

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINTON DARNELL COLLIER,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 251409
Wayne Circuit Court
LC No. 03-005558-01

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to life in prison for the first-degree murder conviction and to two years in prison for the felony-firearm conviction. We affirm.

I

Defendant argues that the prosecution exceeded the trial court's MRE 404(b) ruling by introducing evidence that defendant illegally carried a concealed weapon. We agree, but we hold that the improper introduction of the bad-acts evidence did not affect defendant's substantial rights.

Defendant did not object to the evidence as improper bad-acts evidence, and, thus, the issue was not preserved. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Unpreserved evidentiary issues are reviewed for plain error that affected the defendant's substantial rights. *Knox, supra* at 508.

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted).]

Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Knox, supra* at 508; *Carines, supra* at 763.

MRE 404(b)(1) provides:

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. It may, however, 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 when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other crimes, wrongs, or acts is admissible if: (1) the prosecutor offers it to prove something other than character or propensity, (2) the evidence is relevant, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Knox, supra* at 509.

Before trial, the prosecution filed a motion to admit other-acts evidence, arguing that defendant's prior assault of the victim, his wife, Iesha Collier; defendant's threat to kill both himself and Iesha; and defendant's removal of the marital furniture were admissible to show defendant's assaultive history and his premeditation. The trial court granted the motion to admit the other-acts evidence, finding the other-acts evidence admissible to show motive and to put the killing in context. Because the fact that defendant illegally carried a concealed weapon was not included in the prosecution's motion, the admissibility of this evidence was not ruled on by the trial court.

During direct examination of defendant, defense counsel elicited the fact that defendant regularly carried a gun. During cross-examination, the prosecutor twice asked defendant if he had a permit to carry the gun. Defendant testified that he did not have a permit to carry the gun and that he knew it was illegal to carry a concealed weapon.

We hold that, although the introduction of the bad-acts evidence constituted plain error, it did not affect defendant's substantial rights. There was no showing that the error affected the outcome of the lower court proceedings.¹ Indeed, given the evidence against defendant, including defendant's testimony that he regularly carried a gun and shot Iesha because he wanted to hurt her, the fact that defendant did not have a permit to carry the gun used in the shootings could not have affected the outcome of the lower court proceedings. The jury's decision regarding the first-degree murder charge was not affected by defendant's lack of a permit to carry a concealed weapon.

¹ We note that defendant may have invited the error about which he now complains, given his direct examination testimony that he regularly carried a gun. However, we have nonetheless analyzed the issue using the plain error test.

II

Defendant next argues that the prosecutor improperly expressed personal belief in defendant's guilt. We disagree.

Defendant did not object to the alleged instances of prosecutorial misconduct at trial. Unpreserved claims of prosecutorial misconduct are reviewed under the plain error test. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). When reviewing claims of prosecutorial misconduct, this Court will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

The propriety of a prosecutor's comments depends on the facts of the particular case. *Thomas*, *supra* at 454. This Court reviews the pertinent part of the record and examines a prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *Id.*; *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge. *People v Matuszak*, 263 Mich App 42, 54; 687 NW2d 342 (2004). Similarly, it is improper to use "the prestige of the prosecutor's office to inject personal opinion." *Id.* at 55, quoting *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995). A prosecutor may not encourage the jury to suspend its power of judgment in favor of the wisdom or belief of the prosecutor's office. *Bahoda*, *supra* at 287; *Thomas*, *supra* at 455. However, a prosecutor may argue the evidence and all reasonable inferences arising from the evidence. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). Additionally, a prosecutor is not required to argue in the blindest possible terms. *Matuszak*, *supra* at 56.

Defendant objects to the following passages from the prosecutor's closing argument, asserting that the prosecutor improperly expressed personal belief in defendant's guilt:

The judge will also give you the choice of second[-]degree murder. Second[-]degree murder is murder without the premeditation basically, but murder without premeditation involves three separate states of mind, and I almost hesitate to go through these because I don't think that from the evidence here you should seriously ever even consider anything less than first[-]degree murder, but nevertheless the judge is going to read it to you.

The judge will also read to you that third choice, which is manslaughter. I think the defense is going to argue to you that you ought to consider manslaughter here. I argue to you from the evidence here that you've heard that you ought not to consider it, but nevertheless listen to the judge's instruction about what manslaughter means and where it applies.

The alleged prosecutorial misconduct did not deprive defendant of a fair and impartial trial. The prosecutor's remarks during closing argument were proper. Read in context, the prosecutor did not use the prestige of the prosecutor's office to inject his personal belief in

defendant's guilt. Instead, the prosecutor used the evidence presented at trial to argue that the jury should convict defendant of first-degree murder.

During closing argument, the prosecutor explained to the jury that it had three choices regarding the first count: first-degree murder, second-degree murder, and manslaughter. After explaining that the judge would present the law applicable to those three choices, the prosecutor stated, "I want you to please listen closely to the instructions the judge reads to you." The prosecutor summarized the elements of first-degree murder, second-degree murder, and voluntary manslaughter and used the evidence presented at trial to argue that defendant should be convicted of first-degree premeditated murder. The prosecutor referred the jury back to the evidence and asked the jury to listen to the judge's instructions. The prosecutor did not use the prestige of the prosecutor's office to inject personal opinion or encourage the jury to suspend its power of judgment; instead, he used the evidence presented at trial to argue that the jury should convict defendant of first-degree murder. *Bahoda, supra* at 286-287. There was no plain error in arguing the evidence and reasonable inferences from the evidence. *Matuszak, supra* at 54.

Moreover, this Court will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Ackerman, supra* at 449. A timely curative instruction could have eliminated any prejudice that the prosecutor's comments may have caused. Also, absent an objection, the trial court's instruction that the remarks of counsel are not evidence was sufficient to eliminate any possible prejudice. *Thomas, supra* at 456. The alleged prosecutorial misconduct did not deny defendant a fair and impartial trial.

III

Lastly, defendant argues that he was denied the effective assistance of counsel. Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to prepare, failed to object to the bad-acts evidence concerning the concealed weapon, and failed to object to the prosecutor's alleged expression of personal belief in defendant's guilt. We disagree.

Because defendant failed to move for a new trial or evidentiary hearing, this Court's review is limited to the existing record. *Thomas, supra* at 456. The determination of whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). After finding the facts, the trial court must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a denial of the effective assistance of counsel under the state and federal constitutions,

[f]irst the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance

constituted sound trial strategy. Second, the defendant must show the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [*People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003) (internal citations and quotations omitted).]

Defendant was not denied the effective assistance of counsel. First, defendant was not deprived of the effective assistance of counsel by defense counsel's alleged failure to prepare. Indeed, even if defense counsel's performance was deficient, defendant failed to demonstrate prejudice. When claiming denial of the effective assistance of counsel due to defense counsel's lack of preparation, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

During opening statement, defense counsel asserted that the evidence would show that the police did not find an extra magazine clip in defendant's Jeep. Defense counsel also stated, "when you hear the people say, Well, there was a second clip, then you have to as jurors say where is the second clip? Why didn't we find it?" However, the testimony at trial established that the police did find a second magazine clip found in defendant's Jeep. During closing argument, the prosecutor directed the jury's attention to defense counsel's misstatement regarding the existence of a second magazine clip.

Defense counsel's misstatement did not constitute sound trial strategy, and, thus, counsel was deficient. Although defense counsel was deficient, defendant was not prejudiced. Defendant failed to demonstrate that, but for defense counsel's error, the result of the trial would have been different. *Hill, supra* at 138. Given the strength of the evidence presented at trial, defense counsel's misstatement regarding a tangential issue – the number of magazines in defendant's Jeep – did not alter the result of the proceedings or undermine the reliability of the verdict. The jury's verdict was not based on a misstatement in defense counsel's opening statement, but, rather, on the evidence actually presented at trial.

Second, defendant was not deprived of the effective assistance of counsel by defense counsel's failure to object to the introduction of evidence regarding defendant's lack of a permit to carry the gun. Although the bad-acts evidence was improperly admitted, defense counsel's failure to object was not necessarily deficient. The failure to object can constitute sound trial strategy. *People v Rice*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). "Certainly there are times when it is better not to object and draw attention to an improper comment." *Bahoda, supra* at 287 n 54.

Defense counsel did not object to the first inquiry into defendant's lack of a permit, but objected to the second inquiry as "asked and answered," and the trial court sustained this objection. Defense counsel's "asked and answered" objection could constitute sound trial strategy because, unlike an objection based on the bad-acts nature of the evidence, it does not draw the jury's attention to the illegality of defendant's behavior. Instead, it focuses the jury's attention on the repetitive nature of the prosecutor's questions.

Even if defense counsel's failure to object to the bad-acts evidence was deficient, defendant failed to demonstrate prejudice. Given the evidence against defendant, including defendant's testimony that he regularly carried a gun and shot Iesha because he wanted to hurt her, defendant did not demonstrate a reasonable probability that, but for defense counsel's failure to object, the result of the trial would have been different.

Third, defendant was not deprived of the effective assistance of counsel by defense counsel's failure to object to the prosecutor's allegedly improper closing remarks. Defense counsel was not required to make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Counsel was not ineffective for failing to object to the prosecutor's proper comments.

Affirmed.

/s/ Christopher M. Murray

/s/ Patrick M. Meter

/s/ Donald S. Owens