STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2014
v	No. 316487 Oakland Circuit Court
DONALD MARTIN GRANT, Defendant-Appellant.	LC No. 2012-243671-FH

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Defendant Donald Martin Grant appeals by right his jury trial convictions for the manufacture of 20 or more but less than 200 marijuana plants, MCL 333.7401(2)(d)(*ii*), and possession of marijuana, MCL 333.7403(2)(D). We affirm.

Members of the Oakland County Narcotics Enforcement Team executed a search warrant at the home of Julia Ozga, defendant's girlfriend, on October 31, 2012, during which they discovered approximately 93 grams of marijuana in the master bedroom and approximately 50 marijuana plants growing in a detached garage. Defendant was present when the raid took place. Although there is some indication that Ozga had a medical marijuana card, she pleaded guilty to manufacturing 20 to 200 marijuana plants as well as possession with intent to deliver marijuana. Both defendant and Ozga testified at trial that defendant did not live at the residence, did not assist in growing the marijuana plants, did not have access to the garage, and did not possess the marijuana in any way. That testimony, however, was contradicted by the testimony of other witnesses and by Ozga's prior statements to police indicating that defendant lived at the home and helped her take care of the marijuana plants because she was not physically able to do so.

Defendant first argues that he was denied his constitutional right to present a defense when the trial court precluded him from referencing medical marijuana at his trial. We disagree. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). Whether a defendant was denied the constitutional right to present a defense is a question of law that we review de novo. *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). A defendant generally has a constitutional right to present a defense, but this right is not absolute—the defendant must still comply with established rules of procedure and evidence designed to ensure fairness at trial. *People v Kowalski*, 492

Mich 106, 139; 821 NW2d 14 (2012); *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002).

"Although marijuana remains illegal in Michigan," the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., "allows the medical use of marijuana by a limited class of individuals." *People v Carruthers*, 301 Mich App 590, 597; 837 NW2d 16 (2013). Two separate provisions of the MMMA provide protection from prosecution for offenses involving marijuana. First, § 4 of the MMMA, MCL 333.26424, provides broad immunity from arrest or prosecution for the medical use or assisting the medical use of marijuana, provided the elements of that section are established. Second, § 8 of the MMMA, MCL 333.26428, provides an affirmative defense to charges involving marijuana used for medical purposes, provided the elements of that section are established.

Defendant does not dispute that he never raised either a § 4 or a § 8 defense before his trial, and in fact he affirmatively waived any such defense in his response to the prosecution's motion in limine seeking an order precluding him from mentioning the MMMA or medical marijuana at his trial. Nonetheless, defendant opposed the prosecution's motion on the basis that an order precluding him from even mentioning the MMMA or medical marijuana would deny him his constitutional right to present a defense. Defendant argued that he should not be precluded from arguing at his trial that he reasonably believed Ozga had a medical marijuana card, and therefore there was a "certain amount of legitimacy" to the marijuana grow operation and he lacked the knowledge or intent to commit a crime. Defendant repeats those arguments on appeal.

In essence, what defendant sought to argue at his trial was that he should be excused from liability for the charged offenses because he reasonably—albeit mistakenly—believed that Ozga was growing marijuana in compliance with the MMMA. However, the fact that defendant may have acted under a mistaken belief as to the legality of the marijuana grow operation is no defense under Michigan law because "ignorance of the law or a mistake of law is no defense to a criminal prosecution." *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 215; 575 NW2d 95 (1997). As such, the trial court properly precluded defendant from admitting evidence concerning the MMMA or medical marijuana in an effort to show that his actions should be excused. Moreover, we note that reference to the MMMA and medical marijuana was irrelevant given defendant's theory of defense. Defendant did not seek to argue that he possessed and manufactured the marijuana at issue under a mistaken belief as to its legality; rather, he maintained that he did not live at Ozga's residence, did not assist in the marijuana grow operation, did not have access to the marijuana grow room, and did not possess the marijuana at issue. Given defendant's theory of the case, his beliefs as to whether Ozga was lawfully growing marijuana were legally irrelevant. Defendant was not denied his constitutional right to present a defense.

Defendant next argues that he was denied a fair trial by several instances of prosecutorial misconduct, and that he was denied the effective assistance of counsel by his trial counsel's failure to object to that misconduct. Defendant failed to object to all but one of the claimed instances of misconduct. Generally, a preserved claim of prosecutorial misconduct is a constitutional issue that we review de novo to determine whether the defendant was denied a fair and impartial trial. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v*

Dobek, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). As to the unpreserved allegations of misconduct, we review for plain error affecting substantial rights. *Brown*, 279 Mich App at 134, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Claims of prosecutorial misconduct are decided on a case by case basis by examining the record and evaluating the remarks in context. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Error requiring reversal cannot be found if a curative instruction "could have alleviated any prejudicial effect." *Id*. at 329-330.

