STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2000
v	No. 209510 Recorder's Court
HARRISON BISHOP SMITH, Defendant-Appellant.	LC No. 96-008896

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession with intent to deliver over 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(3); MSA 14.15(7401)(2)(a)(3). Defendant was sentenced to 6½ to 20 years' imprisonment. We affirm.

I

Defendant argues on appeal that he was denied a fair trial because of prosecutorial misconduct. Although three of defendant's specific claims in this regard are not preserved due to the failure to object to the alleged misconduct, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), this Court will nonetheless review the issue to prevent manifest injustice. *Id.* The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Claims of prosecutorial misconduct are decided on a case by case basis; the reviewing court examines the record and evaluates the alleged improper remarks in context. *Id.*

Defendant's first claim of prosecutorial misconduct is that the prosecutor, in closing argument, improperly expressed his personal opinion as to the credibility of a witness when he stated: "Those police officers testified credibly I submit to you. Those police officers testified honestly and from that witness stand you could tell that they were doing that."

A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may, however, argue from the facts that the defendant or another witness is

not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). When deciding issues of prosecutorial misconduct, the prosecutor's comments depend on the facts of the case and must be read as a whole. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991).

Reading the prosecutor's argument in its entirety, we conclude that the prosecutor was not rendering his own personal belief regarding the credibility of the police officers; rather, he was proposing to the jury the argument that the police witnesses should be believed. Following the alleged improper statement, the prosecutor continued his argument by reviewing the testimony of the police officers. Moreover, the prosecutor's use of the phrase, "I submit to you," was used to posit a proposition or an argument to the jury, not to improperly communicate or advance his personal beliefs. Under the circumstances, we find no manifest injustice arising out of the prosecutor's comments. *Paquette, supra*.

Defendant next maintains that the prosecutor improperly suggested that defendant was guilty of other criminal activity beyond the scope of the trial. We disagree.

The prosecutor, during closing argument, stated that "[w]e'll never know whether he was the supplier of those people next door." Defendant was arrested after walking out of his house during the course of an arrest, for possession of cocaine, of three individuals in the vacant lot next to his residence. Defendant suddenly stopped and walked back toward his house. As he approached the stairs, a police officer observed defendant toss a plastic bag containing an off-white substance to the ground. Another officer retrieved the substance, which tested positive for cocaine. Although a defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused, *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999), we believe the prosecutor's remark was a fair comment on the evidence presented at trial and the inferences therefrom.

Defendant's third allegation of prosecutorial misconduct is that the prosecutor suggested that defense counsel did not believe defendant's testimony and, therefore, denied him a fair trial. We disagree.

It is error for the prosecutor to suggest to the jury that defense counsel was intentionally trying to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). However, a prosecutor may argue that defense counsel inaccurately summarized that evidence presented at trial. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996).

In this instance, our review of the record indicates that the prosecutor did not say that defense counsel did not believe defendant's testimony. Rather, the prosecutor merely suggested that defense counsel's interpretation of defendant's testimony did not conform with the testimony of defendant. The prosecutor was merely attempting to draw a fair comparison between defense counsel's interpretation of defendant's testimony and the prosecution's interpretation. In light of defense counsel's failure to object to the alleged misconduct, which prevented the trial court from fashioning a curative instruction, *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996), we find that the prosecution's argument neither constituted misconduct nor caused a manifest injustice.

Defendant's final allegation of prosecutorial misconduct is that the prosecutor improperly argued that defense counsel was guilty of misconduct and thus attempted to shift the focus from the evidence to defense counsel. However, reiterating that the comments must be reviewed in context, we disagree.

The record reflects that defense counsel interjected the issue of penalty in his closing argument, arguing that the lesser offense that the court would instruct the jury on was not truly a lesser offense because the penalties for both offenses were the same. The prosecutor objected and the trial court sustained the objection. In rebuttal argument, the prosecutor explained to the jury that the penalty issue was not for its consideration and that it should be "angry about" defense counsel's attempt to shift the blame for the penalty to the jury.

A prosecutor may not personally attack the credibility of defense counsel, *People v Kennebrew,* 220 Mich App 601, 607; 560 NW 2d 354 (1996), and may not interject issues broader than the guilt or innocence of the accused, *Rice, supra* at 438. However, in this case, we believe the prosecutor was merely attempting to re-focus the jury on the relevant trial issues. A prosecutor's statement during closing argument may not be improper if the statement was made in response to defense counsel's statement. *People v Redfern*, 71 Mich App 452, 454; 248 NW2d 582 (1976). Under the circumstances, we find that the prosecutor's comments did not constitute misconduct.

II

Defendant's second issue on appeal is that the trial court abused its discretion when it failed to adequately question jurors during voir dire. We disagree. Defense counsel did not object to the conduct of jury selection; therefore, defendant has failed to preserve this issue for appeal, and we review to determine if the trial court's action was inconsistent with substantial justice. MCR 2.613(A).

Under MCR 6.412(C)(1), the purpose of voir dire is to "discover[] grounds for challenges for cause and [to] gain[] knowledge to facilitate an intelligent exercise of peremptory challenges." The trial court is given discretion in the scope and conduct of voir dire. MCR 6.412(C)(1); *People v Tyburski,* 445 Mich 606, 618-619; 518 Mich 441 (1994). In this case, the trial court conducted voir dire and allowed counsel to submit questions for the court to ask potential jurors. Both the prosecutor and defense counsel requested specific questions and the trial court asked those questions of the jurors. Defendant claims that the trial court abused its discretion because it failed to adequately question the jurors to find hidden biases.

Pertinent to this issue, the *Tyburski* Court, *supra* at 619, held that:

> [T]his Court has determined that where the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised. *Fedorinchik v Stewart*, 289 Mich 436, 438-439; 286 NW 673 (1939).

> This Court has long recognized the importance of a voir dire that allows the court and the parties to discover hidden bias that would render a potential juror incompetent.

In *Tyburski*, unlike the present situation, defense counsel requested that the trial court ask probing questions and that the defense thereafter be allowed to ask follow-up questions; however, the trial court denied defense counsel's request. *Id*. at 611. Furthermore, in *Tyburski*, defense counsel moved for, but was denied, a new trial because of the voir dire procedures. *Id*. at 617-618. Here, by contrast, defense counsel was given an opportunity to submit questions to the court, availed himself of that opportunity, and subsequently failed to object to the voir dire procedures. Although defendant suggests that there were many questions that the trial court should have asked the jurors to find potential biases, defendant does not allege that any juror had a particular bias. Furthermore, defense counsel failed to use any peremptory challenges. A failure to use all but one of the available challenges waives the issue of defective jury selection process on appeal. *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). Under the circumstances, this Court finds that the trial court did not abuse its discretion in its conduct of voir dire. The voir dire process was not inconsistent with substantial justice. MCR 2.613(A).

III

Defendant's final issue on appeal is that defendant was denied effective assistance of counsel when defense counsel failed to request more probing questions of jurors, or failed to challenge any juror. Since defendant failed to move for a new trial or *Ginther*[1] hearing, this Court must review this issue on the basis of the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficiency so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must also overcome a strong presumption that the challenged action is sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id*. at 687. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Rice*, *supra* at 445.

In *People v Robinson*, 154 Mich App 92; 397 NW2d 229 (1986), this Court affirmed the conviction of a defendant and, in so doing, rejected the defendant's ineffective assistance of counsel claim stemming from an alleged failure to challenge jurors who indicated they were previous victims of crimes involving larceny. This Court stated:

> A reviewing court cannot see the jurors or listen to their answers to voir dire questions. A juror's race, facial expression, or manner of answering a question may be important to a lawyer selecting a jury[.]

* * *

> A lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury. Defense counsel may want to retain certain prospective jurors, especially, and be willing to express satisfaction so the prosecution will not or cannot eliminate them.

* * *

> Our research has found no case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would so hold, and we do not so hold in this case. [*Id.* at 95.]

Defendant herein is claiming that certain jurors, who had property stolen and sold for drug purposes, or had been a victim of armed robbery, or had a relative killed, or had a brother addicted to cocaine, should have been challenged by defense counsel even though each juror indicated a willingness to set aside their experiences and give a fair verdict. However, as in *Robinson*, there is no indication in this case why defense counsel did not challenge those jurors or what selection strategy counsel was using. The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Under the present circumstances, defendant has not overcome the presumption that defense counsel's failure to challenge particular jurors was sound trial strategy. Defendant's claim of ineffective assistance of counsel is therefore without merit.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens

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