

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE LEE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

April 28, 2000

No. 212292

Kent Circuit Court

LC No. 97-005867-FC

Before: Meter, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to concurrent prison terms of twenty to forty years each for the assault convictions and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the evidence was insufficient to sustain his convictions. When reviewing the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103; 570 NW2d 146 (1997). We will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant argues that the evidence was insufficient to support a finding that he was the person who shot at the victims. Viewed in a light most favorable to the prosecution, the evidence revealed that defendant was discharged from the hospital emergency room at 7:45 p.m. The shooting occurred at approximately 8:15 p.m., and an officer was dispatched to the scene at 8:30 p.m. The evidence also demonstrated that defendant had a motive to shoot the victims because they had beaten him earlier that

afternoon. In addition, both victims unequivocally identified defendant as the shooter. Both stated that they saw him through the open car window. Detective Postma, who was assigned to the case, testified that both victims also picked defendant out of a photo drop and did not identify any other persons as the shooter. Clearly, this evidence was sufficient to allow a rational jury to conclude beyond a reasonable doubt that defendant was the shooter.

II

Defendant also argues that his motion for new trial should have been granted because the verdict was against the great weight of the evidence. We disagree. Conflicting testimony and questions of witness credibility are not sufficient grounds for a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Moreover, we will not substitute our judgment for that of the factfinder on issues of witness credibility absent exceptional circumstances. *Id.* at 642. Here, defendant does not demonstrate any exceptional circumstances. He simply outlines his theory of the case, points out alleged inconsistencies and argues that the prosecution's witnesses were not credible and had a strong motivation to lie about who shot at them. We find that the trial court did not abuse its discretion when it found that the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 27-28; 592 NW2d 75 (1998).

III

Defendant next argues that the prosecutor committed error requiring reversal when he made a statement that implicated defendant's right to remain silent and that the trial court should have granted a mistrial based on the prosecutor's improper comment. We agree that the prosecutor's comment was improper. The trial court, realizing that the comment was improper, admonished the prosecutor and gave a cautionary instruction to the jury.

Constitutional errors such as this are subject to review to determine if the beneficiary of the error can show that the error is harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). In order to demonstrate that an error is harmless beyond a reasonable doubt, it must be proved that there was no reasonable possibility that the error contributed to the conviction. *Id.* The error must be assessed in the context of the other evidence presented at trial. *Id.*

After reviewing the entire record and considering the statement itself in the context of the other evidence, we conclude that the error was harmless beyond a reasonable doubt. It did not contribute to the verdict. There was substantial evidence to support defendant's conviction. In addition, the issue of defendant's right to remain silent was not raised or emphasized at any other time during trial. Moreover, the prosecutor's statement was not inculpatory. And, immediately after defendant moved for a mistrial based on the statement, the trial court issued a cautionary instruction and ascertained from the jury that it understood that the defendant had an absolute right not to testify and that if he exercised his right it must not be held against him.

IV

Defendant also argues that there were numerous instances of prosecutorial misconduct during the prosecutor's closing and rebuttal argument.

Generally, prosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In addition, a prosecutor is not required to state inferences or conclusions in the blandest terms possible. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Emotional language may be used during closing argument and is "an important weapon in counsel's forensic arsenal." *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

A. The preserved claims of prosecutorial misconduct

First, defendant argues that the prosecutor improperly distorted facts in order to cast doubt on defendant's alibi. Specifically, he claims that the prosecutor's comment that defendant lied when he gave his first alibi to police was unsupported by the evidence. We disagree. The prosecutor's comment that defendant lied about his first alibi was not improper in light of the testimony of Detective Postma, who stated:

I believe initially he [defendant] told me he was in the hospital, and *after he was released from the hospital he had left for Mississippi*. But as I questioned him a little further about Mississippi and where he was going, whose car he was driving, what route he had taken, that story kind of fell through, and he admitted he had lied about Mississippi and he wasn't there. [Emphasis added.]

The shootings in this case occurred after defendant was released from the hospital. Based on Postma's testimony, the prosecutor's argument that defendant lied about his first alibi when he said he was in Mississippi was not a distortion of the facts in evidence.

Defendant also objected when the prosecutor argued that one of the witnesses believed that the presence of a police sticker allows access to and theft from a vehicle. At trial, the witness about whom the prosecutor was talking testified that if the victim's car did not have a police abandoned sticker on it, he would not have been tampering with it. This testimony, taken in conjunction with testimony that the victim saw defendant and the witness tampering under the hood of his car and that parts had been removed from his car, supports the inference made by the prosecutor. The prosecutor's comment was not based on fabricated facts, contrary to defendant's argument on appeal. Keeping in mind that the prosecutor was not required to state his inferences in the blandest possible terms, we find that his comment was a reasonable inference based on the evidence. Moreover, even if the inference was a stretch, it was based on evidence and did not deprive defendant of a fair trial.

B. The unpreserved claims of prosecutorial misconduct

Defendant raises numerous unpreserved claims of prosecutorial misconduct arising out of comments made by the prosecutor during closing and rebuttal argument. Appellate review of the unpreserved claims of prosecutorial misconduct is precluded unless the prejudicial effect could not have been cured by a cautionary instruction or if the failure to consider the issue would result in a miscarriage of justice. *People v Nimeth*, 236 Mich App 616, 626; 601 NW2d 393 (1999). We find that, with the exception of one of the unpreserved issues of prosecutorial misconduct, which is discussed below, our failure to review will not result in the miscarriage of justice. We also note that the allegedly improper comments were either reasonable inferences drawn from the evidence or were otherwise proper argument.

One unpreserved error warrants review. During his closing argument, defense counsel stated that the prosecutor had tried to shift the burden of proof. Counsel was referring to the prosecutor's statement implicating defendant's right to remain silent. On rebuttal, the prosecutor stated:

Few things here. Mr. Grace got upset about allegedly I'm shifting the burden. I've always told you the burden rests with me. *What upset me is to watch the defendant, while the victim [sic] is up here testifying, shake his head, making comments. I know you could see it and I know you could hear it. And that's improper.* [Emphasis added.]

We agree with defendant that the italicized comment was patently inappropriate. The comment did not relate to the prosecutor's theory of the case and was not a comment on the evidence or reasonable inferences from the evidence. *Bahoda, supra* at 282. It was a gratuitous attack on what the prosecutor perceived to be the improper conduct of the defendant during the trial. Although we find that the comment was improper, we do not find that it constitutes error requiring reversal. Defendant has not shown that a cautionary instruction would not have cured any prejudice or that the comment, in and of itself, deprived him of a fair trial.

V

Defendant next argues that the jurors were told that defendant allegedly pointed and laughed at one of the jurors during deliberations and that reversal is warranted as a result of this "extraneous influence." We disagree. Defendant has failed to show that this extraneous influence was related to a material aspect of the case or that there was a direct connection between the extrinsic influence and the adverse verdict. *People v Budzyn*, 456 Mich 77, 89; 566 NW2d 229 (1997); *Anderson, supra*. Indeed, all of the jurors indicated that the information about defendant's alleged conduct did not affect the verdict. Thus, we find that there was no error requiring reversal. The trial court did not abuse its discretion when it denied defendant's motion for mistrial on this ground.¹

VI

Defendant also argues that the cumulative effect of the errors in this case warrants reversal of his conviction. We disagree. In light of the overwhelming evidence of defendant's guilt, the effect of the errors, which did not affect material issues in the case, was not sufficiently prejudicial to warrant a finding that defendant was denied a fair trial. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999); *People v Kosters*, 175 Mich App 748, 756-757; 438 NW2d 651 (1989).

VII

Defendant also argues that we should remand for an evidentiary hearing and the appointment of an independent investigator. However, another panel of this Court denied defendant's motion to remand that was based on the precise grounds asserted here. As such, defendant's request for a remand amounts to a motion for rehearing, which is not only untimely, MCR 7.215(G), but is also improper because it merely reiterates the same issues previously ruled upon by this Court. MCR 2.119(F)(3).

VIII

Defendant next argues that the sentences imposed for the assault convictions are disproportionate. We disagree. The sentences imposed are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

IX

Finally, we have reviewed defendant's allegations of error found within his Standard 11 brief on appeal. With regard to defendant's claims of ineffective assistance of trial counsel, we are limited to reviewing errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). The record fails to support defendant's allegations of ineffective assistance of trial counsel. Moreover, we note that defendant has failed to overcome the presumption that the challenged actions were sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Similarly, we find that defendant has failed to demonstrate that his appellate counsel's performance was seriously deficient, nor has he overcome the presumption that appellate counsel's decisions with regard to which claims to pursue on appeal was sound trial strategy. *People v Hurst*, 205 Mich App 634, 641-642; 517 NW2d 585 (1994). The remainder of the issues raised in defendant's brief are unpreserved and defendant has failed to show the existence of any plain errors that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Thus, we find that defendant has not raised any errors requiring reversal.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

¹ We are mindful that it is not clear as to what happened between defendant and the juror. The juror either saw defendant do something inappropriate, which both defendant and the deputy who was escorting him deny or, the juror fabricated the incident, which the trial court did not believe or, the juror perceived the situation to be something that it was not. We do not believe, however, that this effects the outcome because defendant has still failed to meet his burden of demonstrating that the extraneous influence, either real or imagined, had any bearing on the verdict.