

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAVON WOODALL,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 247216

Wayne Circuit Court

LC No. 02-013085-01

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for assault with intent to murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b, and we affirm.

Defendant says that he was denied a fair and impartial trial due to the prosecution's misconduct in making improper closing remarks that shifted the burden of proof to defendant and denigrated defense counsel. We disagree.

Defendant preserved this issue for our review and we review a preserved claim of prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Accordingly, we must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). The propriety of a prosecutor's remarks will depend upon the particular facts of each case, *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991), and a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003).

Also, a prosecutor may not imply in summation that a defendant "must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). We find that the challenged remarks did not shift the burden of proof to defendant to come forward with evidence as to why the complainant would lie. Rather, the prosecutor used a rhetorical question to make the point that the complainant should be believed when he says it was defendant who shot him. A prosecutor may properly comment upon the credibility of a witness during closing arguments. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992).

(This Court held that the prosecutor's remark during closing arguments "that 'ultimately [the witness] told the truth,'" was an appropriate argument.) Therefore, the prosecutor's closing remarks about the complainant did not constitute prosecutorial misconduct.

Defendant also claims that the prosecutor denigrated defense counsel. "A prosecutor cannot personally attack the defendant's trial counsel because this type of attack can infringe upon the defendant's presumption of innocence." *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). "Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality." *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984).

Although the prosecution indirectly referred to defense counsel's alleged "plan B" defense, we find that the prosecution was merely commenting on the evidence presented and the credibility of the testimony offered on defendant's behalf. The alleged denigration of defense counsel was not an improper attack on defense counsel *personally*; rather, it was an attack on the alternate theory of defendant's case that the prosecutor believed defendant's attorney had implemented. Defendant was not denied a fair and impartial trial.

Also, defendant maintains that the trial court committed reversible error by not instructing the jury on the lesser included offense of assault with intent to do great bodily harm less than murder, MCL 750.84. We disagree.

Defendant failed to request the instructions he now asserts should have been included and failed to object to the alleged defects in the instructions given. Therefore, we review to determine if there is plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999). Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), our Supreme Court held that an inferior offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense. *Id* at 357. This means that all the elements of the lesser offense must be included in the greater offense.

Under *Cornell*, a crime is a necessarily included lesser offense if the charged greater offense requires the jury to find a *disputed* factual element that is not part of the lesser included offense. The question here is whether there was a legitimate dispute over the shooter's intent to kill. The record indicates that the only testimony and argument from defendant related to the identity not the intent of the shooter. Therefore, intent to kill was not a disputed factual element in this case. The testimony and evidence at trial overwhelmingly showed that the shooter walked up to the complainant, pulled out a gun and repeatedly shot the victim. Then, after the victim fell to the ground, the shooter proceeded to fire two more shots. Therefore, under *Cornell*, the trial court did not commit error by failing to provide the assault within intent to cause great bodily harm instruction because there is no dispute on the element differentiating the two crimes: intent to kill.

Also, defendant asserts that he received ineffective assistance of counsel because his trial attorney withdrew as counsel before the sentencing hearing because he had been hired by the Wayne County Prosecutor's Office. Defendant insists that "[t]he lawyer that was appointed at sentencing was like having no lawyer at all." We disagree.

Because defendant did not move for a new trial or evidentiary hearing in the trial court, he failed to preserve this issue for this Court's review. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Therefore, our review is limited to errors that we can discern from our review of the record. *Id.* To establish ineffective assistance of counsel, a defendant must show that counsel's performance was so deficient that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant offers no argument in his brief on how the outcome of the sentencing would have been different had defendant's original attorney represented him at the sentencing hearing. Moreover, the record at sentencing shows that defendant's attorney was familiar with defendant's presentencing investigation report and made several well-informed arguments on defendant's behalf. Defendant was not denied effective assistance of counsel.¹

Affirmed.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello

¹ Defendant says, incorrectly, that neither he nor his attorney had the opportunity, before sentencing, to review the presentence report. At sentencing, defense counsel stated:

Your honor, *I have reviewed the presentence report and the guidelines. I've discussed this matter with Mr. Woodall.* The prosecutor and I have had an opportunity to go through the guidelines. [Emphasis added.]

These comments show that both defendant and defense counsel reviewed the presentence report before sentencing.