

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOWANDA EPPENGER,

Defendant-Appellant.

UNPUBLISHED

September 29, 1998

No. 198583

Recorder's Court

LC No. 94-004618

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison for the first-degree murder conviction, a concurrent ten to twenty-year prison term for the assault with intent to commit murder conviction, and a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that she was denied the effective assistance of counsel because defense counsel failed to adequately advise her regarding a plea offer by the prosecution. We disagree.

This Court will find ineffective assistance of counsel only where a defendant demonstrates that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied the defendant a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To show prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Lavearn, supra*, 448 Mich 217. To succeed on a claim of ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Here, the prosecutor denied ever making a firm plea offer to defendant. However, even if we were to assume that a plea offer was made, defendant failed to show that defense counsel's performance with respect to the offer fell below an objective standard of reasonableness. While the decision to plead guilty is the defendant's, when a plea offer is made, counsel must consult with his or her client and explain the matter to the extent reasonably necessary to permit the client to make an informed decision. MRPC 1.2(a); MRPC 1.4(b); *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). An attorney may offer a client a specific recommendation whether to go to trial or to plead guilty, but such a recommendation is not required, and failure to provide such a recommendation does not necessarily constitute ineffective assistance of counsel. *Corteway, supra*, 212 Mich App 446. The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea. *Id.* Absent unusual circumstances, where a counsel has adequately apprised a defendant of the nature of the charges and the consequences of a plea, an informed and voluntary choice whether to plead guilty or go to trial can be made by the defendant without a specific recommendation from counsel.

The record indicates that defendant was aware of the nature of the charges against her and the consequences of a plea. Defendant testified that she was aware that she was charged with first-degree murder, and that the penalty for first-degree murder was life in prison. Defendant further testified that she was aware of a plea offer pursuant to which she would plead guilty to second-degree murder, and would serve five years in prison for second-degree murder and two years in prison for felony-firearm. Therefore, assuming a plea offer was made, we conclude that defendant had sufficient information on which to base an informed and voluntary choice whether to plead guilty or go to trial. Accordingly, defendant failed to establish that defense counsel's representation with respect to the plea offer constituted ineffective assistance of counsel.

Defendant next argues that she was denied a fair trial by the misconduct of the prosecutor. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). On appeal, this Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We have carefully reviewed each of defendant's numerous allegations of prosecutorial misconduct. However, we find no error requiring reversal in the prosecutor's comments or conduct. Prosecutors are generally accorded great latitude in their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor is free to argue the evidence and all reasonable inferences arising from it, as it relates to the prosecution's theory of the case. *Bahoda, supra*, 448 Mich 282. Furthermore, a prosecutor may use "hard language" when it is supported by the evidence, and is not required to phrase arguments in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant next argues that she was denied a fair and impartial trial by the misconduct of the trial judge. We disagree.

A defendant in a criminal trial is entitled to a “neutral and detached magistrate.” *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The test to determine whether a trial court’s comments or conduct pierced the veil of judicial impartiality is whether the trial court’s comments or conduct “were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.” *People v Collier*, 168 Mich App 687, 697-698; 425 NW2d 118 (1988). When reviewing a claim of judicial misconduct, this Court must view the record as a whole and must not take portions of the record out of context. *Collier, supra*, 168 Mich App 698. If the trial court’s conduct pierces the veil of judicial impartiality, the defendant’s conviction must be reversed. *Id.*

After reviewing the record, we conclude that judicial misconduct did not deny defendant a fair and impartial trial. While the trial judge could have been more courteous to defense counsel on certain occasions, the trial judge’s conduct comes nowhere near the level of conduct this Court has required for reversal in other cases. See *People v Conyers*, 194 Mich App 395, 398-406; 487 NW2d 787 (1992); *People v Moore*, 161 Mich App 615, 617-619; 411 NW2d 797 (1987); *Wigfall, supra*, 160 Mich App 773.

Affirmed.

/s/ Roman S. Gibbs

/s/ David H. Sawyer

/s/ Martin M. Doctoroff