STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2012
v	No. 301603 Oakland Circuit Court
MCARTHUR TAYLOR, Defendant-Appellant.	LC No. 2010-231900-FC

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. He was sentenced as a fourth habitual offender, MCL 769.12, to 27 to 50 years' imprisonment. Defendant appeals as of right. We affirm.

I. DEFENDANT'S MOTION FOR MISTRIAL

Defendant argues that he was denied a fair and impartial trial when the trial court refused to grant a mistrial following witness Michael Cooper's testimony relaying statements made by a man identified only by the nickname Cash. Although we agree that the admission of one of Cash's statements was improper, we hold that the trial court did not abuse its discretion by declining to grant a mistrial.

We review a trial court's decision to grant or deny a mistrial for abuse of discretion.[1] An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes.[2]

At trial, defense counsel asked Cooper whether he saw Cash return to a van before it left to follow the victim. Cooper responded that he did not see Cash return to the van and that Cash said "[o]h man, my friends left without me" and "[w]e were gonna hit a lick tonight."[3]

[1] *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999).

[2] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[3] Cooper explained at trial that "hit a lick" is a euphemism for robbery.

Defendant argues that Cooper's testimony concerning Cash's statements was impermissible hearsay that prejudiced defendant because it created the inference that the occupants of the van, shown at trial to include defendant, intended to rob someone.

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[4] The "matter asserted" refers to the matter asserted by the out-of-court declarant, not the party offering the evidence.[5] The matters Cash asserted in the two statements were 1) that his friends left without him, and 2) that he and his friends were going to rob someone that night. The first assertion was responsive to the question asked and is not challenged on appeal. However, Cash's second assertion that "[w]e were gonna hit a lick tonight" did not support Cooper's answer to the question of whether he saw Cash return to the van. It was non-responsive to defense counsel's question. We can reach no other conclusion but that the statement "[w]e were gonna hit a lick tonight" was offered for the truth of the matter asserted: that Cash and his friends intended to rob someone that night. Accordingly, Cash's statement was hearsay under MRE 801(c). Moreover, contrary to the prosecution's argument, the testimony did not fit within the hearsay exception in MRE 803(3) (statement of declarant's then existing state of mind). Cash's state of mind was irrelevant.

However, despite the fact that Cash's statement was hearsay, defendant has failed to show that a mistrial was necessary. Accordingly, the trial court did not abuse its discretion in refusing to grant a mistrial, and reversal is unwarranted. "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."[6] "[A]n unresponsive, volunteered answer to a proper question [such as the statement at issue here] is not grounds for the granting of a mistrial,"[7] unless "the error complained of is so egregious that the prejudicial effect can be removed in no other way."[8] Defendant claims Cash's statement that "[w]e were gonna hit a lick tonight" was so damaging that even if defendant had objected to Cooper's statement and the trial court had provided a curative instruction, it was unrealistic to expect that the curative instruction would be sufficient to remedy whatever prejudice occurred. To that end, defendant notes that after the jury started its deliberations, it asked the trial court whether Cooper's testimony regarding Cash's statement was hearsay. Defendant argues that the jury's question shows that they improperly considered Cash's statement. We disagree.

We have recognized that "[a]lthough jurors are presumed to follow instructions, some errors cannot be cured with an instruction."[9] However, defendant fails to provide any specific

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[4] MRE 801(c).

[5] *People v Jones*, 228 Mich App 191, 224; 579 NW2d 82 (1998).

[6] *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

[7] *Id.*

[8] *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

[9] *People v Messenger*, 221 Mich App 171, 179 n 3; 561 NW2d 463 (1997).

argument to support his claim that the prejudicial effect from the alleged hearsay statement in this case could not have been cured with an instruction. Moreover, we note that after the trial court denied his motion for a mistrial, defendant initially indicated that he desired a curative instruction concerning Cash's statements and the trial court said that it would give the instruction. However, defendant withdrew that request before the final jury instructions. In the absence of authority to the contrary, the general rule that "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors" [10] controls this case. Had the trial court given the curative instruction originally requested by defendant, it is presumed that the jury would have followed that instruction.[11] Thus, defendant has failed to show that a mistrial was necessary in this case because he has failed to show that "the error complained of is so egregious that the prejudicial effect can be removed in no other way."[12]

II. JURY INSTRUCTION

Defendant next argues that the trial court erred in not granting defendant's request for a limiting instruction to the effect that Cash's statement was hearsay where, after it had begun deliberations, the jury asked whether Cash's statement was hearsay. We disagree.

