STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2004
v	No. 246707 Wayne Circuit Court
ALEJANDRO TORRIS GARDNER, Defendant-Appellant.	LC No. 02-005687

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a person convicted of a felony, MCL 750.224f. Defendant was sentenced to life imprisonment for the first-degree murder conviction, two years' imprisonment for the felony-firearm conviction, and two to five years' imprisonment for the felon in possession of a firearm conviction. We affirm.

Defendant first argues that his attorney's failure to pursue a jury site view, after initially requesting one, constitutes ineffective assistance of counsel because it denied him the right to present evidence in his defense. Defendant contends that a site view would have clearly established the ambient light levels in the area, as well as other relevant details, and would have shown that the witnesses' identifications of him as the shooter were unreliable. We disagree.

Because defendant did not move for a new trial or a *Ginther*[1] hearing in the trial court, this issue is not preserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

"To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

809 (1995). In applying this test, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

A review of the record reveals that there was extensive testimony regarding the lighting conditions at the time of the shooting, as well as the general layout of the scene of the shooting and its environs. Ten witnesses testified regarding the lighting conditions in the vicinity of the bar outside of which the victim was shot. Several of them testified extensively about the number and placement of various sources of illumination in the vicinity of the shooting. Witnesses testified regarding the layout of the streets, buildings, and other objects that would have determined the lines of sight. Photographs of the scene of the shooting and its surroundings, as well as an evidence technician's sketch of the same, were presented to one of the police officers, and she testified regarding details of nearby houses, their yards, and the layout of the area around the bar, including an alley and a vacant lot. It appears from the record that these photographs and the sketch were visible to the jury on a screen as the officer testified. Even if they were not, these items were admitted into evidence, and presumably would have been available to any juror having questions regarding lines of sight at the scene of the shooting.

Two police evidence technicians testified extensively regarding the crime scene and the sketch made of it. From the trial transcript, it is clear that there was a television positioned so that the jurors could see it as at least one of the technicians went over the photographs and sketch, explaining details of the vicinity of the shooting. Both evidence technicians testified regarding where the light sources in the vicinity of the shooting were located, the positions of nearby structures, the angle from which the shooter would have had to have fired, and where investigators found various items of evidence, including shell casings, blood, the victim's cell phone, parked cars, and footprints.

Had a site view been undertaken, it would have been difficult, if not impossible, to recreate the exact conditions existing at the time of the shooting. Numerous factors influence the amount of illumination at a given outdoor location at night: the number, positioning, and intensity of sources of artificial illumination; the amount of illumination from the moon and stars; and the amount of cloud cover, to list a few. There was conflicting evidence regarding some of these factors. There was disagreement, for example, in the testimony regarding whether certain porch lights were turned on near the place from which the shooter fired. Other potential sources of illumination at the scene would be inherently difficult to reproduce in the exact quantities present at the time of the shooting, for example, the quantity of light from headlights of nearby passing cars.

Given all of the variables affecting visibility and lines of sight, had a jury site view been undertaken, it could well have harmed defendant's case, possibly giving jurors the impression that the witnesses were able to see better than they actually could the night of the shooting. Such an outcome could cause jurors to have more confidence in the witnesses' identification of defendant than they would without the site view, thus prejudicing his defense. We also note that defense counsel made the request before two of the prosecution's key witnesses testified. Hearing their testimony, with the details about lighting favorable to the prosecution, defense counsel might well have decided that the prosecution would be able to better resolve any of the lighting variables in its favor.

In sum, with the uncertain benefit and potential for prejudice to defendant's case that a jury site view represented, it would not be unreasonable for defense counsel to have decided, upon reconsideration, not to pursue his initial request. Since there were sound strategic reasons for not pursuing the request for a jury site view, defendant has not overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *LeBlanc*, *supra* at 578. Consequently, defendant has not established that his counsel's assistance was ineffective.

Defendant next argues that he is entitled to a new trial because the prosecutor made comments that amounted to a claim that the jurors had a "civic duty" to convict defendant. We disagree. This issue is not preserved since defendant did not object to the comments at trial. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Therefore, this Court's review is for a plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Generally, prosecutors are afforded great latitude regarding their arguments and conduct. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id*.; *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Still, prosecutors should not resort to civic duty arguments which appeal to the fears and prejudices of jurors. *Thomas, supra* at 455-456. The test for prosecutorial misconduct is whether defendant is denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be put at risk when the prosecutor interjects into the trial issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Whether a prosecutor's remarks are proper depends on all the facts of the case, and they must be read in their entirety and evaluated in light of both the defense arguments and the relationship they bear to the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). An improper argument by a prosecutor appealing to the civic duty of the jury to convict may be cured by a cautionary instruction that the arguments of counsel are not evidence. *People v Abraham*, 256 Mich App 265, 276; 662 NW2d 836 (2003); *People v Stimage*, 202 Mich App 28; 507 NW2d 778 (1993).

The prosecutor made the remarks at issue after summarizing the evidence supporting the prosecutor's case. Defendant argues that *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984), is "directly on point and controlling on this issue."[2]

However, assuming arguendo that error did occur, the error was not "plain," and defendant has not met his burden of showing that it affected his substantial rights. "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'" *People v Grant*, 445 Mich 535, 549; 520 NW2d 123 (1994). The error defendant alleges is not as plain or obvious as a trial court's misapplication of sentencing guidelines, or the violation of a "bright-line" rule relating to the admissibility of polygraph evidence, both of which are examples of errors held to be "plain."

[2] Defendant fails to note that, despite the trial errors in *Wise*, this Court affirmed the defendant's conviction, holding that error requiring reversal did not occur.

See *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Kimble*, 252 Mich App 269, 278; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003).

In *People v Phillips*, 112 Mich App 98; 315 NW2d 868 (1982), aff'd sub nom *People v Wesley*, 421 Mich 375; 365 NW2d 692 (1984), this Court acknowledged that there is a fine line between a proper argument on the evidence and an improper "civic duty" argument. Given the prosecutor's clear statement that it was because she had proved the elements of the charged offenses beyond a reasonable doubt that the jury should convict defendant, and this Court's acknowledgement that arguments on the evidence that come close to an improper "civic duty" argument are acceptable, the prosecution's comment at issue, if indeed error, was not a "plain," "clear," or "obvious" error.

Further, we conclude that error requiring reversal did not occur because defendant has not met his burden of establishing that he was prejudiced by the remark. *Carines*, *supra* at 763-764. This Court has held that an improper "civic duty" argument can be "cured by a cautionary instruction that 'arguments of counsel are not evidence.'" *Stimage*, *supra* at 30. In the present case, the trial judge instructed the jury that it must only consider the evidence that had been properly admitted in reaching its verdict, an instruction he later repeated. He also instructed the jury that the lawyers' statements and arguments were not evidence. The jury presumably followed these instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White