STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2008
v	No. 278576 Wayne Circuit Court
SHAWNTAE DERMAINE ROGERS, Defendant-Appellant.	LC No. 06-014264-01

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a joint jury trial, defendant and his brother, codefendant Shelton Rogers, were each convicted of felonious assault, MCL 750.82. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 58 months to 15 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from a stabbing incident on November 11, 2006, outside the home of Sanyel Barnes, with whom defendant had a boyfriend-girlfriend relationship. The victim, Mark Hutcherson, parked his car in the driveway outside of Barnes's house to wait for her to return home. When Barnes arrived, she was accompanied by defendant, Shelton, and a female acquaintance. Defendant became upset after learning that the victim was the father of Barnes's son. The victim testified that he saw defendant throw Barnes to the ground and take her by the arm into the house. He tried to enter the house to see what was going on, but was stopped by Shelton. Defendant came outside and, along with Shelton, pinned the victim face down on the front porch. The victim was kicked and heard Barnes scream "stop stabbing him" while he was on the porch. Barnes testified that defendant stabbed the victim repeatedly with a knife. After defendant and Shelton departed, the victim was taken to the hospital where he was treated for a laceration on the back of the head and three stab wounds to the back.

Defendant's theory at trial was that Barnes stabbed the victim. The sole defense witness, Shelton, testified that the victim initiated the altercation outside of Barnes's house. Shelton testified that Barnes stabbed him in the hand while he fought with the victim and that he never saw defendant possess a knife. Shelton denied any knowledge of who stabbed the victim.

On appeal, defendant argues that the prosecutor's misconduct during rebuttal argument denied him a fair trial. Because defendant did not object to the prosecutor's remarks, we review the claim to determine whether there was plain error affecting defendant's substantial rights.

People v Carines, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id.* at 64. Otherwise improper prosecutorial comments might not require reversal if they address issues raised by defense counsel. *Id*

"Included in the list of improper prosecutorial commentary . . . is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But a prosecutor is free to argue from the evidence that a witness is credible or not worthy of belief. *Dobek, supra* at 67; *Schutte, supra* at 722.

Examined in context, the prosecutor's remarks that Shelton was "lying through his teeth" and "wouldn't know the truth if it spat him in the face every day in the morning" were not improper. It is apparent from the record that the prosecutor was arguing from the evidence that Shelton was not a credible witness. The prosecutor was not required to state his argument in the blandest terms. *Schutte, supra* at 722.

The prosecutor's additional remark that his salary and that of Sergeant Nathan Duda, the officer in charge of this case, are the same, regardless of whether the case is won or lost, was responsive to the closing argument of codefendant Shelton's counsel that "this is not about justice. This is about winning, and doing everything it takes to pile it on, and win . . . ." Given the responsive nature of the prosecutor's remark and the absence of any apparent prejudice, we find no plain error affecting defendant's substantial rights. *Dobek, supra* at 67.

Finally, the prosecutor's additional remark about defendant's and Shelton's attorneys making "fake arguments," while better left unsaid, was not so egregious as to deny defendant a fair trial. Although a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001), the thrust of the prosecutor's argument in this case was that credible evidence supported each of the charges brought against defendant and codefendant Shelton. The prosecutor continued by arguing, "in the People's case, there's every reason to convict both Shelton Rogers and Shawntae Rogers exactly as they are charged." Any possible prejudice could have been cured by a timely objection to the "fake arguments" remark and a request for a curative instruction. *Dobek, supra* at 68. We are not persuaded that an outcome-determinative plain error occurred. *Id.* at 67-68 (prosecutor's denigration of defense counsel's arguments as "red herrings" did not warrant reversal).

With regard to defendant's alternative claim that trial counsel's failure to object to the prosecutor's rebuttal remarks constituted ineffective assistance, we note that this Court previously denied defendant's motion to remand with respect to this claim. "When no *Ginther*[1]

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant concedes in his appellate (continued…)

hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish a basis for reversal on a claim of ineffective assistance of counsel, defendant must show that trial counsel's performance was deficient and that there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

Having concluded that the prosecutor did not improperly vouch for the credibility of witnesses, nor impermissibly comment on his and Duda's salaries, we reject defendant's claim that counsel's failure to object on these grounds constituted deficient performance. Trial counsel need not make meritless objections. *Matuszak, supra* at 58. And while the prosecutor might have gone too far when commenting that "fake arguments" were made, defendant has not overcome the strong presumption that counsel's failure to object was sound trial strategy or shown the requisite prejudice to succeed on a claim of ineffective assistance of counsel. *Matuszak, supra* at 57-58. Trial counsel might have considered an objection unnecessary because the prosecutor's rebuttal argument was followed by the trial court's jury instructions that "[t]he lawyer's statements and arguments are not evidence" and "you must decide this case based only on the evidence that was admitted during this trial." Jurors are presumed to follow the trial court's instructions. *Id.* at 58. There is no basis in the record for concluding that, but for trial counsel's alleged error, there is a reasonable probability defendant would have been acquitted of the felonious assault charge.

Next, relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant seeks resentencing on the ground that there was no jury verdict to support the trial court's scoring of three offense variables, OV 3, OV 4, and OV 9, which were used to determine his sentence for the felonious assault conviction. Our Supreme Court has ruled that the *Blakely* decision does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007). Therefore, as a matter of law, we reject defendant's constitutional challenge to his sentence. To the extent that defendant embeds within the constitutional argument a separate claim that there was no evidence supporting the scoring of the three cited OV factors, the issue is not included in the statement of questions and arguments involved, MCR 7.212(C)(5) and (7), it is insufficiently briefed, lacking any reference whatsoever to the statutory language and the record, *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), and, substantively and prejudice-wise, it does not require remand for resentencing. Scoring determinations will be upheld if there is any evidence in support. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). There was medical testimony from the doctor who treated the victim that the wounds were life threatening, absent medical care, thereby supporting the 25 points scored for OV 3, MCL 777.33(1)(c). There was evidence of at least two victims, Hutcherson and Barnes, who were placed in danger of physical injury, thereby supporting the score of 10 points for OV 9, MCL 777.39(1)(c). And, even if we assume a lack of supporting

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brief that the existing record is sufficient to evaluate the claims of ineffective assistance of counsel without remand being necessary.

evidence showing a serious psychological injury requiring professional treatment for purposes of OV 4, MCL 777.34(1)(a)(10 points), this would only reduce the total OV score to 75 points, keeping defendant at OV level IV, with no change in the sentencing guidelines range under the applicable sentencing grid, MCL 777.67.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald