

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP OLIVER WARD,

Defendant-Appellant.

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UNPUBLISHED

December 10, 2009

No. 286418

Ingham Circuit Court

LC No. 07-000423-FH

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of first-degree home invasion. See MCL 750.110. The trial court sentenced defendant as a habitual second offender, MCL 769.10, to serve 51 to 360 months in prison. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that the trial court erred when it denied his motion to suppress evidence seized from an apartment where he resided as an overnight guest. We review de novo a trial court's decision on a motion to suppress evidence, but we review its factual findings with respect to that decision for clear error. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000).

Prior to trial, defendant moved to suppress items of clothing seized from an apartment where defendant resided as an overnight guest. The trial court found that the apartment owner gave police officers valid consent to search the apartment and that the evidence was in plain view. The trial court then determined that the police officers validly seized the evidence and, for that reason, denied the motion. At trial, prior to opening arguments, the prosecutor sought clarification regarding the continued admissibility of the evidence in light of defendant's new argument that any testimony regarding the owner's consent would violate his constitutional right to confront the witnesses against him. Without the owner's testimony, defendant argued, the prosecution could not lay the proper foundation to admit the evidence. The trial court agreed and suppressed the evidence. In light of the trial court's ultimate decision to suppress the evidence, even if we were to agree with defendant that the trial court erred when it denied his initial motion, he would not be entitled to any relief.

Defendant also argues that the trial court erred when it denied his motion for a mistrial. Defendant moved for a mistrial after the prosecutor admitted that he incorrectly paraphrased an

argument defense counsel made during opening arguments, which resulted in the admission of evidence the court had previously suppressed. This Court reviews a trial court's decision on a motion for mistrial for an abuse of discretion. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

This Court reviews claims of prosecutorial misconduct on a case-by-case basis in context to determine whether the remarks denied defendant a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A trial court should grant a motion for a mistrial only when the prejudicial effect of an error cannot be cured in any other way. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

Again, the trial court suppressed all of the evidence seized from the apartment where defendant resided as an overnight guest, and prohibited the parties from introducing any evidence regarding what occurred in the apartment after police entered the apartment. Following defendant's opening arguments, the prosecutor successfully argued that defendant opened the door to the admission of the black coat when defense counsel allegedly told jurors that there was no blood found on defendant's coat. On the final day of trial, defendant moved for a mistrial because he believed that the introduction of the black coat was so prejudicial that it deprived him of a fair trial. During his argument opposing the motion, the prosecutor informed the trial court that he had learned, after reviewing the trial record, that he had incorrectly paraphrased defendant's trial counsel's opening arguments. Following the parties' arguments, the trial court denied defendant's motion because it did not believe that the prejudicial effect from the introduction of the black coat was so great as to warrant a mistrial.

It is undisputed that defendant's trial counsel did not state during his opening arguments that no blood was found on defendant's coat. Nonetheless, it is well settled that a prosecutor's good faith effort to admit evidence does not constitute misconduct. See *Dobek*, 274 Mich App at 70. And there is no record evidence that the prosecutor's mischaracterization was not made in a good faith belief that defendant's trial counsel had made the statement alleged. Consequently, there was no misconduct.

In addition, we agree with the trial court's determination that any error in the admission does not warrant a new trial.<sup>1</sup> The trial court gave a curative instruction that sufficiently protected defendant's rights. See *Horn*, 279 Mich App at 36. Moreover, during its final instructions to the jury, the trial court instructed the jury that it could only base its decision regarding defendant's guilt on the evidence properly admitted. The trial court also instructed the jury that attorney's questions and statements are not evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

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<sup>1</sup> We express no opinion as to whether the trial court properly determined that the items found in the apartment could not be admitted at trial. Rather, for purposes of this appeal, we shall assume that the coat was not admissible.

In addition, assuming that the coat was improperly admitted, any prejudice was harmless. Officers using a police dog tracked a suspect matching defendant's physical characteristics to the apartment where defendant was found. Testimony also established that, when defendant was arrested, he had what appeared to be several fresh cuts on his hands and wrists. And there was an envelope found at the crime scene that had defendant's blood on it. Therefore, there was compelling evidence that connected defendant to the crime other than the coat. In light of this evidence and the other evidence produced at trial, we conclude that any error in the admission of the coat would not warrant relief. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Lastly, defendant argues that the trial court erred when it ordered him to repay his court-appointed legal fees without considering his ability to pay. Specifically, defendant argues that the trial court had to state on the record that it had considered defendant's ability to pay his court-appointed legal fees under the rule stated in *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). However, our Supreme Court has since held that a trial court is not required to consider a defendant's ability to pay his or her court-appointed legal fees before it can order a defendant to do so. *People v Jackson*, 483 Mich 271, 298; 769 NW2d 630 (2009). Rather, a trial court is only required to consider whether a defendant has the ability to pay his or her court-appointed legal fees at the time the order is enforced, but only if the defendant argues he or she does not have the ability to pay. *Id.* The *Jackson* Court further noted that a trial court should not entertain a defendant's challenges to his or her ability to pay a court imposed fee until the court attempts to enforce that fee. *Id.* at 292.

Here, while the trial court ordered defendant to reimburse the county \$300 for his court-appointed legal fees at defendant's sentencing, efforts to collect that fee did not occur until August 5, 2008, when the trial court filed a form approved by the Supreme Court Administrative Office, which ordered the enforcement of the fees imposed. In accord with MCL 769.11, the court ordered defendant to remit a portion of his prisoner's funds to pay the fees. Because defendant has yet to contest his ability to pay his court-appointed legal fees, we decline to further consider the issue.

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering

/s/ Mark J. Cavanagh

/s/ Michael J. Kelly