STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND PAYNE,

Defendant-Appellant.

UNPUBLISHED
December 18, 2008

No. 281187
Ingham Circuit Court
LC No. 07-000471-FH

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant was found guilty by a jury of unarmed robbery, MCL 750.530, and was sentenced as a second habitual offender, MCL 769.10, to 4 to 20 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from an incident in which he admittedly attempted to steal two bottles of tequila from a Meijer store. The critical issue at trial was whether defendant was guilty of unarmed robbery because he used force or violence, particularly by punching an undercover store detective when she stopped him as he attempted to leave the store.

Defendant makes two arguments on appeal. First, he contends his due process right to a fair trial was violated due to prosecutorial misconduct. Specifically, defendant argues that during closing argument the prosecutor made several character-related statements causing the jury to convict him of unarmed robbery because he was a thief rather than based on the evidence. We disagree.

Defendant did not preserve his claim of prosecutorial misconduct below. Unpreserved claims of prosecutorial misconduct are subject to the plain error rule. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The defendant must show (1) there was error, (2) the error was clear or obvious, and, (3) the error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is required occur only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Defendant's claim of plain error fails. The gist of defendant's argument is that the prosecutor improperly urged the jury to convict him of unarmed robbery based on his bad character as reflected in his admitted history of shoplifting. Although defendant does not cite

MRE 404(b)(1), it is apparent that if the prosecutor were simply asking the jury to conclude that defendant was guilty of unarmed robbery based on his bad character or criminal propensity as reflected in his admitted history of shoplifting, this would be an improper use of character evidence. See MRE 404(b)(1) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); see also *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005), quoting *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992) ("It is not proper for the prosecutor to comment on the defendant's character when his character is not in issue.") However, in this case, defendant was also a witness. The relevant comments made in closing and rebuttal argument by the prosecutor were meant to discredit defendant as a witness, not to imply that the jury should conclude that because he is a shoplifter he is guilty of unarmed robbery. In other words, the prosecutor's references to defendant being an admitted repeat shoplifter were directed at the jurors' assessment of the credibility of defendant's testimony, not an attempt to use the past shoplifting crimes as direct substantive evidence of guilt on a propensity theory.

In this regard, "[a] prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Defendant himself introduced evidence that he had shoplifted at Meijer several times by volunteering that information when he cut off the prosecutor as she was in the course of asking him a question on cross-examination. Once defendant placed evidence of his repeated theft into the trial,[1] the prosecutor reasonably argued that defendant's admitted history of theft was an appropriate factor for the jury to consider as reflecting negatively on the credibility of his testimony, because a prosecutor may argue reasonable inferences from the evidence, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and "theft offenses have traditionally been viewed as strongly probative of veracity," *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997) (quotation omitted),. Indeed, that a prosecutor may use admitted evidence that a witness has committed prior theft offenses to attack the credibility of the witness is inherent in the provision of MRE 609(a)(2) allowing the admission in certain circumstances of evidence of the prior conviction of a witness for a theft crime to impeach the credibility of the witness.[2] Thus, defendant has not established error, let alone plain error, with regard to the prosecutor's use of his admitted commission to several shoplifting offenses to attack his credibility.

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[1] Prior to defendant's volunteered testimony expressing that he had shoplifted from Meijer several times, no such evidence had been admitted. The store detective had earlier testified on direct examination by the prosecutor that she recognized defendant "from a prior encounter in the store." While this might have allowed speculation that defendant had shoplifted from Meijer on a prior occasion, it did not make that fact clear and certainly did not provide an indication that defendant had done so *several* times previously.

[2] No evidence was admitted at trial of defendant having been convicted of prior theft crimes. Accordingly, if defendant had not volunteered the fact that he committed prior theft crimes against Meijer, the prosecutor could not properly have attacked his credibility on that basis. But, since defendant himself placed his prior theft crimes into evidence (perhaps in an effort to indicate, consistent with the defense theory, that he was a non-violent thief) there is no basis to conclude that the prosecutor acted improperly in using that evidence to impeach his credibility.

Apart from its larger context, the prosecutor's use of the phrase "he is just a thief" in closing argument might seem as an indication that the prosecutor was engaging in a general attack on defendant's character or urging the jury to convict him simply because of his acknowledged history of repeated theft. However, the prosecutor stated:

> Some things are not right with the Defendant's version of these events. And I don't know if it's a memory problem or it's just a problem he just wants you to think this isn't a big deal, he is just a thief.

In context, the prosecutor was not making an improper propensity argument based on defendant's bad character as a thief, but rather was accurately alluding to the defense theory that defendant was guilty of merely stealing the bottles of tequila as opposed to the charged crime of unarmed robbery involving the use of force or violence.

Further, even if there were any plain error in the prosecutor's remarks, we conclude that it did not affect defendant's substantial rights, *Carines*, *supra* at 763, in light of the strong evidence of guilt from the testimony of the store employees about defendant punching the store detective.

Next, defendant argues that trial counsel provided ineffective assistance in failing to object to the prosecutorial remarks at issue. We disagree. Ineffective assistance of counsel is established by showing counsel's performance was deficient and a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant has failed to make either showing. First, because we conclude that the prosecutor's remarks were proper, it follows that trial counsel was not deficient in failing to make a meritless or futile objection to those remarks. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Moreover, there is no reasonable probability that a successful objection by trial counsel to those remarks would have changed the outcome of the trial in light of the strong evidence of defendant's guilt.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder