STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2004
v	No. 244057 Wayne Circuit Court
TIMOTHY DEVALE JOHNSON, Defendant-Appellant.	LC No. 01-014226-01

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of ninety months to fifteen years for the murder conviction, to be preceded by a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant first argues that various remarks by the prosecutor during closing and rebuttal arguments were improper. Because there was no objection to these remarks below, we may grant relief only for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that certain remarks by the prosecutor involved improper vouching for the truthfulness of witnesses. However, considered in context, these remarks were part of permissible argument based on the evidence regarding the credibility of Cannon and Ellis. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (a prosecutor may argue from the facts that a witness is credible). The remarks did not involve improper vouching by suggesting that the prosecutor had special knowledge as to the truthfulness of either Cannon's or Ellis' testimony. See *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002) (a prosecutor may not vouch for witness credibility "by implying the prosecution has some special knowledge that the witness is testifying truthfully").

Defendant also claims that numerous remarks by the prosecutor were improper because the prosecutor "was testifying without having taken the oath." We disagree. Prosecutors "are

free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Here, defendant has not established any impropriety in the pertinent remarks. Considered in context, they were supported by the evidence presented at trial, or reasonable inferences or argument from that evidence. Moreover, the remarks could not plausibly have been understood as assertions of personal knowledge by the prosecutor regarding the facts of the case. We also note that, contrary to the implication of defendant's argument, it is not inherently improper for a prosecutor to argue from the evidence that a defendant's version of events makes no sense and did not occur, because a prosecutor may argue from the facts that a defendant is not worthy of belief. *Howard, supra* at 548.

Finally, defendant argues that the prosecutor improperly expressed his personal opinion as to defendant's guilt in certain remarks made during rebuttal argument. But it is apparent that the challenged statements were permissible argument based on the evidence, *Schutte, supra* at 721, and not inappropriate expressions of mere personal opinion unsupported by the evidence.

Defendant has not established plain error based on the prosecutor's closing and rebuttal arguments.

II

Defendant next argues that the trial court erred in its response to a note from the jury requesting the rereading of certain testimony. However, defense counsel affirmatively approved the proposed written response by the trial court to that request, stating that he believed it was "correct and accurate and I have no problem with that". By affirmatively approving the trial court's decision in this regard, defendant waived any error. *People v Carter*, 462 Mich 206, 208-209; 612 NW2d 144 (2000). Defendant also argues in effect that it is not clear from the record that the trial court's written note was actually provided to the jury. However, the record reflects that the trial court instructed a court officer to provide the note to the jury, and the note is also included in the lower court file. Defendant has not established any plain error, *Carines, supra* at 763-764, with regard to his unpreserved claim that the jury might not have actually received the note.

III

Defendant argues that the trial court erred by instructing the jury on flight when the parties had agreed before the beginning of trial that the prosecutor would not seek such an instruction. Because defendant did not object to the flight instruction when it was given, we may grant relief only for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763-764. Defendant is not entitled to relief under this standard.

Before jury selection, the prosecutor asserted that the fact that the case was dismissed at one point at a preliminary examination was irrelevant. Defense counsel then expressed that he was agreeable to not mentioning the earlier dismissal, provided the prosecutor did not request an instruction on flight, noting that defendant was arrested almost immediately after a second arrest warrant was issued. The prosecutor said that he was "not going to raise the issue of flight" and

that he did not think there "is evidence of flight really." Defense counsel responded, "Okay, fine." The trial court then said that "since you agree on that, that would be fine". As the prosecution notes, it is not apparent from the record why the trial court decided to give an instruction on flight, or even if a party requested it. Thus, defendant has not shown plain error with regard to the giving of the flight instruction. Furthermore, even if we assumed for purposes of discussion that the prosecutor requested the instruction and that it was plain error for the trial court to grant that request in light of the parties' earlier agreement, we would still conclude that relief is not warranted under the *Carines* standard. Defendant does not argue that the trial court's flight instruction was unsupported by the evidence or was otherwise improper apart from the parties' agreement. Indeed, Cannon testified that defendant left Ellis' home after the shooting, and defendant himself testified that he left the scene in his car after the gun went off. Accordingly, we see no basis to conclude that the flight instruction, which was substantively supported by the evidence, resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.

IV

Defendant also argues that the trial court erred by failing to instruct the jurors that they had a right to disagree as to the proper verdict and, accordingly, to return no verdict. Again, because defendant did not object to the court's instructions below, we may grant relief only for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763-764. As we understand defendant's argument, he is contending that the trial court's initial jury instructions following closing arguments were flawed because they did not expressly state that the jury had the option of returning no verdict at all. However, defendant has not cited any authority, nor have we found any, requiring such an express instruction in the initial instructions following closing arguments, or at any point, in the absence of a report by the jury that it is deadlocked. Nor is it obvious from the face of any constitutional or statutory provision of which we are aware that such an instruction should be given. Thus, we conclude that defendant has not established any plain error in this regard.

Further, in its instructions, the trial court told the jury that a verdict in a criminal case must be unanimous and that "none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict". It should have been apparent from the court's remarks that the jurors were not required to return a verdict if all jurors were unable to agree on a verdict in the course of deliberating and, thus, that the jury as a whole effectively had the option of not returning a verdict. Accordingly, we also reject defendant's derivative claim that the trial court's instructions were coercive in limiting the jury to the options of returning a guilty or not guilty verdict. Indeed, far from being coercive, the trial court instructed the jury that any verdict "must represent the individual considered judgment of each juror" and, as previously noted, that no juror should give up his or her honest opinion just to reach a verdict.

V

Finally, defendant argues that he received ineffective assistance of counsel based on trial counsel's failure to object to each of the issues previously discussed in this opinion. Because

defendant did not raise his claim of ineffective assistance of counsel below, our review is limited to errors apparent on the existing record. *People v Wilson*, 257 Mich App 337, 363; 668 NW2d 371 (2003). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient with counsel having made errors so serious that counsel did not perform as the counsel guaranteed by the Sixth Amendment, and (2) a reasonable probability of a different outcome but for counsel's error. In this regard, a reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 362, quoting *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). There is a strong presumption that counsel's performance constituted sound trial strategy. *Id.* Here, defendant has not established that he received ineffective assistance of counsel.

First, there is no basis to conclude that trial counsel was deficient in failing to object to the prosecutorial remarks discussed previously, because defendant has not established that those remarks were improper. See *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002) (defense counsel is not ineffective for failing to make futile objections).

Second, the trial court's denial of the jury's request to rehear certain testimony was in the realm of permissible trial strategy. It is not manifest that honoring the jury's request to reread this testimony would necessarily have benefited defendant. Trial counsel could reasonably have concluded that there was a possibility that juror confusion on important points would have benefited defendant by increasing the likelihood that the jury would have found a reasonable doubt concerning his guilt of the charged crime of second-degree murder based on the matters that led to the jurors' request to rehear testimony. Thus, defendant has not overcome the presumption of sound trial strategy with regard to trial counsel's agreement with the trial court's decision to deny the jury's request to be reread the pertinent testimony.

Third, as discussed previously, it is not apparent from the record that the flight instruction was given at the prosecutor's request. Furthermore, even assuming for purposes of discussion that the flight instruction was requested by the prosecutor, trial counsel's decision not to object was also in the realm of reasonable trial strategy. While the instruction indicated that flight could reflect consciousness of guilt, it also stated that such evidence did not prove guilt and that a person might run or hide "for innocent reasons such as panic, mistake or fear". Trial counsel could reasonably have concluded that these remarks might be viewed by the jury as placing the judge's prestige behind a conclusion that defendant's conduct of leaving the scene of the shooting after it occurred was not necessarily indicative of guilt, and that this outweighed any negative ramifications arising from the rather obvious point that flight could also reflect consciousness of guilt. Nevertheless, even if counsel's failure to object to the flight instruction could be considered error in light of his having earlier secured an agreement that the prosecutor would not seek such an instruction, we would still conclude that defendant is not entitled to relief in this regard because defendant has provided no basis for concluding that the flight instruction was substantively unsupported by the evidence or unfair to defendant. Thus, there is no basis for concluding that the instruction would undermine confidence in the outcome of the trial, which is required for purposes of an ineffective assistance of counsel claim.

Lastly, as discussed previously, we have found no authority requiring a trial court to expressly state to a jury that it has the option of not returning a verdict in its initial jury instructions following closing argument. Trial counsel cannot be considered to have provided

ineffective assistance by failing to present a novel legal argument in this regard. *People v Reed,* 453 Mich 685, 695; 556 NW2d 858 (1996).

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage