STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2008
v	No. 276998 Oakland Circuit Court
GERALD LEE BEELBY, Defendant-Appellant.	LC No. 2006-206274-FH

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

PER CURIAM.

Defendant was convicted by a jury of arson, MCL 750.72, for which he was sentenced to 14 to 20 years in prison. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from an incident that occurred on June 18, 2005, at a house owned by Robert Redmond at 301 Oakland Street in Holly. Delores Hernandez rented the upstairs unit of the house and defendant later moved in with her. Defendant owned a yellow "golf ball looking thing" with a green fuse that he described as "a quarter stick of dynamite." Neighbors often heard defendant and Hernandez argue.

On the night of June 17, 2005, defendant and Hernandez went to a bar with Hernandez's brother and his ex-wife. Defendant and Hernandez argued and defendant left, saying that he was going to walk home. Hernandez later left the bar and spent the night at a friend's house.

Sometime between midnight and 1:00 a.m., defendant showed up at the home of Joseph Fultz. He was upset and explained that he had had an argument with Hernandez. Half an hour later, Fultz walked defendant home. Defendant, who was still upset, said "he was going to go home, throw shit out the window and burn his house." Fultz tried to dissuade him. Once at the house, Fultz stayed to talk with defendant, "trying to calm him down and tell him it's probably best to just leave things alone." After 20 minutes, Fultz left. Defendant, who had run out of cigarettes, accompanied Fultz home and got some from him. Defendant then left.

Joseph and Sarah Miller lived next door to Hernandez and defendant. Sometime between 5:30 and 6:00 a.m., they heard loud noises from next door and Sarah Miller saw defendant hurling boxes out the upstairs front door; other items were already on the ground, including a toilet, a television, a fan, a cabinet, and a bench. At approximately 7:00 a.m., defendant came to

the Millers' door, said his house was on fire, and suggested that they might want to evacuate. Sarah Miller went outside and saw that defendant's house "was completely engulfed in flames." Steven Sipes, who lived across the street, was awakened by an explosion and looked out to also see flames shooting out the upstairs window. He also noticed items lying about the yard.

A responding police officer noticed various items in the front yard, including a bicycle, boxes, clothing, and "household items." Defendant emerged from his grandfather's house across the street and approached his house. When the officer went to speak with defendant, he dropped to the ground, curled up in the fetal position, removed his socks, and "was crying about his house being on fire and saving his son's bike."

One firefighter noted that the fire seemed to be unusually intense. Investigators were called in to determine the cause and origin of the fire. An electrical engineer ruled out the electrical and natural gas systems as causes. He found no defects in any appliances that could account for the fire. James Lehtola, an arson investigator, determined from burn patterns on the floor of the bedroom that a flammable liquid had been poured on the bedroom floor and ignited with an open flame. An arson investigator hired by Redmond's insurer, Robert Puddy, also noticed distinctive burn patterns on the floor and determined that the fire was caused by the ignition of vapors from an accelerant poured primarily on the bedroom floor and, to a lesser extent, on the kitchen floor. He collected two samples from the upstairs unit and sent them to a laboratory for testing. They tested positive for gasoline.

Hernandez spoke to defendant about a week after the fire. They got into an argument, during which defendant said, "I burnt your shit down." Hernandez admitted that she did not know if defendant was serious and added that "then he like took it back, you know." Sipes also spoke to defendant. On the morning of the fire, defendant said that the fire started after he fell asleep with a lit cigarette in his hand, yet remarked that "it sounded like a bomb going off." Later, he said that he had used a bomb to start the fire. Later still, he said the fire had been started with gasoline.

Defendant testified that after he walked back home from the bar, he went to visit Fultz and discussed his problems with Hernandez. He admitted that Fultz walked him home but denied saying anything to him about starting a fire. Once home for the night, he began packing his things to move out. He got tired of going up and down the stairs, so he started dropping his belongings off the balcony. Coincidentally, the toilet malfunctioned and broke away from the floor, so defendant discarded that too. Sometime while defendant was in the house, he noticed that there was a fire in the bedroom and ran out. Defendant denied setting the fire deliberately and claimed that it was caused by his "carelessness." Defendant admitted that he told Sipes that he had fallen asleep with a lit cigarette. He denied telling him anything different. However, he told Lehtola "that couldn't have happened" and suggested that the fire was caused by the electrical system or the furnace. He told Puddy that he was not at home when the fire started.

I. Appellate Counsel's Brief

Defendant, through appellate counsel, raises two related arguments on appeal. He argues that the prosecutor's misconduct denied him a fair trial and that defense counsel was ineffective for failing to object. The issue of prosecutorial misconduct has not been preserved because defendant did not object at trial. Therefore, review is precluded unless defendant establishes a

plain error that affected the outcome of the trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004), lv den 471 Mich 868 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), lv den 469 Mich 1012 (2004). The issue of ineffective assistance of counsel has not been preserved because defendant did not move for a new trial or evidentiary hearing below. Therefore, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), lv den 463 Mich 855 (2000); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003), lv den 471 Mich 916 (2004). The reviewing court must examine the prosecutor's remarks in context on a case-by-case basis. *Id.* at 272-273. The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002), lv den 468 Mich 880 (2003). The prosecutor's remarks are not to be taken out of context; his closing argument should be considered in its entirety and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Hedelsky, supra* at 386; *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982).

To establish a claim of ineffective assistance of counsel, "defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 274130, issued May 15, 2008), slip op at 4 n 2 (citations omitted), lv pending.

The prosecutor summarized the events that began on the night of July 17. He noted that the two couples went to the bar and that defendant eventually got into a fight with Hernandez. The prosecutor continued, "And what does the defendant do – it tells you a little bit about his nature – he throws beer on her chest, on her upper torso in an open, public bar. And he's obviously fighting with her." Defendant argues that this comment constituted an improper character argument. While the implied reference to defendant's character for having a short temper may have been inappropriate because defendant's character was not at issue, *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992), lv den 440 Mich 909 (1992), this one isolated remark did not deprive defendant of a fair trial. The crux of the prosecutor's argument was that defendant became mad at Hernandez at the bar, which defendant admitted, and that this was his motive for setting the fire. Further, the trial court's instructions that the jury is to decide the case based only on the evidence and that the attorneys' arguments are not evidence effectively dispelled any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995), reh den 448 Mich 1225 (1995). Consequently, defendant was not prejudiced by counsel's failure to object. *Horn, supra*.

In commenting on the expert witnesses' testimony, the prosecutor stated:

> Ask yourselves this too. Physical evidence has no bias. It has no friends. These scientists aren't here to testify against the defendant because they have any personal bias against him either. These are expert witnesses. People that are specialists in their field and I submit to you, you can look across the whole state

of Michigan and you wouldn't find better experts than what you heard in this trial. These are some of the most experienced people. Some of the best of the best.

Defendant argues that in making these remarks, the prosecutor improperly vouched for the witnesses' credibility. We disagree. The prosecutor cannot vouch for the credibility of a witness or suggest that he has some special knowledge concerning a witness's truthfulness. *Bahoda, supra* at 276. The prosecutor may, however, comment on the credibility of his own witness during closing argument and argue from the facts that the witness has no reason to lie. *Thomas, supra* at 455. He may also argue that a witness should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984), lv den 422 Mich 852 (1985). The prosecutor did not claim that he knew the witnesses had testified truthfully or that he had special knowledge regarding the witnesses' credibility. He commented only on their qualifications for rendering expert testimony as evidenced by their foundational testimony. We find no error. Because there was no error, defense counsel was not ineffective for failing to object. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003), lv den 469 Mich 972 (2003).

There was evidence that defendant had been drinking and defendant admitted that he was still drunk at 6:00 a.m. Defense counsel argued that defendant was intoxicated and that intoxicated persons have difficulty formulating an intent. In response, the prosecutor noted that defendant had been drinking "over a 14 hour period so it works out to one drink an hour. Your body eliminates about one drink an hour as it goes along." This statement was improper because it was not supported by the evidence presented at trial. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 803 (1995). However, improper remarks are subject to harmless error analysis, *People v Armentero*, 148 Mich App 120, 134; 384 NW2d 98 (1986), lv den 425 Mich 883 (1986), and because intoxication was not offered as a defense, we cannot conclude that defendant was prejudiced by the remark, especially where, as here, it was made in response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996), lv den 456 Mich 886 (1997).

Defendant lastly takes issue with the prosecutor's implication that he deliberately evaded the police. Lehtola testified that he completed his investigation within several weeks but it took many months to arrest defendant because "part of the problem was I didn't know Mr. Beelby's whereabouts." In commenting on this testimony, the prosecutor stated, "Why was the defendant trying to stay out of the way of the police after the first conversations with them? Because he knew what he had done." We find no error. The prosecutor's comment was a reasonable inference based on the testimony, *Bahoda, supra* at 282, and evidence that defendant evaded the police permits an inference of consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Because there was no error, defense counsel was not ineffective for failing to object. *Goodin, supra* at 433.

II. Defendant's Standard 4 Brief

Defendant raises several additional issues in a pro se Standard 4 brief. He first argues that the failure to preserve Redmond's house, which was torn down after the fire, deprived him of an opportunity to have his own expert conduct a cause and origin examination. Because defendant did not raise this issue below, it has not been preserved for appeal. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005), lv den 476 Mich 863 (2006). Therefore, review

is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

It is generally preferable that the police "keep all evidence until the criminal prosecution is concluded without concern for its value at trial." *People v Tate*, 134 Mich App 682, 692; 352 NW2d 297 (1984). A defendant is constitutionally entitled to have access to evidence, and the state's failure to disclose exculpatory evidence to a defendant violates due process. *Arizona v Youngblood*, 488 US 51, 55, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988), reh den 488 US 1051; 109 S Ct 885; 102 L Ed 2d 1007 (1989). But when the state fails to preserve potentially exculpatory evidence, due process is violated only if the police act in bad faith. *Id.* at 58. Reversal is required only where the defendant can show "that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007), lv den 480 Mich 1008 (2007).

The record shows that the samples collected by Puddy were retained by the testing laboratory and were not consumed by the testing process and thus presumably could have been tested by an independent expert had one been retained. Although the house was razed after the fire, defendant has not shown that the burned remains contained exculpatory or even potentially exculpatory evidence or that the sheriff's department or the prosecutor acted in bad faith in failing to maintain the house. Defendant has thus failed to establish plain error.

Defendant next argues that trial counsel was ineffective for failing to retain a cause and origin expert to assist him in cross-examining the prosecutor's experts, to testify that the fire was accidental, and to rebut the testimony of the prosecutor's experts.

The decision whether to call an expert witness is a matter of trial strategy. *Ackerman, supra* at 455; *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999), lv den 461 Mich 997 (2000). Decisions regarding how to cross-examine and impeach witnesses are also matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987), lv den 429 Mich 853 (1987). "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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

There is nothing in the record to suggest, and defendant has not offered any evidence to show, that another cause and origin expert would have determined that the fire was accidental. Further, the fact remains that gasoline was detected in samples taken from the house. Therefore, even if counsel had been able to get the prosecutor's experts to agree that there was a basis for disputing certain theories regarding the behavior of fire and the interpretation of the charred remains, or had he located an expert who could refute some of the testimony offered by the prosecutor's experts on those points, defendant has failed to establish a reasonable probability that but for counsel's failure to retain such an expert, the outcome of the trial would have been different. *Ackerman, supra* at 455-456.

Lastly, defendant argues that the prosecutor engaged in a variety of misconduct. He first argues that the prosecutor improperly presented false evidence to obtain a conviction.

A prosecutor may not knowingly use false testimony to obtain a conviction, and a prosecutor has an obligation to correct false evidence and advise the defendant and the trial court if a government witness lies under oath. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998), lv den 461 Mich 861 (1999). The crux of defendant's argument is that the prosecutor's experts lied about the cause of the fire. Part of this contention depends on facts outside the record, which cannot be considered on appeal. MCR 7.210(A)(1); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999); *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994). Regardless, both Lehtola and Puddy were qualified as experts in cause and origin and offered their opinions on the cause of the fire. An opinion is by definition "a belief or judgment based on ground insufficient to produce complete certainty," *Random House Webster's College Dictionary* (1997), and thus cannot be true or false. With regard to Lehtola's testimony that defendant denied having fallen asleep while smoking a cigarette, defendant admitted saying that to Lehtola, although he claimed that he had lied. For these reasons, defendant has not shown a plain error.

Defendant next argues that the prosecutor improperly argued to the jury that defendant had lied. A prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to his theory of the case. *Bahoda*, *supra* at 282. The prosecutor may also "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief" or is lying. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997), lv den 459 Mich 884 (1998); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990), lv den 437 Mich 927 (1991). Because defendant admitted that he lied to Lehtola, it was reasonable to infer that he may not have been truthful about the rest of his testimony. Defendant has not shown a plain error.

Defendant next argues that the prosecutor wrongfully suppressed evidence regarding defendant's blood alcohol level at the time of the fire. Specifically, he claims that when the prosecutor argued that defendant was not as drunk as defense counsel had implied, he failed to disclose that defendant had registered a .110 blood alcohol content on a preliminary breath test given several hours after the fire. Neither the police report nor any other evidence regarding defendant's blood alcohol level was in evidence and, as noted, the prosecutor cannot argue facts not in evidence. *Stanaway*, *supra* at 686. Further, whether defendant was drunk or not was irrelevant because voluntary intoxication was not a valid defense. MCL 768.37(1); *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004). Defendant has not shown a plain error.

Affirmed.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens