STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 23, 2008
v	No. 280087 Wayne Circuit Court
LEONDO EUGENE FORD, Defendant-Appellant.	LC No. 07-005809-01

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of assault with intent to commit murder (AWIM), MCL 750.83, two counts of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. Facts

Sixteen-year-old Parez testified that he and his close friend, 17-year-old Brandon, went to defendant's house to purchase marijuana on February 10, 2007, at about 11:00 p.m., but left because he did not have enough money. Parez had known defendant for two or three months. While there, Parez observed about eight people in the house, including codefendant Bernard Hart, and two guns on a crate. Before leaving, Parez asked defendant about the guns, and defendant described one as a nine-millimeter and the other as a .38 caliber.

Parez and Brandon testified that as they walked away from defendant's house, they saw two men come out of an alley with guns. Brandon could not identify the two men. Parez identified the men as defendant and codefendant Hart, and explained that he could see defendant's face and recognized his voice. Parez testified that defendant had the same nine-millimeter weapon that he saw at the house earlier, and codefendant Hart had the .38-caliber weapon. Defendant pointed the nine-millimeter gun at Parez's head and asked why he did not purchase marijuana. Parez told defendant that he did not have enough money. Parez stated that defendant pointed the gun at Brandon and asked why Brandon came to his house. Defendant then pointed the gun back at Parez's head and pulled the trigger, but the gun did not fire. Brandon testified that he ran when this occurred. Parez stated that defendant then "cocked the gun back," pulled the trigger again, and shot him in the right jaw. Parez fell, got up and started running. As he was fleeing, defendant shot Parez again in the right shoulder. Parez continued to

run, and he saw defendant and the codefendant shooting at Brandon. Parez also saw Brandon holding his head. Brandon testified that as he fled, he was shot in the back of the head. Brandon did not see who shot him.

II. Remand

Defendant argues that the trial court abused its discretion by granting the prosecution's motion to remand the case to the district court to permit the prosecutor to present additional evidence through Brandon who did not testify at the first examination. According to defendant, the trial court improperly remanded to the district court because the trial court did not find that the district court abused its discretion, the trial court acted without jurisdiction, and, because the prosecutor presented only cumulative evidence at the second examination, defendant's due process rights were violated. We disagree. This Court has recognized "the circuit court's well-established authority to remand criminal cases for further preliminary proceedings once it obtains jurisdiction." *People v Dunham*, 220 Mich App 268, 276; 559 NW2d 360 (1996). "Jurisdiction of a criminal defendant is acquired by the circuit court 'upon the filing . . . of the return of the magistrate before whom [the defendant] had waived preliminary examination,' . . . or 'before whom the defendant had been examined.'" *People v Johnson*, 427 Mich 98, 107 n 7; 398 NW2d 219 (1986) (citations omitted, alterations by *Johnson* Court). Once a circuit court has obtained jurisdiction, it may remand to the district court to enable the prosecution to present additional evidence without making a finding that the district court abused its discretion in binding over the defendant. *People v Staffney*, 187 Mich App 660, 662; 468 NW2d 238 (1991).

In the instant case, the prosecution charged defendant with AWIM, assault with intent to do great bodily harm less than murder, and felonious assault with regard to both victims. At the preliminary examination, only Parez testified and he did not state that Brandon had been shot in the head. The district court bound defendant over on assault with intent to do great bodily harm with respect to both victims and AWIM and felonious assault with regard to Parez only. The trial court then obtained jurisdiction when the magistrate filed the return. The prosecution motioned for remand in order to establish a basis for the AWIM and felonious assault charges with regard to Brandon. The trial court granted the motion without finding that the district court abused its discretion. On remand, Brandon testified that he was shot in the head and defendant was bound over on the additional charges.

We see no error in this process. The trial court properly obtained jurisdiction when the magistrate filed the return, *Johnson*, *supra* at 107 n 7, and, subsequently, the trial court properly granted the prosecution's motion to remand to present evidence in order to add additional counts. Under the circumstances, defendant's due process rights were not violated because the additional testimony was not cumulative, as Brandon testified that he was shot in the head and no evidence of this fact was proffered at the first examination. Further, in such instances no finding of an abuse of discretion is necessary, *Staffney*, *supra* at 662, contrary to defendant's claim that the trial court should have applied the abuse of discretion standard. Nor did the trial court lose its jurisdiction to grant the motion to remand as a result of affirming the magistrate's bind over. Jurisdiction, once vested in the trial court, is not lost by virtue of the court's decision to grant a motion to remand to add additional counts based on other evidence. See *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965). Finally, any error in the preliminary examination is not cause for reversal if the defendant received a fair trial and was not otherwise prejudiced. *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990). Defendant has not indicated how he was

deprived of a fair trial or otherwise prejudiced by the alleged errors in the bind over process. Because the counts added after the second examination were also part of the first examination, defendant was not unfairly surprised or deprived of an opportunity to defend. For this reason, even assuming error occurred, it was harmless and defendant's claim fails. *Id.*

III. Double Jeopardy

Defendant further argues that his convictions and sentences for two counts of AWIM and two counts of felonious assault violate his double jeopardy protections against multiple punishments for the same offense.[1] We disagree. Double jeopardy issues are reviewed de novo. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple punishments for the same offense. *Id.* at 299. The validity of multiple punishments under the Michigan Constitution is determined under the federal "same-elements test" set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), which requires the reviewing court to determine "whether each provision requires proof of a fact which the other does not." *Smith*, *supra* at 305, 315-316 (citation omitted). If the Legislature has clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent, multiple offenses may be punished if each offense has an element that the other does not. *Id.* at 316.

Felonious assault requires the use of a dangerous weapon and an intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). In contrast, AWIM does not require the use of a dangerous weapon, and requires an actual intent to kill. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (citations and internal quotation marks omitted). Because each offense has an element that the other does not, defendant's convictions of both AWIM and felonious assault do not violate the double jeopardy protection against multiple punishments. Defendant's double jeopardy clam fails.

IV. Prosecutorial Misconduct

Defendant also argues that he is entitled to a new trial because the prosecutor misstated the evidence, improperly vouched for a witness, and denigrated defense counsel. We disagree. Because defendant failed to object to the prosecutor's remarks, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We decide issues of prosecutorial misconduct on a case-by-case basis, *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998), considering the prosecutor's conduct in context

[1] Defendant was charged with AWIM, assault with intent to do great bodily harm less than murder, and felonious assault with regard to each victim. The jury convicted defendant as charged. At sentencing, the assault with intent to do great bodily harm less than murder convictions were vacated as necessarily included offenses of AWIM. Over defendant's objection, the felonious assault convictions were allowed to stand.

of the pertinent portion of the record, *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999), and in light of the defense's arguments and the evidence produced at trial, *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982).

A. Misstatement of Evidence

Defendant asserts that the prosecutor improperly argued facts not in evidence, thereby depriving him of a fair and impartial trial. Specifically, defendant claims that the prosecutor stated that Brandon had identified defendant and the codefendant as the assailants, contrary to Brandon's testimony at trial. While it is true that a prosecutor may not make statements of fact that are unsupported by the evidence, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), that is not the case here and, thus, we cannot agree with defendant.

The prosecutor made the challenged remark, referring to "these two men out there with guns," during closing argument as follows:

> We heard what [Parez] said. He said it's Mr. Ford that took off half his face. You heard that [the codefendant] was out there. These two people. [Parez] said he just saw them together at Mr. Ford's house.
>
> They go back to the house, the aunt's house. They're bleeding. The police are called. The E.M.S. comes. Who did they say? [Brandon] doesn't know these people. If you're gonna say [Brandon's] a lie, what is he gonna lie about? If he was such a good friends, cousins, friends, so close they would be considered relatives and call each other affectionately cousins, why wouldn't he said yeah I saw who was shooting, I saw who tried to blow off my head, it was [the codefendant] or Mr. Ford?
>
> That's not what he came in here and testified. He came and he testified about what he saw, what he knows. That's what [Brandon] says he saw. *What he saw was these two men out there with guns* and [the codefendant] firing and that he saw that, well who he believed and what we know circumstantially [Parez] says its Mr. Ford. He was in his head. He was within an inch of his head with that gun.
>
> There is no problem seeing when somebody's that far. He not only recognized his face, he recognized his voice. He knows these men. [Brandon] does not. And if he were here to lie, he [sic] come in and say hey I saw those two men, too. But that's not what he said. He told you what he knows. What he knows is I got shot. This is what we did and this why we did - - we were over there. [Emphasis added.]

In rebuttal argument, the prosecutor stated:

> And then if why [sic] it was such a big lie, why wouldn't [Brandon] come in and lie? Wants to make the case stronger if his cuz' came in and lied? Didn't do that. That didn't happen.

The prosecutor did not state that Brandon had identified either defendant or the codefendant as the shooters. The prosecutor asserted that Brandon saw two men come out of the alley and indicated that Brandon could not identify the shooters. These statements are consistent with Brandon's testimony at trial that he could not identify the assailants. Read in context, it is clear that the prosecutor did not misstate the evidence.

B. Vouching for Witnesses

Defendant also contends that the prosecutor impermissibly vouched for Parez's credibility. We disagree. A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, a prosecutor is free to argue from the facts that a witness is credible. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

In the present matter, the prosecution made the following statements in her closing and rebuttal arguments:

> But I want you to remember what the evidence is, not arguments, who argues better, who says it better but what the evidence is. Please go back, look at the photographs, look at the sketch, look at everything. Weigh what reason would [Parez] come in here and says it's Mr. Ford and [the codefendant]? No reason. The only reason is because *it's the truth*.
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> * * *
>
> It's a 16-year-old [sic] didn't want to tell the police he was out buying weed and got shot from the get go. He did say who shot him, though. And he said these two men. Nobody else. These two men.
>
> Did the 16-year-old wants [sic] to tell the police, let alone his mother, he was out buying weed and got shot? Nope. But he came in and he under oath at the exam *told the truth*. Under oath you saw him here testify. Kid doesn't even know the word altercation, had struggled with prior.
>
> Do you think he was sitting here trying to fool all you people? No, he told it like it is. He told you exactly what he knew. Came forward and he told it and he said I got shot.
>
> * * *
>
> You got a 16-year-old kid came forward, *he told the truth*. And that's up for [sic] you to evaluate that. . . . The 16-year-old identified him and he said and he told the officer what he said and that's what you look at. That's the evidence, not what you are told to speculate in argument 'cause that's not evidence. [Emphasis added.]

Viewed in context, the challenged remarks did not suggest that the prosecutor had special knowledge that Parez was credible. Rather, the prosecutor's argument focused on refuting defense counsel's assertions that Parez's testimony was inconsistent and not credible. Moreover, the prosecutor relied on the evidence when making the challenged remarks: the prosecutor discussed the consistency of Parez's testimony and his demeanor, and argued that there were reasons based on the evidence to conclude that Parez was credible. This argument was proper. *Id.*

C. Denigration of Defense Counsel

Defendant argues that the prosecutor denigrated defense counsel. We disagree. A prosecutor may not personally attack the credibility of defense counsel or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities. *Id.*

During rebuttal argument, the prosecutor stated:

> And you heard defense. Their job is to get your mind off the evidence. Off the evidence. They have a job. Everybody here has a job . . . . Their job is to get your mind off the evidence.

These remarks were made after defense counsel twice suggested to the jury that the prosecution was attempting to "insult [their] intelligence." The prosecutor's remarks conveyed her contention that, based on the evidence, the defense's theory of the case was a pretense and ignored the evidence. Given that these statements were made during a vigorous adversarial proceeding, we conclude that they did not amount to an improper personal attack on defense counsel, or improperly shift the jury's focus from the evidence to defense counsel's personality. A prosecutor is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Lastly, to the extent that any of the prosecutor's comments prejudiced defendant, the trial court's final instruction indicating that the attorneys' arguments were not evidence, that the jury should decide the case on the basis of properly admitted evidence, and that the jury was to consider itself the judge of the witnesses' credibility was sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). For all of the foregoing reasons, we conclude that the prosecutor did not engage in misconduct requiring reversal. Defendant's claim fails.

V. Right to Present Witnesses and Right to Testify

Defendant next argues that he is entitled to a new trial because the trial court failed to obtain a valid waiver of his right to testify and his right to call witnesses. We cannot agree. When a defendant intentionally relinquishes a known right, he waives any claim of error on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). It is plain on the record that defendant waived his right to testify and to call witnesses. After the prosecution rested, the trial court asked if the defense intended to call any witnesses. Defense counsel indicated that he and defendant had discussed the matter and the defense would not be calling

any witnesses. The trial court asked defendant if he agreed, and defendant replied, "Yes." The trial court then asked defendant if he understood that he had a right to testify and defendant replied, "Yes." The court asked defendant if he wished to waive his right to testify and he replied, "Yes." Thus, defendant has waived any claim of error on appeal. *Id.*

VI. Ineffective Assistance of Counsel

Lastly, defendant claims he was denied effective assistance of counsel. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness, and that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant contends counsel was ineffective because counsel failed to call several witnesses who could have supported an alibi defense. Defendant has not provided any witness affidavits disclosing the witnesses' proposed testimony or indicating that the witnesses would have been willing to testify on his behalf, nor has defendant identified any evidence of record establishing that the proposed witnesses could have provided valuable evidence that would have affected the trial's outcome. Defendant's unsupported assertion in his brief that the witnesses would have supported an alibi is insufficient to demonstrate that he was deprived of a substantial defense. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Consequently, this claim does not warrant reversal.

We also reject defendant's argument that he was denied effective assistance because counsel failed to object to the prosecutor's allegedly prejudicial remarks. Because the trial court's instructions adequately protected defendant's rights, defendant cannot demonstrate a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Frazier*, *supra* at 243.

Affirmed.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly