

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH PHILLIP BOYER,

Defendant-Appellant.

UNPUBLISHED

February 18, 1997

No. 190168

Cass Circuit Court

LC No. 95-008391

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to twenty to forty years of imprisonment for the armed robbery conviction, as enhanced by the fourth habitual offender statute, MCL 769.12; MSA 1084. We affirm.

Defendant first argues he was denied a fair and impartial trial because of the prosecutor's improper statements during closing argument. We disagree. Prosecutorial misconduct issues are reviewed on a case by case analysis. *People v McElhaney*, 215 Mich App 269; 545 NW2d 18 (1996); *People v Allen*, 201 Mich App 98; 505 NW2d 869 (1993). This Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *McElhaney, supra*; *People v LeGrone*, 205 Mich App 77; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *McElhaney, supra*; *Allen, supra*.

Defendant argues that during the prosecutor's closing argument, he made a statement of fact rather than opinion. We disagree. This Court has held that the prosecution is free to comment with respect to the evidence and all reasonable inferences may be drawn from the evidence as it relates to its theory of the case. *McElhaney, supra*. In addition, a prosecutor is not required to state inferences and conclusions in the blandest possible terms. *People v Launsbury*, 217 Mich App 358; ___ NW2d ___ (1996). A prosecutor may argue the evidence shows that the defendant is guilty. *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

* Circuit judge, sitting on the Court of Appeals by assignment.

In the instant case, the prosecutor made his statement in reference to the evidence presented at trial. Therefore, we hold that the remark was proper. Furthermore, the trial court instructed the jury that the attorneys' statements and arguments were not evidence but were only meant to help the jury understand the evidence and each side's legal theories. *People v Hall*, 396 Mich 650; 242 NW2d 377 (1976). Therefore, any error was cured by the court's instruction. Lastly, the evidence against defendant was overwhelming and considerable. *People v Biggs*, 202 Mich App 450; 509 NW2d 803 (1993). Thus, we hold that defendant was not denied a fair and impartial trial. *McElhaney, supra; Allen, supra*.

Defendant next argues he was denied the effective assistance of counsel because the burden of proof was impermissibly shifted to him to prove his innocence, and because defense counsel failed to object to the trial court's instruction. We disagree. Defendant failed to move for a new trial, nor was a *Ginther*¹ hearing held. Therefore, this Court's review is limited only to the extent that counsel's claimed mistakes are apparent on the record. *People v Nantelle*, 215 Mich App 77; 544 NW 2d 667 (1996). Effective assistance of counsel is presumed. A defendant bears the burden of proving that counsel's assistance was ineffective. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show: (1) that counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *Nantelle, supra*. The defendant must show he was denied a fair trial with a reliable result and must also show a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *People v Johnnie Johnson*, 451 Mich 115; 545 NW2d 637 (1996). Furthermore, defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991). This Court must be highly deferential in scrutinizing counsel's performance. *Strickland, supra*.

Defendant argues the burden of proof was impermissibly shifted to him when the trial court read to the jury defendant's *Contentions and Theory of the Case*, which stated in pertinent part: "The defendant contends that the defendant is innocent and not guilty of the charges made against him in this cause." Defendant has failed to cite any precedential authority which holds that a defendant's claim that he is innocent impermissibly shifted the burden of proof to defendant. This Court will not search for authority to sustain a party's argument. *People v Hoffman*, 205 Mich App 1; 518 NW2d 817 (1994); *People v Fowler*, 193 Mich App 358; 483 NW2d 626 (1992). In any event, defendant has not overcome the presumption that defense counsel's submission of defendant's *Contentions and Theory of the Case* was not sound trial strategy. The trial judge instructed the jury numerous times that the burden of proof was on the prosecutor. In addition, defendant's *Contentions and Theory of the Case* stated the burden of proving defendant's guilt beyond a reasonable doubt was on the prosecutor. Therefore, we hold that defendant was not denied the effective assistance of counsel on this basis.

Defendant also argues he was denied the effective assistance of counsel because his attorney failed to object to the jury instruction given at trial. We disagree. At trial, defense counsel submitted a

list of proposed instructions to be read to the jury. Defendant specifically requested CJI2d 3.5, entitled “Evidence”, which the trial court read verbatim to the jury. In *People v Hunt*, 170 Mich App 1; 427 NW2d 907 (1988), the defendant also argued his counsel’s failure to object to the given jury instruction amounted to ineffective assistance of counsel. However, this Court held that since the jury instructions were not defective, counsel’s failure to object was not ineffective. *Id.*

The jury instructions, as given, were not defective. Therefore, defense counsel’s failure to object on this basis does not render his representation of defendant ineffective. Since the record demonstrates the trial court read verbatim from the Criminal Jury Instructions, defendant has failed to overcome the presumption that counsel’s assistance was effective. Defendant was not denied the effective assistance of counsel.

Finally, defendant argues the trial court improperly instructed the jury to only consider the evidence presented instead of considering the “lack of evidence” as well. We disagree. Jury instructions are read in their entirety to determine if error occurred requiring reversal. *People v Paquette*, 214 Mich App 336; 543 NW2d 342 (1995); *People v Gaydosh*, 203 Mich App 235; 512 NW2d 65 (1994). A defendant is not entitled to a new trial if the instructions sufficiently protected the rights of the defendant and fairly presented to the jury the issues to be tried. *People v Holt*, 207 Mich App 113; 523 NW2d 856 (1994).

As previously mentioned, defense counsel requested the trial court read to the jury CJI2d 3.5, entitled “Evidence”, which the trial court read verbatim. We conclude that, when reading the jury instructions as a whole, the instructions were not likely to have misled the jury, and defendant failed to demonstrate any prejudice from the instructions as given. The trial court read verbatim the instructions requested by defense counsel. Had defendant’s attorney desired the term “lack of evidence” to be included, he should have objected at the trial court level or requested such phrase be included in the instruction when given. However, this was not done. Defense counsel stated he had no objections to the trial court’s instructions. We are hesitant to reverse the judgment of a lower court because of an error in jury instructions where no objection was raised at trial. *People v Hess*, 214 Mich App 33; 543 NW2d 332 (1995). In addition, the trial court instructed the jury on numerous occasions that it must find that the prosecution proved defendant’s guilt beyond a reasonable doubt. Therefore, we hold the instructions sufficiently protected defendant’s rights and fairly presented to the jury the issues to be tried.

Affirmed.

/s/ Richard Allen Griffin

/s/ Gary R. McDonald

/s/ Charles W. Johnson

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).