Generally, this Court reviews de novo claims of instructional error.[13] However, a trial court's decision whether to provide additional jury instructions after deliberations begin is reviewed for abuse of discretion.[14]

This issue concerns the trial court's decision not to provide defendant's requested hearsay instruction under MCR 6.414(H), which provided in relevant part that "[a]fter jury deliberations begin, the court *may* give additional instructions that are appropriate." [15] Therefore, as is apparent from the rule's own terms, a trial court's decision regarding whether to grant additional instructions after deliberations have begun is discretionary, not mandatory.[16] Moreover, as

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[10] *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

[11] *Id*.

[12] *Lumsden*, 168 Mich App at 299.

[13] *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011).

[14] See *People v Perry*, 114 Mich App 462, 467-468; 319 NW2d 559 (1982).

[15] MCR 6.414(H) (emphasis added). MCR 6.414(H) was incorporated into the new MCR 2.513 by amendment effective September 1, 2011. However, because MCR 6.414(H) was in effect through defendant's trial, MCR 6.414(H) controls this case. See MCR 1.102; *People v Jackson*, 465 Mich 390, 396; 633 NW2d 825 (2001) (applying new court rules to actions brought on or after the effective date of an amendment).

[16] Indeed, trial courts' discretion regarding jury instructions during deliberations is greater than its discretion regarding jury instructions before deliberations begin. See, e.g., *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003) ("A defendant's request for a jury

discussed above, the trial court initially offered to issue a curative instruction regarding the hearsay nature of Cash's statement. However, defense counsel expressly withdrew the request for a curative instruction prior to the final instructions, effectively agreeing to the jury instructions' language as written. In other words, defendant chose not to avail himself of the opportunity to have the jury instructed regarding Cash's statement. The trial court did not abuse its discretion in declining to instruct the jury regarding Cash's statement after it had begun deliberations.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant last argues that his trial counsel was ineffective for failing to call an expert witness to testify on the reliability of eyewitness identification. We disagree.

Because the issue was not raised before the trial court, this Court's review is limited to mistakes apparent on the record.[17] To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." [18]

The decision of an attorney regarding whether to call an expert witness is a matter of trial strategy.[19] Defendant bears the burden of overcoming the "strong presumption that counsel's performance constituted sound trial strategy."[20] Generally, "the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense."[21] "A substantial defense is one that might have made a difference in the outcome of the trial."[22]

Defendant argues that in making strategic decisions, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[23] In support of his claim that defense counsel was ineffective, defendant cites a series of cases and studies to show that an expert witness would have helped the jury assess the credibility of the victim's identification. However, the record is without facts concerning what investigation or evaluations defense counsel made into whether to call an expert witness, and,

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instruction on a theory or defense *must be granted* if supported by the evidence.") (emphasis added).

[17] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[18] *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 675; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[19] *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

[20] *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

[21] *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citations omitted).

[22] *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (citations omitted).

[23] *Strickland*, 466 US at 691.

this Court's review is limited to mistakes apparent on the record. Thus, defendant has failed to establish the factual predicate for his claim of ineffective assistance of counsel.[24]

Moreover, defense counsel's failure to request an expert witness did not deprive defendant of a substantial defense. On cross-examination, defense counsel elicited a series of admissions from the victim related to the credibility and reliability of his identification of defendant. In her closing argument, defense counsel used those admissions to question the length of time the victim had to observe the assailant and the accuracy of the victim's identification of defendant. Also, defense counsel argued that the fact that the victim saw defendant's picture in a newspaper before identifying him in the lineup tainted the victim's identification. Defense counsel raised the substantial defense of misidentification at trial through cross-examination of the victim and through her closing argument. Defense counsel's decision not to request an expert witness did not deprive defendant of a substantial defense. This strategy was unsuccessful, but "[a] particular strategy does not constitute ineffective assistance of counsel simply because it does not work."[25] Defendant has therefore failed to show that defense counsel's representation fell below an objective standard of reasonableness.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

[24] *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

[25] *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).