

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN T. SMITH,

Defendant-Appellant.

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UNPUBLISHED

January 24, 2008

No. 274422

Wayne Circuit Court

LC No. 06-008033-01

Before: Whitbeck, P.J., Owens and Schuette, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant received concurrent sentences of 26 to 50 years’ imprisonment for the armed robbery conviction, 10 to 20 years’ imprisonment for the home invasion conviction, and 40 to 60 months’ imprisonment for the felon in possession of a firearm conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. At the time he committed the current offenses, defendant was on parole for carrying a concealed weapon, MCL 750.227, and taking a firearm from a police officer, MCL 750.479b(2). The trial court ordered that defendant serve his current sentences be served consecutively to the parole matter. Defendant appeals as of right. We affirm defendant’s conviction and sentence, but vacate the trial court’s final order for reimbursement of attorney fees and remand to the trial court for redetermination of this issue.

**I. Underlying Facts**

Andrew Burks, the victim in this case, is a freelance photographer and a part-time consignment dealer of high-priced eyeglasses. Burks first met defendant in June 2005 at a barbershop. Through their conversation, defendant learned that Burks sold eyeglasses. Burks had with him at the barbershop a pair of wood-grain Cartier eyeglass rims. Defendant liked the rims, so Burks sold them to him for \$750.

Between three and four weeks later, on the afternoon of July 1, 2005, Burks was outside his home washing his car. Defendant drove up with his girlfriend and approached Burks. Defendant indicated that he wanted to buy a pair of glasses for his girlfriend. Burks took the couple into the front room of his house, where he stored his business equipment and inventory.

Defendant's girlfriend selected a pair of \$400 eyeglasses, but did not have enough money to purchase them. Burks agreed to save the glasses for her, and defendant and his girlfriend left.

At approximately 9:00 or 9:30 p.m. the same day, Burks was carrying fishing equipment from his car into his house. As he entered his front door, defendant approached him from behind and put a gun to the right side of his head. Burks saw defendant from the corner of his eye. He recognized defendant by his voice and appearance as the man who was at his home earlier that day. Burks described his assailant as a light-skinned, approximately 30-year-old African-American man with a beard, measuring approximately five feet nine inches tall and weighing approximately 195 pounds. Burks could not specifically describe defendant's hair because defendant was wearing a baseball cap, but he believed that defendant either had short hair or was bald. Burks indicated that defendant was still wearing the clothes he had worn earlier in the day—a jogging shirt, Air Force One shoes, and a white cap.

Defendant pushed Burks into the house. When defendant tried to change the position of his gun, Burks attempted to wrestle free. At that time, Burks could see defendant face-to-face. During the fray, defendant's accomplice, who has yet to be apprehended, walked into the house. The accomplice pointed a gun at Burks and Burks surrendered. The two men pushed Burks face down on the floor. The accomplice tied Burks' ankles together with a fan belt and his wrists together with the electrical cord from an iron. Defendant ransacked Burks' home and stole photography equipment, eyeglasses, Gucci watches, DVDs, a Play Station, guns, and Burks' wallet containing over \$1,000.

After defendant and his accomplice left, Burks hopped outside and found a neighbor, Ramsey Scotland, to free him and call for help. Scotland testified that Burks told him, "They just robbed me. They took all of my stuff." Scotland initially claimed that when Burks was bound, he said that he did not know who robbed him. When asked to clarify his testimony, Scotland indicated that Burks said "they" robbed him, but never expressly said that he did not know the people who robbed him.

Burks did not know defendant's name at the time of the robbery and could give the police only a physical description. Burks questioned people from his neighborhood and learned that defendant went by the name "James Carlos Stafford" or "Stanford." Burks provided the name to the police and looked through mug shots at the police precinct, but did not locate his assailant at that time. Approximately one year later, police officers brought several photographs to Burks' home. Burks did not see his assailant in the first set of photographs the officers showed him. The officers then showed Burks an additional nine photographs, including a photograph of defendant. Burks immediately identified defendant as the man who robbed him at gunpoint.

Detroit Police Officer Aaron Colwell initially responded to the call reporting the robbery and took Burks' statement. Burks told Colwell that he met defendant at a barbershop but did not know defendant's name. However, Burks was certain that he knew his assailant. On the computer-generated police report form, Colwell later typed that Burks described defendant as five feet nine inches tall and approximately 165 pounds. He indicated that defendant was light-skinned and had short black, or "Afro," hair.

Detroit Police Investigator Donald Olsen followed up on Colwell's initial report. Olsen explained that he did not search for defendant's fingerprints in Burks' house because Burks

admitted that he had invited defendant into the house earlier that day and as a result, he expected to find defendant's fingerprints in the house even if defendant did not commit the robbery. Olsen initially searched for "Carlos Stafford" in a computer database, but did not discover the link to "Sean Smith." However, he linked "Carlos Stafford" as an alias for "Sean Smith" in the database during a later search.

Alexis Neal testified that she and defendant have been in a relationship since June 2004 and lived together since May 2005.<sup>1</sup> Neal knew that defendant used the names "Carlos," "Carlos Stafford," and "James Carlos Stafford." She testified that defendant was bald before his incarceration and presented two personal photographs depicting defendant with a shaved head. Neal claimed that on July 1, 2005, defendant was helping her pack to move to a larger apartment and they did not finish moving until long after dark. Although Neal initially claimed that she was certain of the date because it was a holiday weekend, she later admitted that she was not sure that she moved on July 1, 2005, only that she moved that weekend.

## II. Judicial Bias

Defendant argues that the trial court revealed its bias against the defense to the jury by interjecting prejudicial and disdainful comments and inappropriately interrupting defense counsel. Defendant did not challenge these comments at trial, so our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). MCR 6.414(B) states in part,

The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court.

"A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Paquette, supra* at 340. We review the record as a whole and place the court's comments in context to determine if defendant was denied a fair trial. *Id.*

On cross-examination, defense counsel questioned Burks regarding his identification of defendant, eliciting from Burks the clarification that he first looked at photographic lineups at the police precinct and then at his house. The following exchange then occurred:

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<sup>1</sup> There is no indication that Neal was the woman with defendant at the barbershop in June 2005 or at Burks' house on the afternoon of July 1, 2005.

*Q.* All right. And then you were shown photos again, you said? I mean, you had no problems answering the questions that the Prosecutor asked you, and it's a simple question.

*The Court:* Oh, please don't do that. Just ask the man questions. Don't argue with him.

*[Defense Counsel]:* All right, I'm not going to argue with him—

*The Court:* No, don't do that, starting by "You know, you were able" thing, you know, that's a trick. Don't do it. Don't try it.

*[Defense Counsel]:* Thank you, your Honor. I apologize.

Had the trial court not interrupted, the prosecutor likely would have objected on the ground that defense counsel was arguing with the witness. Defense counsel repeatedly accused Burks of changing his testimony and attempted to impeach Burks with statements that were, in reality, consistent with his trial testimony. Further, the prosecutor raised repeated objections to defense counsel's line of questioning. The trial court acted with proper discretion to prevent the furtherance of that line of questioning.

Later in the cross-examination, defense counsel tried to impeach Burks with testimony given at the preliminary examination. Defense counsel asked Burks several questions to clarify that he first met defendant at the barber shop and did not see him again until three or four weeks later. During the questioning, defense counsel queried, "Right. So I'm trying to get a handle on this. You first met him at the barber shop [sic]? . . . You never saw him before?" The trial court then chastised defense counsel as follows:

*The Court:* You've gone over this, [defense counsel].

\* \* \*

You've gone over this. The Jury's heard it, too. If you can't keep up with it, that's your problem.

*[Defense Counsel]:* Well, I can keep up with it, your Honor.

*The Court.* No, no, no. You're asking him to repeat the same thing so you can keep up. They haven't asked. Now you should be listening. I've heard this. I'm sitting right here with you and I know exactly what he said, and you keep asking him the same questions. Same thing.

*[Defense Counsel]:* I won't ask him any other—any of the same questions, your Honor.

*The Court:* Well, you did.

*[Defense Counsel]:* I'm going to ask him a different question.

*The Court:* Thank you. All right.

The trial court's comments at this point were reasonable. Throughout cross-examination, defense counsel could not remember the timeline of events and incorrectly accused Burks of giving inconsistent testimony on direct examination and at the preliminary examination. Burks provided the same timeline during his testimony at the preliminary examination and on direct examination. The prosecutor had already challenged defense counsel's attempts to impeach Burks' trial testimony with his consistent preliminary examination testimony. Under these circumstances, it was reasonable for the trial court to interrupt to control the flow of the trial and limit the repetitive questioning and improper impeachment techniques.

Defense counsel then tried to question Burks regarding the description of the suspect's hair that he gave to police, prompting an interruption from the trial court:

*Q.* Did you ever tell the police that the person that robbed you had African American hair, short African American hair?

*The Court:* Would you please—

\* \* \*

Let me tell you this. You can't look at a person and you can't look at his hair and tell whether he's an African American. You can't do it. You can say he's black, but you don't know whether he's an American or not.

*[Defense Counsel]:* Okay. I'm sorry, your Honor.

*The Court:* Okay, well, fine.

*[Defense Counsel]:* Black.

*The Court:* Don't use that term. Just ask him the—

*[Defense Counsel]:* I apologize.

*The Court:* This is not a court for political correctness as seen by some people. You can describe the person, but you cannot describe his citizenship by the way he looks.

*[Defense Counsel]:* I apologize.

*The Court:* So don't do that. Thank you.

Defense counsel's description of defendant's hair as "African American" was likely taken from Cowell's police report, which indicated that the suspect had "Afro" hair. However, Colwell had not yet testified regarding the contents of his report. The court was, therefore, unaware of this description and defense counsel did not inform the court or the witness of his reason for asking the question in this form. Although the court's comments regarding defense counsel's political correctness were unnecessary, they did not deprive defendant of a fair trial.

The court's comments did not attack the substance of defense counsel's question. Further, the jury later heard Colwell's testimony regarding the description in the police report, which placed defense counsel's earlier question into context.

Finally, during closing argument, defense counsel argued that the evidence against defendant was circumstantial and attempted to define "circumstantial evidence" for the jury. The trial court interrupted and indicated that it would instruct the jury on the law. The court instructed defense counsel, "You just argue the facts . . . . Just argue the facts, or what passes for facts. Don't instruct them on the law. That's me. I do that." Shortly thereafter, defense counsel attempted to read the standard jury instruction regarding eyewitness identification when arguing that Burks' identification of defendant was not reliable. The court interrupted:

*The Court:* [Defense counsel], that's what I just asked you not to do. Do not instruct the Jury. That comes from the Court. You are reading the Instruction on identification. That's not for you.

\* \* \*

I tell the Jury that.

*[Defense Counsel]:* I'm—I want you to tell them, Judge.

*The Court:* Right, and I will.

*[Defense Counsel]:* I know.

*The Court:* But you can't—you cannot charge the Jury. You're only supposed to argue the evidence that they heard in the courtroom.

*[Defense Counsel]:* And I'm applying the facts of this case—

*The Court:* You are not supposed to apply the facts to the law.<sup>[2]</sup> The Court gives the law, period. You may argue the facts as you see them, period. That's all.

This Court described the use of closing arguments as follows: "Closing arguments are an opportunity to point out and summarize the evidence, to argue the facts and law, and to pull together the fragmented pieces of a case in a cohesive and coherent manner." *Williams Machine & Fabricating, Inc v Olson*, 137 Mich App 728, 734-735; 359 NW2d 205 (1984). In Michigan, "counsel are entitled to argue their theory of the case, even though this necessitates occasional reference to the law of the case." *People v June*, 34 Mich App 313, 316; 191 NW2d 52 (1971). However, it is improper for counsel to read law to the jury. *Id.* Ultimately, it is the duty of the

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<sup>2</sup> We note that this statement was incorrect. However, in context and as explained below, we conclude that it did not unduly influence the jury.

trial court, not the parties, to instruct the jury regarding the applicable law.<sup>3</sup> MCL 768.29; MCR 6.414(H); *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996).

Defendant contends that the trial court failed to interrupt the prosecutor when she instructed the jury regarding the law during her closing argument, thereby revealing a preference for the prosecution. During closing argument, the prosecutor loosely described factors that the court “might tell [the jury] to consider when evaluating witnesses.” The prosecutor then described various facts supporting her argument that Neal was not a credible witness. However, the prosecutor did not reference the jury instructions again during that portion of her argument. At the conclusion of her closing argument, the prosecutor told the jury that the court would instruct them regarding the elements of the charged crimes. However, the prosecutor then gave a description of the elements of each offense without interruption from the court.

The court likely interrupted defense counsel, and not the prosecutor, because defense counsel attempted to read the standard jury instructions to the jury rather than paraphrasing the law and applying it to the facts. The trial court was not required to read the standard jury instruction, only to give instructions that adequately and accurately informed the jury of the law. See *People v Stephan*, 241 Mich App 482, 496; 616 NW2d 188 (2000). Hearing the standard jury instruction read verbatim by an attorney could lead to confusion about the proper standard to follow. The trial court acted within its discretion to prevent jury confusion. Further, we do not believe that the trial court’s brief comment that defense counsel should “[j]ust argue the facts, or what passes for the facts,” unduly influenced the jury or denied defendant a fair trial, especially because the jurors were instructed that they were the factfinders in this case. Accordingly, we hold that the trial court did not “pierce the veil of judicial impartiality.”

### III. Admission of OTIS Information

At trial, the prosecutor presented the first page of defendant’s biographical information from the Michigan Department of Corrections online Offender Tracking Information System (OTIS). At the time of the trial, defendant had grown out his hair. The prosecutor presented the OTIS printout, which included a photograph, to show that defendant had a shaved head on July 26, 2005, three weeks after the charged offenses occurred. Defendant argues that the OTIS printout should have been redacted because it contains several pieces of irrelevant and highly prejudicial information, such as a long list of aliases and various “active” sentences not involved in the current case, and claims that he was prejudiced by the admission of this printout because the fact that the document comes from the Department of Corrections indicates that defendant has a criminal history. We disagree. We review a trial court’s determination to admit or exclude evidence for an abuse of discretion and preliminary questions of law de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

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<sup>3</sup> The *June* Court explained the reason for entrusting the trial court with the duty of instructing the jury with the law as follows: “This rule establishes a standard of propriety separating the impartial role of the judge from the adversary roles of counsel. It ensures that the role of the judge in instructing on the law is not usurped by counsel, thereby destroying the impartiality of the forum.” *June*, *supra* at 316.

This evidence is relevant because it supports Burks' identification of defendant, given Burks' description of his assailant as either bald or wearing a short hairstyle.<sup>4</sup> Pursuant to MRE 402, relevant evidence is generally admissible. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

The picture contained in the OTIS printout was highly relevant because it was taken only three weeks after the current offense occurred and showed that defendant was bald, which was consistent with the description that Burks gave of his assailant. Given that defendant had longer hair at trial and no longer matched the description given by Burks of his assailant, the picture was relevant to establish defendant's identity as the perpetrator.

We note that the list of defendant's aliases was not prejudicial in this case because the evidence was also admitted through the testimony of several witnesses. Moreover, evidence of a defendant's aliases is admissible to establish identity. *People v Pointer*, 133 Mich App 313, 316; 349 NW2d 174 (1984). Given that Burks learned that "James Carlos Safford" (or "Stafford" or "Stanford") was his assailant, evidence of aliases was relevant to establish that defendant went by that name.

Second, contrary to defendant's assertion on appeal, the jury was not informed of defendant's previous convictions. Defendant contends that the jury should not have been informed of his criminal past because he stipulated that he had committed prior unnamed felonies to prevent the admission of more prejudicial information regarding those offenses. Yet on the bottom of the first page of the OTIS printout, only the words "Prison Sentences," followed by the word "Active," appear. Any additional information was cut off. Further, the printout only indicates that defendant has a criminal history, which defendant stipulated was true. No allegedly prejudicial information regarding the nature of any prior offenses was presented to the jury. Further, the fact that the OTIS printout indicated that it was prepared by the Department of Corrections also did not cause undue prejudice. Defendant was on trial for a criminal offense and had obviously been arrested in relation to the charge. Furthermore, given that defendant stipulated that he had committed prior felonies, it would be reasonable to assume that he had "active" sentences and had prior contact with the Department of Corrections. Accordingly, we find that the trial court did not abuse its discretion by admitting the proffered evidence.

#### IV. Ineffective Assistance of Counsel

Defendant argues that his counsel was ineffective for failing to request the appointment of an expert on eyewitness identification. Defendant asserts that this evidence was necessary to

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<sup>4</sup> Defendant's picture on the OTIS website was updated on November 6, 2006, and now depicts defendant with longer hair.



challenge the only evidence presented against him—Burks’ identification. Because defendant failed to move for a new trial or *Ginther*<sup>5</sup> hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant “must show that his attorney’s representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, “a defendant must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different . . . .’” *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Defendant must also overcome the presumption that the challenged action constitutes sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. [*People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).]

We review a trial court’s findings of fact for clear error and questions of constitutional law de novo. *Id.*

Defense counsel has a duty to reasonably investigate defendant’s case and make strategic decisions based on that investigation. See *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Further, we will not assess counsel’s competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

The only evidence linking defendant to the July 1, 2005, offenses is Burks’ eyewitness identification. As noted by defendant, none of the stolen goods were recovered and linked to defendant and no attempts were made to find his fingerprints at the scene. This Court and the Michigan Supreme Court have recognized that eyewitness identifications are often unreliable and many convictions have been based on mistaken identifications. See *People v Davis*, 241 Mich App 697, 700-703; 617 NW2d 381 (2000).

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<sup>5</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Pursuant to MCL 775.15, an indigent defendant may petition the court to pay the costs of a defense expert witness. However, the trial court is not required to grant the defendant's request. Our Supreme Court explained,

As MCL 775.15 makes clear, a trial court is not compelled to provide funds for the appointment of an expert on demand. In *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), this Court held that, to obtain appointment of an expert, an indigent defendant must demonstrate a “‘nexus between the facts of the case and the need for an expert.’” (Citation omitted.) It is not enough for the defendant to show a mere possibility of assistance from the requested expert. “Without an indication that expert testimony would likely benefit the defense,” a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Id.* [*People v Tanner*, 469 Mich 437, 442-443; 671 NW2d 728 (2003).]

It is unlikely that the trial court would have granted defendant's request for a state-funded expert witness had defense counsel made such a motion in this case. There was sufficient indication that Burks' pretrial identification of defendant was reliable. Burks was acquainted with defendant and spoke face-to-face with him on two prior occasions. Further, it is unlikely that investigating officers affected Burks' identification of defendant, given that Burks reviewed several photographs on more than one occasion before finally identifying his assailant. Defendant has failed to demonstrate that the requested expert testimony would likely have benefited his defense. Accordingly, defense counsel is not ineffective for failing to raise a futile or meritless motion. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

In any event, defense counsel adequately challenged Burks' eyewitness identification at trial. Defense counsel noted during his opening statement that this case involved mistaken identity. On cross-examination, defense counsel highlighted Burks' testimony that his assailant approached him from behind and put a gun to his head. Defense counsel further highlighted Burks' testimony that he could only see his assailant through the corner of his eye, and that Burks could not see the perpetrators during most of the robbery because he was lying face down on the ground. Defense counsel elicited testimony that Burks was angry and upset and, therefore, very emotional during the robbery. Defense counsel further argued that Burks was focused more on the gun pointed at his head than on the face of his assailant and that the robbery occurred within a few minutes. Finally, defense counsel highlighted that Burks did not identify defendant as his assailant until almost a year after the robbery occurred. Accordingly, defendant has not met his burden of establishing that his counsel was constitutionally ineffective.

#### V. Prosecutorial Misconduct

Defendant argues that the prosecutor improperly attacked Neal's credibility during her closing argument by expressing her personal opinion, backed by the prestige of the prosecutor's office, regarding the photographic evidence Neal brought to the stand. Because defendant failed to challenge the prosecutor's purportedly improper comments and actions at trial, we review defendant's allegation of prosecutorial misconduct for plain error affecting his substantial rights. *Carines, supra* at 763-764, 774. “This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether defendant received a fair and impartial trial.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

During closing argument, the prosecutor attacked Neal's credibility as a witness. In doing so, she questioned Neal's choice of photographs as follows:

Another thing to look at is this woman says this is her boy friend [sic]. She talks about romantic evenings in, quiet times together. She brings two photographs of him from their relationship that started in 2004. You've got to be kidding me, that these are the best two photographs she can bring of her boyfriend.

This boyfriend that she has a great relationship with, lives with, these are the two that she chose to bring in? One; him in a twin bed. Is that consistent of someone who lives together? A twin bed?

Next; in a towel, smoking something. Bees. I don't know. On my desk at work, I would—I've had better pictures than this of my husband or boyfriends in the past. These are the best? Not consistent with it being a true relationship.

The prosecutor did not improperly attack Neal's credibility. The prosecutor challenged Neal's credibility on several grounds, highlighting Neal's admission that she was uncertain whether she was actually with defendant on the evening of July 1, 2005, noting that Neal volunteered irrelevant information in an attempt to make herself seem like a more truthful person, and concluding that Neal allegedly dated defendant while he was still married to his wife. The prosecutor's challenge to the nature of defendant and Neal's relationship was a small piece of her overall argument challenging Neal's credibility.

Further, the prosecutor did not state an opinion supported by the prestige of the prosecutor's office. The prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, the prosecutor may not vouch for or attack the credibility of a witness by insinuating that she has special knowledge as the prosecutor regarding the veracity of the witness. *Id.* at 276. The prosecutor gave her personal opinion regarding the relationship between defendant and Neal based on her personal experience. However, her comments were based on rational observations that anyone could make and did not rely on special knowledge held only by the prosecutor's office. Accordingly, we reject defendant's claim of prosecutorial misconduct.

## VI. Order to Reimburse Attorney Fees

After defendant's sentencing hearing, the trial court entered a final order for reimbursement of attorney fees, ordering defendant to pay \$1,140 in attorney fees for his court-appointed attorney. Defendant contends that the trial court improperly entered this order without inquiring into his current or future ability to pay. Because defendant failed to preserve his challenge to the imposition of attorney fees by objecting at the sentencing hearing, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764, 774.

In *People v Dunbar*, 264 Mich App 240, 251-252; 690 NW2d 476 (2004), the defendant complained that the court failed to assess his ability to pay his attorney fees before entering the order imposing those costs. The *Dunbar* Court explained:

The crux of defendant's claim appears to be that the trial court should have made a specific finding on the record regarding his ability to pay. We do not believe that requiring a court to consider a defendant's financial situation necessitates such a formality, unless the defendant specifically objects to the reimbursement amount at the time it is ordered, although such a finding would provide a definitive record of the court's consideration. However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. [*Id.* at 254-255 (internal citations omitted, emphasis in original).]

Because defendant failed to challenge the imposition of attorney fees, the sentencing court was not required to make formal findings of fact regarding defendant's financial situation. However, the sentencing court failed to indicate whether it considered defendant's ability to pay. At the sentencing hearing, the court failed to mention the employment and financial sections of defendant's presentence investigation report and made no mention of defendant's potential future ability to pay. Accordingly, the sentencing court failed to make even the most minimal considerations required by *Dunbar*. Accordingly, we remand this case to the trial court to "reconsider its reimbursement order in light of defendant's current and future financial circumstances." *Id.* at 255.

Defendant's convictions and sentences are affirmed. We vacate the trial court's final order for reimbursement of attorney fees and remand to the trial court for reconsideration of this issue. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ Donald S. Owens  
/s/ Bill Schuette