Defendant first argues that the prosecutor committed misconduct when it "denigrated" the testimony of defendant and Ozga during closing argument by making disparaging remarks about their credibility. We disagree. Taken in context, we conclude that the prosecutor was not merely making prejudicial and denigrating remarks about defendant and Ozga, but rather was arguing, from the abundance of evidence, that their testimony was incredible. The prosecutor supported its claims by referencing the evidence. "A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In so doing, a prosecutor "is not required to state inferences and conclusions in the blandest possible terms." *Id*. Rather, the prosecutor may use "hard language." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). There was no plain error with respect to these unchallenged remarks.

Defendant next argues that the prosecutor improperly vouched for the credibility of a prosecution witness when she stated during closing argument that "[i]f you think [the plants shown in photographs] are marijuana and you agree with the opinion of a narcotics officer [the witness] for many years, whose [sic] seen marijuana plants hundreds of times . . . [y]ou can believe the testimony of him." A prosecutor may not vouch for a witness' credibility in a manner that suggests she has a special knowledge regarding the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 279; 531 NW2d 659 (1995). However, a prosecutor is entitled to comment generally on a witness' credibility based on the evidence. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004); *Launsburry*, 217 Mich App at 361. Here, the prosecutor did not express a personal knowledge or belief in the witness' credibility, but rather argued that he was entitled to belief based on his years of experience dealing with narcotics. There was no plain error with respect to this unchallenged remark.

Defendant next argues that the prosecutor expressed a personal belief in defendant's guilt when she asserted, during closing argument, that Ozga "pled guilty to her part . . . and now it's time that [defendant] be held . . . equally accountable." A prosecutor may not express a personal belief in the defendant's guilt. *People v Laidler*, 291 Mich App 199, 201; 804 NW2d 866 (2010), rev'd in part on other grounds 491 Mich 339 (2012). Taken in context, however, the prosecutor was not expressing a personal belief in defendant's guilt, but rather arguing that, based on the evidence and applicable law, a guilty verdict was warranted. Likewise, contrary to defendant's argument, the prosecutor was not asking the jury to find defendant guilty merely because Ozga pled guilty. Rather, she was arguing that, like Ozga, defendant should be held accountable based on the evidence of his guilt. Defendant has not shown plain error, specifically that the prosecutor expressed a personal belief, with respect to this unchallenged remark.

Defendant next argues that the prosecutor improperly elicited inflammatory testimony from a rebuttal witness regarding threats defendant made to her. We disagree. A review of the

record reveals that the challenged testimony was elicited during the prosecutor's redirect examination of the witness, *after* defendant had questioned the witness' motive for testifying and suggested that she delayed coming forward out of fear that her illegal drug activities would be revealed. The witness denied these allegations and claimed that she delayed coming forward because defendant had threatened her. When, on cross-examination, the witness acknowledged that defendant had never threatened her physical harm, the prosecutor asked on redirect what defendant *did* say to her, which resulted in the challenged testimony that defendant said "F*** you, you f*** whore . . . N lover, go f*** yourself."

A prosecutor is entitled to rebut a defendant's assertion by eliciting evidence directly contradicting that assertion. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Evidence that defendant previously threatened the witness was certainly relevant to rebutting defense counsel's suggestion that the witness delayed coming forward because of her own illegal activity. And, while defendant argues that the nature of his threats was irrelevant and unduly prejudicial, he frames this evidentiary issue as a claim of prosecutorial misconduct. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). There is no indication that the prosecutor was acting in bad faith in eliciting the challenged testimony. There was thus no plain error with respect to this unchallenged conduct.

Defendant finally argues that the prosecutor mischaracterized the rebuttal witness' testimony during closing argument when she asserted that defendant had a "distaste" for that witness, "maybe because she dates African Americans[.]" A prosecutor may not mischaracterize a witness' testimony or make statements of fact to the jury that are unsupported by the evidence. *Unger*, 278 Mich App at 239; *Callon*, 256 Mich App at 330. We agree that the prosecution mischaracterized the witness' testimony; although defendant allegedly called the witness a "N lover," there was no testimony that she dated African Americans. Nonetheless, we conclude that the comment did not deprive defendant of a fair trial. Defense counsel immediately objected to the remark, and the trial court agreed that the remark was a mischaracterization. The prosecutor then apologized twice before correcting the inaccurate statement and asserting that defendant disliked the witness for "whatever reason." Given the fact that the jury was made fully aware of the inaccuracy, defendant was not denied a fair trial.

Given the above conclusions, we likewise reject defendant's claim of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that (1) his defense counsel's performance was objectively deficient and (2) the deficient performance prejudiced his defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant cannot meet the first prong. Obviously, with respect to the prosecutor's mischaracterization of testimony, any claim of ineffective assistance is meritless, since defense counsel timely objected to the remark. As to the remaining, unchallenged instances of alleged misconduct, we have already concluded that there was no impropriety. Accordingly, any objection would have been meritless. Defense counsel is not ineffective for failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next argues that he was denied a fair trial by the improper admission of prior-acts evidence under MRE 404(b). We disagree. We review a trial court's decision whether to

admit evidence for an abuse of discretion, but preliminary questions of law, such as whether a rule of evidence precludes admissibility, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The challenged evidence related to testimony by a police officer that during a visit to Ozga's home on August 14, 2010 for a neighbor dispute, defendant was observed in the backyard of Ozga's home, near an area where marijuana plants were plainly visible. When the officer called for defendant to come to the fence to speak with him, defendant ignored the request and disappeared behind the garage. When Ozga arrived some time later, she informed the officer that defendant probably ran because he had an outstanding warrant. She acknowledged the presence of the marijuana plants but asserted that they belonged to her brother, whom she would not name. The officer returned to the home the following day, August 15, and arrested defendant for the outstanding warrant, at which time defendant was found to be in possession of marijuana.

"Generally, Michigan's Rules of Evidence proscribe the use of character evidence to prove action in conformity therewith." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), citing MRE 404. However, while MRE 404(b) forbids the admission of evidence of an individual's prior conduct for improper purposes, the rule provides that such evidence may be admissible for other, proper purposes, such as to establish "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[.]" MRE 404(b)(1). MRE 404(b) is a rule of inclusion, only prohibiting evidence that is used solely for the purpose of showing action in conformity with character. *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010). In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), our Supreme Court set forth the test for trial courts to use in determining the admissibility of other acts evidence. A trial court must first determine that the evidence is offered for a proper purpose under MRE 404(b); second, that the evidence is relevant to that purpose under MRE 402; and third, that the probative value of the evidence is not substantially outweighed by unfair prejudice under MRE 403. *Id*. at 74-75. Finally, upon the admission of other acts evidence, the trial court may, upon request, provide a limiting instruction to the jury under MRE 105. *Id*. at 75.

The first question is whether the prosecution articulated a proper noncharacter purpose for the admission of the challenged evidence. *People v Crawford*, 458 Mich 376, 385-386; 582 NW2d 785 (1998); *VanderVliet*, 444 Mich at 74. In its brief in support of the motion to introduce the challenged evidence, the prosecution argued that the evidence was relevant, among other things, to establishing defendant's identity as the manufacturer and/or possessor of the marijuana in 2012, his knowledge of the nature of the controlled substance as being marijuana, and to show the history between defendant and Ozga; i.e., to negate defendant's claim that he did not live at the residence. There is no doubt that these purposes are proper noncharacter purposes under MRE 404(b). Moreover, the evidence was relevant to these purposes. Evidence that defendant was seen in 2010 at Ozga's house, near plainly visible marijuana plants, before disappearing upon the officer's request to speak with him, and that he was subsequently arrested the next day at the residence while in possession of marijuana, made it "more probable" that defendant did in fact live at the residence and that he did in fact have knowledge of, access to, and control (actual or constructive) over the marijuana found during the 2012 raid.

Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). "Evidence is unfairly prejudicial where there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. See also *McGhee*, 268 Mich App at 614, citing *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) ("[U]nfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock"). "A determination of the prejudicial effect of evidence is best left to a contemporaneous assessment of the effect, presentation, and credibility of testimony by the trial court. Accordingly, a defendant must meet a high burden to show that a trial court abused its discretion by declining to exclude relevant evidence under MRE 403." *People v Albers*, 258 Mich App 578, 588-589; 672 NW2d 336 (2003) (internal quotations and citations omitted).

As discussed above, evidence that defendant was seen at his girlfriend's home in 2010 near plainly visible marijuana plants, that he subsequently disappeared when an officer requested to speak with him, and that he was later arrested at that home while in possession of marijuana, was probative of defendant's living situation, his knowledge of (and assistance in) the manufacture of marijuana, and his possession (actual or constructive) of marijuana found in the same home in 2012. There is no doubt that the evidence was prejudicial, inasmuch as all relevant evidence is, *McGhee*, 268 Mich App at 613-614, but the probative value was not *substantially* outweighed by the danger of unfair prejudice. Defendant vehemently denied participating in the marijuana grow operation or having any access to or control over the marijuana, and also denied living at the home. Thus, the evidence was not merely "marginally probative," and there was no risk that it would be given "undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. The trial court did not abuse its discretion in admitting the challenged evidence.

Affirmed.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot