

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD JONES,

Defendant-Appellant.

UNPUBLISHED

May 1, 2007

No. 267111

Wayne Circuit Court

LC No. 05-004482-01

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

PER CURIAM.

Defendant was convicted of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to twenty to forty years' imprisonment for the assault conviction, two to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that the trial court abused its discretion by not allowing defendant to inquire into an eyewitness's understanding of whether an immunity agreement protected the witness from prosecution for parole violations stemming from prior felony convictions. We find it unnecessary to address whether the trial court abused its discretion because, assuming error, it was clearly harmless beyond a reasonable doubt. MCL 769.26;¹ *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The witness did testify before the jury that it was his

¹ MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission *or rejection of evidence*, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [Emphasis added.]

understanding that he had an immunity agreement with the prosecutor. The witness later testified that it was his belief that the prosecution could not bring any charges against him relative to drug activity at the house where the shooting occurred. The trial court refused to allow defendant to make further inquiry into whether the immunity agreement specifically covered parole violations, and not merely standard criminal charges, arising out of the witness's drug activity at the crime scene. The court found that defendant's request was a "backdoor way of getting in evidence of prior convictions."

The harmless-error analysis involves determining whether it affirmatively appears that the error undermined the reliability of the verdict. *Lukity, supra* at 495. "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* If this alleged error is deemed of constitutional magnitude under the Confrontation Clause, an error is harmless beyond a reasonable doubt if it is clear that a rational jury would have found the defendant guilty absent the error. *Shepherd, supra* at 347. Here, the witness told the jury that he had an immunity agreement and that it covered illegal drug activity at the scene; the added fact, assuming it to be true, was that it extended to parole violations and not just standard criminal charges. This is a de minimis, and in the context of this case, inconsequential exclusion of testimony. After hearing the testimony, reasonable jurors surely concluded that the witness was not going to be prosecuted for anything related to the drug activity. In sum, the jury heard evidence bearing on the witness's credibility and bias in the form of the immunity testimony, and the disputed evidence concerning parole violations would have added little if anything to the inquiry. Given the exceptionally strong evidence of defendant's guilt and the limited value of the challenged evidence, we confidently conclude that it is *not* more probable than not that a different outcome would have resulted without the alleged error. It is clear that a rational jury would have found defendant guilty absent the alleged error. There has been no miscarriage of justice.

Defendant next argues on appeal that the prosecution vouched for its witnesses' credibility and bolstered their testimony by telling the jury that the witnesses were testifying truthfully. We disagree. This Court reviews constitutional issues involving prosecutorial misconduct de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct claims are decided case by case, and the prosecutor's remarks are evaluated in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may not vouch for the credibility of witnesses by implying that she has some special knowledge that the witnesses testified truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant objects to the prosecutor's remark that, "later in [defendant's] statement, because I don't think it's the truth, the evidence has kind of shown the truth." Defendant's claim of misconduct regarding this statement is meritless given that first, the statement in no way vouches for a witness, and second, in the very same statement, the prosecutor states that she is basing her opinion on the evidence as required by *Howard*.

Next, defendant objects to the following statement made by the prosecutor, “[C]ommon sense and reasonableness. We’ve got witnesses who have no motive to lie. What are they here to lie for? They said the defendant is shooting.” However, immediately after this statement the prosecutor discussed the testimony of a witness who was shot in the back of the head and was not offered immunity. Taken in context, the statement was based on the evidence.

The next statement defendant finds objectionable is, “[the witness] came in and testified about what he saw. He didn’t come in and here and – If all these people had some motive to lie, what is it? What is it?” The prosecutor was simply asking the jury a rhetorical question. Furthermore, immediately preceding the question, the prosecutor related the question to the evidence when she stated, “[The witness] is a victim, too. He’s here because this case was important to him as well. He was shot seven times.” Thus, read in context, the prosecutor related her opinion to the evidence.

The last statement defendant objects to is, “The truth is that [defendant is] in there with [his accomplice] and they’re both shooting. And I believe that they even used, one or the other, [the victim’s] gun, in that shooting, that there were three guns.” However, before making this statement the prosecutor stated, “[Defendant] says he ran out after he heard the first shot. Then in the second part of the statement . . . he says I saw [one of the witnesses] being shot. What part’s the truth?” Again, the prosecutor was basing her opinion on the evidence.

Taken in context, each of the prosecutor’s statements defendant complains of were related to the evidence. She did not imply that she had some special knowledge that the witnesses were testifying truthfully. Even if the prosecutor’s remarks were improper, the trial court could have cured the possible prejudice by giving the jury a cautionary instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). However, defendant declined having any cautionary instruction given to the jury. Reversal is unwarranted.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper