STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2008
v	No. 279247 Wayne Circuit Court
FRANKLIN ORONDE COWANS, Defendant-Appellant.	LC No. 07-005470-01

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, 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 was sentenced to 20 to 40 years' imprisonment for the armed robbery conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the oath was not properly administered to the jury because the record shows that the jury never responded after the oath was read. We disagree.

MCR 2.511(H) provides that a jury must be sworn "substantially" as follows:

> Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict on the evidence introduced and in accordance with the instructions of the court, so help you God. [MCR 2.511(H).]

After jury selection was completed, the trial court asked the selected jurors to rise for administration of the oath. The trial court then administered the following oath:

> Do you solemnly swear (or affirm) that, in this action now before the Court, you will justly decide the questions submitted to you, that unless you are discharged by the Court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with

instructions of the Court, so help you God or (under penalty of perjury) or whichever applies to you?

Defendant cites *People v Pribble*, 72 Mich App 219; 249 NW2d 363 (1976), to support his argument. In *Pribble*, the trial court dismissed the jury for a lunch break after the majority of scheduled witnesses had already been called and questioned by both parties. *Id*. at 221. During the lunch break, the trial judge realized that the jury was not given its oath before the trial began. *Id*. On its own motion, the court declared a mistrial and dismissed the jurors. *Id*. In *Pribble*, this Court was concerned that the jurors were not apprised of their duties as jurors or made aware of the important role of a jury. *Id*. at 224.

Because defendant did not object when the jury allegedly did not respond to the oath, he must show that this error affected his substantial rights. The oath was read almost verbatim from the applicable court rule, after the jury was instructed to rise and advised that the oath was about to be administered. The trial court reminded the jury several times throughout the trial that it was bound by the oath. In addition, the court provided the jury with detailed instructions regarding its duties and expressed the importance of its role. Further, the lower court file indicates that the jury was "impaneled and sworn." There is also no indication that the jury, the judge, or either of the parties had concerns about the oath as administered. Therefore, we cannot conclude that the lack of a verbal response by the jury in the transcript amounted to plain error affecting defendant's substantial rights.

Defendant next argues that the prosecutor engaged in misconduct by making various statements during the rebuttal argument, which shifted the burden of proof at trial and improperly drew attention to defendant's silence. Defendant did not object to the statements at trial.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error, examining whether defendant's substantial rights were affected. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). The test of prosecutorial misconduct is whether it resulted in a denial of defendant's right to a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor's statements must be viewed as a whole, in light of defense counsel's arguments and their relationship to the evidence admitted. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

Defendant analogizes his case to *People v Green*, 131 Mich App 232; 345 NW2d 676 (1983). During closing arguments in *Green*, the prosecutor said, "I have prepared about eleven questions that I am going to direct defense counsel, and I am going to ask him to answer these questions in his closing argument. I would ask the jury to pay attention to see first of all whether or not defense counsel responds to these questions, and secondly, whether or not he adequately answers those questions." *Id*. at 234. The defendant objected and moved for a mistrial, but the trial court denied the motion. *Id*. at 236. This Court concluded that the statements in *Green* required defendant to explain evidence against him and effectively shifted the burden of proof to him. *Green*, *supra*, 131 Mich App 237. In addition, the statements brought attention to the defendant's decision not to testify. *Id*.

In *Green*, the challenged statements were prefaced by the prosecutor's statement that he was directing defense counsel to provide explanations to the specifically stated questions.

Green, *supra* at 234-235. In addition, the prosecutor implied that defense counsel was required to respond with adequate answers to those specific questions. *Id*. In contrast, the prosecutor's statements here were made during rebuttal and attacked defendant's arguments. Unlike in *Green*, the prosecutor here did not present the statements in the form of specific and direct questions for defense counsel to answer. Thus, we must address each of the challenged statements.

While a prosecutor may not attempt to shift the burden of proof by commenting on defendant's failure to present evidence, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), a prosecutor may argue that certain evidence is uncontradicted, *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). Here, the prosecutor referred to the victim's testimony that she was robbed at gunpoint while she walked to her car. The prosecutor then pointed out that defendant did not contradict this testimony. The prosecutor additionally stated that defendant did not contradict evidence of footprints in the snow leading to defendant's door or provide an explanation of how the victim identified defendant immediately in a line-up. A prosecutor's argument that inculpatory evidence is undisputed is not improper comment. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996).

When a defendant advances alternative theories, it is proper for the prosecutor to comment on those theories. *People v Reid*, 233 Mich App 457, 478-479: 592 NW2d 767 (1999). The prosecutor addressed defendant's theory that the boots found in his house and his pant cuffs were wet because the heat was on. The prosecutor then addressed defendant's theory that footprints led to defendant's house simply because the house was in a heavily populated area. Those comments did not shift the burden of proof, but permissibly attacked the credibility of defendant's theories. *People v Fields*, 450 Mich 94, 107, 115; 538 NW2d 356 (1995).

The prosecutor's statements regarding the route defendant traveled to the victim's house provided an explanation of the course of events. A prosecutor's arguments may be based on the evidence and any reasonable inferences arising from that evidence. *People v Ackerman*, 257 Mich App 434, 453-454; 669 NW2d 818 (2003). These statements were part of the prosecutor's explanation supporting the inference that because there was a "dead end" street, the only way to travel from the location of the robbery to defendant's house was to travel the route that the footprints followed.

