STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2008
v	No. 279864 Sanilac Circuit Court
ANTHONY RICHARD GADOMSKI, Defendant-Appellant.	LC No. 05-006015-FC

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of safe breaking, MCL 750.531, and second-degree home invasion, MCL 750.110a(3). He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of three to 30 years for each conviction. He appeals as of right. We affirm.

Defendant first claims the prosecutor committed misconduct when he urged the jury to use a witness's statement to the police, which was only admissible to impeach the witness, as substantive evidence of defendant's guilt. "When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

The record shows that in his closing argument, the prosecutor urged the jury to consider Shawn Kersen's prior inconsistent statement, which was written while not under oath, as substantive evidence. The prosecutor's action was plainly improper and constituted misconduct. See MRE 801(d)(1)(A) (only a prior inconsistent statement given under oath is excluded from the definition of hearsay); *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998) (prior inconsistent statement admissible to impeach credibility is not offered as substantive evidence). In addition to the prosecutor's remark to the jury that the statement was part of the evidence, the prosecutor's act of reading the entire prior statement out loud, with an emphasis on those portions corroborating other testimony against defendant, revealed the prosecutor's intent to have the jury use the statement as substantive evidence of defendant's guilt, not merely to impeach Kersen's surprise testimony at trial that the statement was false and that defendant had actually proclaimed his innocence to Kersen.

Prosecutorial misconduct can be considered a constitutional issue or a nonconstitutional issue depending on the nature of the misconduct. *People v Blackmon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 277184, issued August 19, 2008), slip op p 3. Absent violation of a specific constitutional right in order for prosecutorial misconduct to constitute constitutional error, "the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law." *Id*., p 9 (emphasis omitted), citing *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed 2d 431 (1974). Under the proper standard of review for preserved, nonconstitutional errors "a defendant has the burden of establishing that it is more probable than not that the error in question 'undermine[d] the reliability of the verdict,' thereby making the error 'outcome determinative.'" *Id*., p 10, quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The misconduct by the prosecutor in this case was of a nonconstitutional nature. Like the misconduct in *Blackmon*, the prosecutor's misconduct concerned the violation of an evidentiary rule and did not implicate a specific constitutional right. Similarly, the prosecutor's misconduct was not so severe that it is more probable than not that the error undermined the reliability of the verdict given that there were two other witnesses who testified to defendant's admissions of guilt and there was also considerable circumstantial evidence against him.

Defendant makes an alternative claim that he was denied the effective assistance of counsel. The test for ineffective assistance of counsel is set out in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). First, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *Id*., p 309. Additionally, the Sixth Amendment, US Const, Am VI, requires a defendant to show that the representation was so prejudicial that it deprived him of a fair trial. *Pickens, supra*, p 309.

In the instant case, defendant complains that counsel did not place an objection to the prosecutor's comments during closing on the record. Instead, defense counsel asked to approach the bench. While the objection was not placed on the record, it is apparent that defense counsel objected to the use of Kersen's statement as evidence but the trial judge nevertheless allowed the prosecutor to continue. Counsel is not considered ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Further, a defendant claiming ineffective assistance of counsel must overcome the presumption that counsel's actions constitute a sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). In *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008), this Court stated that "declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." It is reasonable to assume that defense counsel had a reason for not making an objection more explicitly on the record when the prosecutor made the improper statements since it was during the prosecutor's closing argument. In fact, in his own closing argument defense counsel asked the jury not to hold it against his client if he had made too many objections during trial. Defense counsel additionally tried to counter the improper comments made by the prosecutor, and was vigorously advocating for his client. It cannot be said that the defense counsel's performance fell below an objective standard of reasonableness. Since defendant cannot meet the first prong of the test for ineffective assistance of counsel, it is not necessary to evaluate if defendant was prejudiced by defense counsel's actions. Even if we were to find that defense counsel's actions fell below an objective standard of reasonableness,

however, we are not convinced that failure to object on the record was so prejudicial as to deprive defendant of a fair trial.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis