because the hour was late, requiring deliberations to continue the following day. Ultimately, Heck has pointed to no error requiring relief.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens
/s/ Thomas C. Cameron