The very purpose of an objection to allegedly improper prosecutorial statements is to obtain a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). If defendant had objected to any improper statements made by the prosecutor and the objection was sustained, the trial judge could have given the appropriate cautionary instructions to the jury at that moment. Because no objection was made, and a curative instruction would likely have lessened the prejudice, if any, in the jury's mind, reversal is not required here. *Watson*, *supra* at 592-593.

Moreover, any prejudice resulting from a prosecutor's statements is alleviated by a judge's instruction to the jury that arguments of attorneys are not evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). The trial judge here advised the jury in detail regarding the presumption of innocence, the prosecutor's burden, and the defendant's right not to testify. The judge also emphasized that the jury must not consider the fact that defendant did not testify. Further, the judge specifically explained that statements made by the attorneys are not

evidence and should not be considered as such. Therefore, defendant was not denied his right to a fair trial by the prosecutor's statements.

Defendant also argues that his counsel was ineffective for failing to object to the prosecutor's statements noted above. This Court affords wide discretion to decisions made by defense counsel regarding matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Furthermore, this Court will not substitute its own judgment for defense counsel's trial strategy and will not use the benefit of hindsight to determine counsel's effectiveness. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Even if this Court were to find that counsel should have objected to the statements on grounds that they improperly shifted the burden of proof or implicated defendant's right to silence, defendant cannot establish that a reasonable probability exists that, but for counsel's deficiency, the outcome of the proceedings would have been different, or that the resulting outcome was fundamentally unfair or unreliable. *Odom, supra* at 415. While an objection to the prosecutor's statements may have cured the alleged error right away, any confusion in the jury's mind was clarified by the detailed jury instructions that followed. Therefore, defendant was not denied the effective assistance of counsel.

Next, defendant argues that the prosecutor did not file notice of intent to seek an enhanced sentence in a timely manner or proof of service of that notice and, therefore, the enhanced sentence that was imposed must be vacated.

MCL 769.13 provides the procedure for a prosecutor to follow in order to seek an enhanced sentence against a defendant based on prior felony convictions. MCL 769.13(1) states that the prosecutor must file written notice of the enhancement within 21 days after defendant is arraigned on the information. This statute creates a "bright-line" test to determine whether notice is provided within the proper time limit. *People v Ellis*, 224 Mich App 752, 755-757; 569 NW2d 917 (1997). MCL 769.13(2) states that the prosecutor must also file written proof of service of this notice to seek enhancement. However, this Court has held that the lack of proof of service in the lower court file is harmless if the defendant had actual and timely notice of the enhancement. *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999).

The trial court determined that defendant's sentencing guidelines range was 108 to 360 months because of his four prior felony convictions. Defendant was sentenced to 20 to 40 years' imprisonment for the armed robbery conviction, as a fourth habitual offender. Defendant argues on appeal that, prior to sentencing, his sentencing guidelines range was determined to be 108 to 180 months.

Defendant was arraigned on the Information on February 27, 2007. Therefore, the prosecutor had 21 days from February 27, 2007, to file written notice of the enhancement. The prosecutor was also required to file written proof of service of this notice. The Warrant, Complaint, and Information all expressly state that defendant was charged as "Habitual Offender – Fourth Offense Notice." The Warrant and Complaint are dated February 1, 2007, which is the same day of defendant's arraignment on the Warrant and Complaint. The prosecutor's intent to charge defendant as a habitual offender was made clear again at the preliminary examination. The court read the charges, which included the notice that defendant was charged as a fourth habitual offender. The Information listed defendant's status as a habitual offender. It

specifically stated, "[t]ake notice that the defendant was previously convicted of . . .." Each of defendant's prior convictions are listed and described and the Information expressly points out that defendant is subject to the penalties of the habitual offender statute, MCL 769.12.

In *Walker*, this Court concluded that the lack of proof of service in the file was harmless error because the defendant did not argue that he did not receive notice of intent to seek enhancement, but simply argued that the proof of service was not filed with the lower court. *Walker, supra* at 314. This Court held that if, in fact, the prosecutor failed to file proof of service with the lower court, that failure did not prejudice defendant's ability to respond to the habitual offender charge. *Id*. at 315. The cases defendant relies on involve situations where the prosecutor filed a supplemental Information charging defendant as a habitual offender outside the 21-day period. *People v Morales*, 240 Mich App 571, 574; 618 NW2d 10 (2000); *People v Bollinger*, 224 Mich App 491, 492-493; 569 NW2d 646 (1997). Here, there was no need for the prosecutor to file a supplemental Information containing the habitual offender notice because the Information on which defendant was arraigned alleged that defendant was an habitual offender.

Because defendant was fully aware of the prosecutor's intent to proceed against him as a habitual offender, his opportunity to defend against that was not prejudiced by the lack of proof of service. Therefore, the failure, if any, by the prosecutor to file proof of service with the lower court is harmless.

Defendant also argues that he was denied the effective assistance of counsel because his counsel failed to object to the enhanced sentence. Counsel's failure to raise "futile" objections does not constitute ineffective assistance of counsel. *Ackerman, supra* at 455. Because all parties were provided with timely notice of defendant's status as a habitual offender and the prosecutor's intent to proceed pursuant to the applicable statute, any objection would have been futile. Therefore, defendant has not overcome the presumption that counsel was effective. *Odom, supra* at 415.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens