STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2007
v	No. 267897 Oakland Circuit Court
MARTENEZ DOREZ WISE, Defendant-Appellant.	LC No. 2005-203178-FC

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

This case arises out of a violent incident involving defendant and Mark Mishler that took place in a hotel room. Mishler testified that defendant physically assaulted him, demanded his wallet, and stabbed him repeatedly in the face and neck with a woodworking instrument before fleeing Mishler's hotel room. Defendant maintained that Mishler made sexual advances toward him and then physically attacked him, effectively arguing that he retaliated against Mishler in self-defense. Following a trial by jury, defendant was convicted of assault with intent to commit murder, MCL 750.83, and armed robbery, MCL 750.529. The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to 40 to 70 years' imprisonment for the assault conviction and to life in prison for the robbery conviction. Defendant appeals as of right, and we affirm.

Defendant argues that the prosecutor made unfairly prejudicial comments. Defendant did not object below to the challenged comments. Accordingly, we review this claim for plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. (internal citation and quotation marks omitted).

This Court "reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "[T]he 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 Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). "A prosecutor may not inject unfounded and prejudicial innuendo into a trial." *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007). Additionally, a "prosecutor may not make a civic duty argument that appeals to the fears and prejudices of the jurors because this

injects issues broader than the guilt or innocence of the accused into the trial." *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). Moreover, "[a] prosecutor may not comment on a defendant's silence in the face of accusation . . . ." *Id*. at 634. However, "[a] defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[1] warnings have been given," so a prosecutor may "comment on silence that occurred before any police contact." *Id*. Also, a "'prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true.'" *Id*. at 634-635, quoting *Goodin*, *supra* at 432.

In this case, defendant's version of the story included a claim that Mishler made an unwanted sexual advance by reaching between defendant's legs and trying to grab his genitalia. Defendant testified that he "smacked" Mishler's hands down and that Mishler punched him in the mouth, causing defendant to lose a tooth, and then grabbed defendant by the neck. Defendant indicated that while trying to get up by leveraging his arm on the table, he found that his "hand was on one of those carving tools," and he started swinging at Mishler.

On cross-examination, the prosecutor essentially asked why defendant failed to seek medical treatment or report the alleged sexual assault. The prosecutor then expressed doubt with regard to defendant's answers, and defendant admitted that he was telling this story for the first time at trial. The prosecutor later argued that defendant's failure to report his claimed story had credibility implications.

We find the prosecutor's line of questioning and statements regarding defendant's failure to report his story earlier to be proper. Defendant had plenty of information that would have enabled him to provide a substantive description of the incident. He knew the identity of Mishler, his alleged attacker – he knew he was a tattoo school student and he also knew Mishler's hotel room number. Defendant also knew that his friend Rashida, if called upon, could identify Mishler, because she had spoken to him for a while in the bar earlier that night. Defendant also knew the location of the alleged assault – a specific room in the Howard Johnson hotel in Southfield. Under these circumstances, "reporting the crime would have been natural if the defendant's version of the events were true." *Goodin*, *supra* at 432. Thus, the prosecutor properly commented on defendant's failure to do so.

We also reject defendant's argument that the prosecutor improperly criticized him for exercising his constitutional right to a jury trial. The prosecutor asked defendant if he thought it was "a joke to come into a courtroom and at the eleventh hour tell a story that no one has been told before so we can have a trial and you can run the risk of being convicted for something you just didn't do." Rather than a criticism of defendant's exercise of his right to a jury trial, we believe this is most reasonably understood as a challenge to the credibility of defendant's testimony.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 11602; 16 L Ed 2d 694 (1966).

Defendant also claims that the prosecutor improperly appealed to the jury's sense of civic duty when he stated:

> Convict this gentleman over here of assaulting with intent to murder Mr. Mishler as charged, and convict him of robbing him with a weapon as well. Not because I want you to do it, not because you should do it just because you'll go home and feel better the streets are safer. No. You do it because that's what the evidence tells you you must do. Go in there and follow the law, apply the evidence to it, and convict him.

Admittedly, the prosecutor arguably attempted to make a civic duty argument, because the statement effectively operated as an attempt to more or less "remind" the jury that the streets would be safer by convicting defendant. This argument indirectly appealed to the jurors' fears for their own safety. However, the prosecutor also stated that the safety of the streets was not a proper reason to convict defendant. The prosecutor plainly told the jury that it should convict defendant only because "that's what the evidence tells you you must do." This was a proper argument. We find that any prejudice incurred by the indirect reference to the safety of the streets was outweighed by the correct statement of the law. When reading all of the prosecutor's comments as a whole, *Ackerman*, *supra* at 452, defendant's substantial rights were not violated.

Defendant next argues that defense counsel was ineffective for failing to object to the prosecutor's comments described above. Because defendant did not file a motion below for a new trial or an evidentiary hearing concerning this issue, our review of this claim is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

A defendant seeking a new trial based on ineffective assistance of counsel bears a heavy burden to overcome the presumption that counsel provided effective assistance. See *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). The defendant "must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must also establish a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have different. *Id*. He must also demonstrate that the result of the proceedings was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Here, defense counsel did not act unreasonably in failing to object to the prosecutor's comments concerning defendant's credibility, because the prosecutor's comments were proper, as discussed above. With regard to the "civic duty" comment, we find that defendant has not established a reasonable probability that the prosecutor's statement affected the outcome of the trial. Accordingly, reversal is not warranted. *Rodgers*, *supra* at 714.

Defendant next argues that his due process rights were violated when the prosecutor failed to disclose exculpatory evidence. See MCR 6.201(B)(1) ("[u]pon request, the prosecuting attorney must" turn over "any exculpatory information or evidence known to the prosecuting attorney"). We disagree. Whether a defendant was denied a fair trial due to the suppression of evidence by the police or the prosecutor depends upon "whether (1) suppression was deliberate,

(2) the evidence was requested, and (3) the defense could have significantly used the evidence." *People v Miller*, 211 Mich App 30, 44-45; 535 NW2d 518 (1995).

Defendant argues that his due process right to a fair trial was violated when his request for discovery was not honored. Although defendant's argument in his supplemental appellate brief is unclear, it appears that defendant is asserting that the evidence sought consisted of prior inconsistent statements by Mishler that he had spent a significant amount of his funds before his encounter with defendant. Defendant argues that these statements were later contradicted by Mishler's testimony that he had a specific amount of money in his wallet. However, defendant does not establish that the alleged prior inconsistent statements were exculpatory, because he does not explain how the statements were inconsistent with later testimony. That Mishler spent a significant amount of his funds before his encounter with defendant does not contradict testimony that Mishler had a specific amount of funds in his wallet. Accordingly, defendant has not shown that the prosecutor failed to disclose exculpatory evidence.[2]

Defendant also argues, once again, that he was denied the effective assistance of counsel. Specifically, he alleges that defense counsel should have examined the preliminary examination transcripts and acquired the prior inconsistent statements. He also argues that had defense counsel conducted a proper pretrial investigation, he would have uncovered a statement allegedly made by a police officer that Mishler was very evasive when responding to questioning about being robbed. Defendant also argues that with proper investigation, defense counsel would have known that the complainant's girlfriend removed evidence from the crime scene in violation of the law and later offered portions of that evidence to the officer conducting the investigation. Defendant argues that had all this evidence been presented to the jury, it would have discredited the credibility of the prosecution's witnesses, therefore changing the outcome of the case.

As noted above, when there has been no evidentiary hearing below regarding a claim of ineffective assistance of counsel, appellate review is limited to the record. *Barclay*, *supra* at 672. In this case, the record before us does not support a finding that the various facts defendant argues existed really did exist. Moreover, once again, defendant does not explain how various statements allegedly made by Mishler were contradictory. Nor does defendant adequately demonstrate that his counsel's cross-examination of witnesses was deficient or that a review of the preliminary examination transcripts would have affected the outcome of the trial. Thus, we reject his ineffective assistance claim. *Rodgers*, *supra* at 714.[3]

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[2] We again note that defendant's supplemental appellate brief is unclear, but defendant appears to be also arguing that the prosecutor erred in failing to turn over the preliminary examination transcripts. However, presumably defendant was present at the preliminary examination and therefore would have been aware of allegedly inconsistent statements made during the preliminary examination. Accordingly, his argument that the prosecutor somehow withheld exculpatory evidence from him is without merit. Moreover, defendant has not demonstrated prejudice due to the lack of a preliminary examination transcript. See *People v Zinn*, 63 Mich App 204, 211; 234 NW2d 452 (1975).

[3] We also reject defendant's claims, made in both his initial and supplemental appellate briefs, of "cumulative error."

Defendant next argues that his convictions and sentences for both armed robbery and assault with intent to commit murder violate his protections against double jeopardy. Defendant did not preserve this issue below, so our review is for plain error that affected substantial rights. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

The Double Jeopardy Clause affords a defendant three basic protections: "(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004); see also *Ohio v Johnson*, 467 US 493, 498-499; 104 S Ct 2536; 81 L Ed 2d 425 (1984). The issue here is the third protection – the protection against multiple punishments for the same offense.

"The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v US*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 2d 306 (1932); see also *People v Smith*, 478 Mich 292, 324; 733 NW2d 351 (2007).

The offense of assault with intent to commit murder is set forth in MCL 750.83, which states: "Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years." "In the assault statute, the emphasis is on punishing crimes injurious to other people, regardless of whether a weapon is used to effect the injury." *People v Harrington*, 194 Mich App 424, 429; 487 NW2d 479 (1992).

The offense of robbery is set forth in MCL 750.530, which states, in pertinent part:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

MCL 750.529, the armed robbery statute, states, in pertinent part:

> A person who engages in conduct proscribed under [MCL 750.530] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

"[I]t is clear from the language of the armed robbery statute that the Legislature intended to prohibit takings accomplished by an assault and the wielding of a dangerous weapon." *People v Parker*, 230 Mich App 337, 343; 584 NW2d 336 (1998).

Armed robbery requires proof that the defendant was armed with a dangerous weapon, while assault with intent to murder does not. Armed robbery also requires proof that the defendant intended to permanently deprive someone of property, while assault with intent to

murder does not. Finally, the assault crime requires a showing of an intent to kill, while armed robbery does not. Thus, defendant could properly be punished for both crimes under *Blockburger, supra,* and *Smith, supra*.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens