

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERSCELL DOYLE DAVID,

Defendant-Appellant.

UNPUBLISHED

March 20, 2001

No. 219889

Oakland Circuit Court

LC No. 98-161463-FC

Before: Whitbeck, P.J., and Murphy and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797. Defendant, a second habitual offender, MCL 769.10; MSA 28.1082, received an enhanced sentence of fifteen to twenty-five years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant contends as his sole issue on appeal that he was denied a fair trial because of several instances of prosecutorial misconduct. We disagree and note that defendant did not object to any of the prosecutor's statements, which defendant asserts were misconduct. "Appellate review of alleged prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction," *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995), limiting our review to plain error affecting defendant's substantial rights, *People v Schulte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

"Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. The test is whether defendant was denied a fair trial." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (citations omitted).

The complainant in this case testified that she was robbed in a well lit parking lot outside of a party store. She further testified that she was knocked to the ground and threatened at knife point while defendant demanded the keys to her car. After she threw her purse in front of the car, complainant got up and continued to watch defendant as she ran back into the store. Approximately two weeks later, complainant picked defendant out of a photographic lineup. Six months later complainant again identified defendant as her assailant when she picked him out of a corporeal lineup.

Defendant argues that the prosecutor improperly appealed to the jury to sympathize with the victim. “A prosecutor may argue that a witness should be believed.” *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). In addition, “[e]motional language may be used during closing argument and is ‘an important weapon in counsel’s forensic arsenal.’” *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996), quoting *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). However, a prosecutor cannot urge the jury to sympathize with the victim. *Wise, supra*, 104.

Here, the prosecutor never asked the jury to decide the case based on sympathy. In fact, the prosecutor repeatedly asked the jury to decide the case solely on the evidence. Thus, we do not find the prosecutor’s use of emotional language amounted to misconduct. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999); *People v Hoffman*, 205 Mich App 1, 21-22; 518 NW2d 817 (1994).

Next, defendant claims that the prosecutor misstated the burden of proof when explaining reasonable doubt to the jury. “An argument which creates the inference that the defendant must prove something or one in which the defendant is called upon to explain damaging evidence may tend to shift the burden of proof, resulting in error.” *People v Cummings*, 139 Mich App 286, 295; 362 NW2d 286 (1984). Furthermore, a prosecutor may not misinform a jury about the burden of proof. See *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), citing *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983).

However, the prosecutor did not shift the burden of proof by informing the jurors that defendant had failed to present evidence or prove his innocence. The prosecutor simply informed the jurors that the reasonable doubt standard was a “common sense” standard and that such a standard was satisfied if the jurors were reasonable and thought defendant was guilty. We do not find this explanation by the prosecutor to be misconduct. See *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995). Indeed, the prosecutor informed jurors that the trial court would instruct them on the reasonable doubt standard. Further, the trial court did instruct the jurors on reasonable doubt and informed the jurors that they should follow the law as given by the trial court and not the attorneys. Juries are presumed to have followed the instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, we do not find that defendant is entitled to a new trial because there was no error and the jury was properly instructed.

Defendant also argues that the prosecutor impermissibly informed jurors that the victim’s identifications were more credible because she observed defendant during a stressful event. In fact, the prosecutor did tell jurors, during his closing argument, that the victim would never forget defendant’s face and that she would see him again in her nightmares.

“[P]rosecutors 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, 282-283; 531 NW2d 659 (1995) (citations omitted). Here, the prosecutor correctly summarized the testimony of the victim during his closing and rebuttal arguments. Indeed, the victim did testify that the attack lasted twenty seconds and that she looked at defendant the entire time. She stated that she watched defendant while she ran to the store because she was afraid he would come after her. The victim also

testified that she was certain defendant was her attacker because she would never forget his face. Moreover, defendant's trial counsel repeatedly attacked the identifications made by the victim during the photographic lineup, the physical lineup, and the preliminary examination. Clearly, the prosecutor's arguments were phrased as responses to defense counsel's arguments and were proper. In sum, the allegations of prosecutorial misconduct in this case do not constitute plain error because they were not errors at all. See *People v Carines*, 460 Mich 750, 763-764; 697 NW2d 130 (1999).

Finally, defendant claims that the cumulative effect of these errors denied him a fair trial. However, this argument also fails as we find no error in the previously raised issues.

Defendant concludes by arguing that his trial counsel was ineffective because he failed to object to any of the prosecutor's comments. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because there was no *Ginther* hearing in this case, review by this Court is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). We also recognize that a claim of ineffective assistance of counsel raises a constitutional issue, which we review de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

In *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994), our Supreme Court adopted a two-pronged test for determining whether a defendant has been denied effective assistance of counsel as set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In order to establish ineffective assistance of counsel defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) the representation so prejudiced defendant as to deprive him of a fair trial. *Pickens, supra* at 302-303. "To demonstrate prejudice, the 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 Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

In this case, defendant claims that his trial counsel was ineffective for several reasons. First, defendant argues that his counsel was ineffective because the evidence concerning defendant's alias should not have been admitted. However, we note that defendant's trial counsel moved to exclude this evidence before trial, but the trial court ruled that the evidence was admissible.

Second, defendant argues that his trial counsel was ineffective because he failed to object, during the prosecutor's closing and rebuttal argument, to the numerous instances of misconduct. Specifically, defendant states that his trial counsel should have objected to the prosecutor's pleas for the jury's sympathy, the misstatement concerning the burden of proof, and the attempts to strengthen the identification testimony of the victim.

To establish his counsel's ineffectiveness, defendant must overcome the presumption that the challenged action or omission could conceivably be considered sound trial strategy under the circumstances. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). We will not second-guess counsel's trial tactics, *People v Emerson (On Remand)*, 203 Mich App

345, 349; 512 NW2d 3 (1994), nor will we assess counsel's competence with the benefit of hindsight, *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

After reviewing the closing arguments in their entirety, it is clear that defendant's trial counsel exhaustively and extensively addressed the statements made by the prosecutor, which defendant claims amounted to prosecutorial misconduct. Thus, we conclude that defendant has not overcome the presumption that his trial counsel's failure to object to these statements was a matter of trial strategy, and we hold that defendant's ineffective assistance of counsel claim is without merit.

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Jessica R. Cooper