STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2009
v	No. 278240 Wayne Circuit Court
KEHINDA WOFFORD, a/k/a KEHINDE TYRU WOFFORD, Defendant-Appellant.	LC No. 06-011020-01

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

PER CURIAM.

Defendant Kehinda Wofford appeals as of right his jury convictions of possessing a firearm while ineligible to do so (felon-in-possession) in violation of MCL 750.224f and carrying or possessing a firearm during the commission of a felony (felony-firearm) in violation of MCL 750.227b. The trial court sentenced Wofford as a third habitual offender under MCL 769.11 to serve 57 months to ten years in prison for his felon-in-possession conviction and two years in prison consecutive to the felon-in-possession conviction for his felony-firearm conviction. On appeal, Wofford argues that the prosecutor deprived him of a fair trial by making improper arguments during her closing remarks. Wofford also argues that he was deprived of the effective assistance of counsel by his trial counsel's failure to object to the prosecutor's improper remarks. As a result of these errors, Wofford contends that he is entitled to a new trial. We conclude that there were no errors warranting relief. For that reason, we affirm.

I. Basic Facts and Procedural History

Wofford's convictions stem from the shooting deaths of Herbert Lewis and Leonard Jones on July 29, 2005 in Detroit. The prosecution originally charged Wofford and a codefendant, Marsh Spears, with two counts of first-degree premeditated murder (one count for each decedent), felony-murder with regard to Lewis, who was apparently robbed, and conspiracy to commit first-degree murder of a third individual. In addition, the prosecution charged Wofford with felon-in-possession and felony-firearm. However, after a joint trial with Spears, the jury found Wofford not guilty of the murders of Lewis and Jones and not guilty of conspiring with Spears to kill another person. As noted above, the jury did find Wofford guilty of felon-in-possession and felony firearm. The jury also returned a verdict of not guilty on each of the charges raised against Spears. At trial, the primary evidence against Wofford and Spears came from an accomplice to the murders, Jovan Sly.

Sly testified that on July 29, 2005, he was with Wofford and Leroy Wilson, who was otherwise known as "Ace."[1] Sly stated that they were riding around in Wofford's van when he (Sly) suggested that they stop by Spears' home on Fielding Street. Sly testified that he knew Spears as "Head" and that they had been friends for a long time. Sly said that this was the first time Wofford or Wilson had met Spears.

After they arrived at Spears' home, Sly said he, Wofford, Wilson and Spears, sat on Spears' porch and talked for a while. At some point, Spears told Sly that he wanted him "to knock a Nigga off for him." Sly said Spears wanted him to kill the "dark skinned guy" that Spears had introduced to him earlier.[2] The man was "supposed to be rolling" for Spears, which Sly explained meant that he was selling "weed and Ecstasy pills" for Spears. The man sold the marijuana and pills from a house on Stout Street, which was within about a block of Spears' home. Sly said that Spears was angry because the man had shorted him $1300. Spears told Sly that he would give him the $1300. Sly responded, "I can get it done for you." Sly said he then explained to Wofford and Wilson that "my man want me to knock somebody off for him." Sly testified that Wofford and Wilson were "with it," but that Wofford said that his "man will have to pay him."

After they agreed to kill the dark skinned man for Spears, Sly said that Spears suggested that they go over to the drug house and pretend to buy an ounce of marijuana to draw the man out. Sly, Wofford and Ace then walked to the house on Stout. It was about 10:30 at night. Sly said that Spears provided him with a 9 mm handgun and that Wofford and Wilson already had 9 mm handguns.

When they arrived at the house, they asked about an ounce of marijuana. The man they were supposed to kill stated that he did not have that much available in one bag, but said he could get it and called someone on his cell phone. However, Sly said they decided to abandon the plan because the man they were supposed to kill had someone with him who was armed. Sly also indicated that some people had just arrived. Sly, Wofford and Wilson then walked back toward Spears' home.

Sly testified that a guy from the porch—apparently Jones—followed them from the house on Stout. Sly said that, as they were "making our way down" Fielding, "a truck pull up, a guy jump out, throw a hoodie over his head, and ask us were we the guys that wanted to buy weed." Although Sly did not know the man, he was later identified as Lewis. Sly said they all turned around to face Lewis and Wofford said "I'm fixin' to check this Nigga." Wofford punched Lewis, who fell to the ground as Sly and Wofford attacked him. Wofford then shot Lewis four or five times. The medical examiner testified that Lewis had been shot four times and that he died from a shot to his shoulder that entered into his lung. Sly said that Wofford told him to

[1] Wilson died in a shoot-out with police in Kalamazoo before the present trial.

[2] There was testimony at trial that suggested that this man was Frederick Amerson. However, by the time of this trial, Amerson had been murdered and was no longer available to testify about the events of July 29, 2005.

check Lewis' pockets, which he did. Testimony by first responders established that Lewis' wallet, identification and other documents were found under his body.

Sly said that, while he and Wofford were dealing with Lewis, Wilson chased after Jones. Sly said he heard one shot. When Wofford and Sly caught up to Wilson, he was standing over Jones, who had collapsed in Spears' yard. Sly said that they moved Jones to the neighbor's yard and that Wilson shot him in the head. The medical examiner stated that Jones died from a gunshot wound to the groin area—not the head. However, the medical examiner also stated that Jones suffered a gunshot wound to the arm and there was physical evidence to corroborate Sly's testimony that Jones originally collapsed on Spears' property and was moved to the adjacent property.

After the shootings, Wofford got his van and told Sly and Wilson to walk over to 6 Mile Street where he picked them up. Sly said that Wofford told him to call Spears and demand $6000 for the killings, which Sly did. Sly said that Spears responded that they "didn't even kill the guy I wanted dead. The other two guys they was alright with me." Nevertheless, Sly said Spears agreed to meet them at a gas station on 7 Mile Street and paid them $1000.

II. Prosecutorial Misconduct

A. Standard of Review

Where claims of prosecutorial misconduct are preserved, this Court reviews them de novo to see if the defendant was deprived of a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). This Court reviews unpreserved claims of prosecutorial misconduct "for plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

B. Analysis

On appeal, Wofford argues that the prosecutor made improper arguments during her closing statement and throughout her rebuttal. These improper arguments, Wofford further argues, deprived him of a fair trial and warrant reversal of his convictions. When reviewing alleged instances of misconduct, this Court must examine the prosecutor's remarks in context and in light of the arguments presented by the defense. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). The context within which the prosecutor made the remarks is particularly important; a remark that appears to be prejudicial when examined in isolation may nevertheless not warrant relief when made in response to defense counsel's arguments. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). This is especially true in situations where the prosecutor's remarks are directed at the defendant's trial counsel.

In *People v Allen*, 351 Mich 535, 540-541; 88 NW2d 433 (1958), the defendant claimed that the prosecutor engaged in misconduct warranting a new trial when he characterized the defendant's trial counsel's argument as "dishonesty of the highest order" and stated that defendant's trial counsel's statement about test samples was "100% fabrication." Our Supreme Court agreed that the prosecutor's remarks were inappropriate, but disagreed that they warranted relief under the circumstances:

> We concede that there is little room for argument that his remarks were intemperate and perhaps better left unsaid. But under all the circumstances we cannot say that they were fatally prejudicial or entirely without provocation. Criminal trials are not basket luncheons, and we seem faintly to recall that in our experience opposing lawyers rarely if ever pelted each other with rose petals. In any case, counsel for defendants cannot on his side be allowed great latitude to goad and provoke adverse comment or criticism from the prosecutor and then seek a reversal because his strategy succeeded. When opposing counsel makes accusations and creates inferences of unfairness and unprofessional conduct against the prosecution, he is scarcely in a position to ask a reversal because of equally intemperate language used in reply. To permit that would be to award victory to those criminal defendants retaining the best "needler". Under the circumstances presented here we must hold that this ground of error is without merit. [*Id.* at 544.]

Therefore, we shall examine each of the allegedly inappropriate remarks separately and in light of the full context within which they were made to determine whether the remarks warrant relief.

During her closing argument, the prosecutor had to confront the fact that she did not have an independent eyewitness or good forensic evidence tying Wofford to the murders. Indeed, she acknowledged that her case largely relied on Sly's testimony and that the jurors would likely "not want to take Mr. Sly home for Easter dinner." Nevertheless, she argued that reliance on someone like Sly should not deter the jury from finding Wofford and Spears guilty: "You don't have eyewitnesses. You don't have video. You don't have anything taken from the scene. You don't have anything that was left at the scene. So sometimes you have to go to people that participated in it. And historically, we have done that." The prosecutor then began to note several notorious crimes and types of crimes that were only solved after an accomplice came forward. Wofford's counsel objected to these references on the basis that there were no facts in evidence to support the references and the trial court sustained the objection. After the trial court sustained a second objection, the prosecutor closed by reminding the jury of their oath and stating that "if you believe his testimony beyond a reasonable doubt that is all you need" to find Spears and Wofford guilty.

Taken in context, see *Duncan*, 402 Mich at 16, the prosecutor's references were part of an attempt to make the jury more comfortable with the idea that it could convict solely based on an accomplice's testimony. Hence, although the references suggest an improper appeal to convict based on civic duty, see *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995), and were based on facts not in evidence, the remarks were not part of a deliberate attempt to improperly influence the jury by injecting issues broader than Wofford's guilt or innocence, *id.* at 284. Likewise, the trial court actually sustained Wofford's trial counsel's objections and prevented the prosecutor from developing the references or making an argument based on them. Finally, the trial court instructed the jury that the parties' attorneys' closing remarks were not evidence and could not be considered when determining guilt or innocence.[3]

[3] The trial court instructed the jury that it could "only consider the evidence that has been properly admitted in this case," which included "the sworn testimony of the witnesses" and did (continued…)

These instructions cured any minimal prejudice. *People v Watson*, 245 Mich App 572, 586, 592; 629 NW2d 411 (2001). For that reason, to the extent that the references were improper, we conclude that any error did not prejudice Wofford.

Wofford next argues that the prosecutor improperly remarked about the lack of fingerprint evidence on the shell casings found at the scene of the murders. During his closing arguments, Wofford's trial counsel made much of the fact that the officers charged with investigating the murders did not try to get fingerprints off the spent casings. Indeed, he stated that "people" are always "careless about the bullets" and that that is "why in crime scene analyses that's the first thing people should be looking at." He also claimed that Sly's story would be much more credible if there were fingerprint evidence. In rebuttal, the prosecutor remarked: "We didn't get any fingerprints off the casings. You heard what happens to this item when there is an explosion inside of it, you don't have fingerprints on it." She then reminded the jury that Wofford's counsel objected when she tried to get an officer to explain this.[4] At this point, Wofford's counsel objected and the trial court sustained the objection: "Sustained. I ruled that he could not testify about that. So you can't either."

We agree that the prosecutor clearly invited the jury to improperly consider facts not in evidence with these remarks—namely, that any fingerprints on a casing would be lost during the firing process. See *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003) (noting that a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence). However, on this record, we conclude that the improper remarks did not deprive Wofford of a fair trial. Taken in context, these remarks were an attempt to respond to Wofford's trial counsel's improper argument that the police either negligently or deliberately failed to check the casings for fingerprints even though that is normally the "first thing people should be looking at." See *Allen*, 351 Mich 544. In addition, Wofford's counsel objected to the improper remarks and the trial court sustained the objection. The trial court also admonished the prosecutor that she would not be permitted to "testify" during her closing statement and later instructed the jury that the prosecutor's closing remarks were not evidence. We conclude that the trial court's instruction cured any prejudice occasioned by this improper argument. *Watson*, 245 Mich App at 586.

Finally, Wofford contends that the prosecutor improperly denigrated his trial counsel during her rebuttal arguments. During his closing arguments, Wofford's trial counsel tried to focus the jury's attention on the police department's failure to obtain physical evidence or testimony to corroborate Sly's testimony. Specifically, Wofford's trial counsel speculated about the police officer's failure to get statements from the persons at the house on Stout, failure to ask

(…continued)

not include "the lawyers' statements and arguments." The lawyers' statements and arguments, the trial court instructed, were "only meant to help understand the evidence and each sides legal theories." The trial court further instructed that the lawyers' questions "are also not evidence" and should be considered "only as they give meaning to the witnesses'[] answers." Finally, the trial court instructed the jury to "only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge."

[4] During his closing argument, Wofford's trial counsel raised the issue of the police department's failure to examine the casings for prints.

Sly about the location of the guns used, failure to find the "hoodie," and failure to try to get prints off of the shell casings or try to find Wofford's blood on any of the clothing. He even stated that this "evidence was plainly available if you knew what you were doing."

In her rebuttal, the prosecutor characterized Wofford's trial counsel's attempt to shift the focus of the trial to the police department and its investigation as a "diversion" or a "red herring." She also stated that Wofford's trial counsel's argument that there was no evidence to corroborate Sly's testimony as "a lie, that's a lie, that's a lie, ladies and gentlemen." She then went on to describe how the physical evidence was consistent with Sly's testimony. The prosecutor also accused Wofford's trial counsel of misrepresenting the facts. The prosecutor suggested that one such misrepresentation involved Wofford's trial counsel's suggestion that Sly was motivated by a grudge to implicate Wofford. She noted that there was no evidence of a grudge—no evidence that Sly had an altercation with Wofford over a girl and no evidence that Sly shot Wofford. She explained that, when asked about the alleged dispute and shooting, Sly testified that the claims were "nonsense."

> And it's that answer it's nonsense is what your evidence is. Not his [Wofford's trial counsel's] question. Not what he wants to poison your mind with to suggest I'm going to throw something out there. To suggest a motive. To create a beef between Sly and [Wofford]. [Sly] said hey it didn't happen. I visited the guy in the hospital when he got shot in August and when he got shot in September. I continued to hang out with him after these events. I visited him again in the hospital.
>
> Now using your common sense, I want you to compare that with counsel's suggestion to you that you shot him on both occasions. Would you allow the man that shot you to come visit you in the hospital? Again, common sense prevails.

This Court typically affords the prosecutor great latitude in making her arguments, but a prosecutor must not suggest that defense counsel is deliberately misleading the jury. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). However, taken in context, we conclude that the prosecutor was not directly impugning the character of Wofford's trial counsel; instead, she attacked—albeit in particularly strong language—his argument that the physical evidence did not corroborate Sly's testimony and his argument premised on facts not in evidence. Nevertheless, we agree that the prosecutor overstepped the boundaries of proper rebuttal when she characterized Wofford's trial counsel's remarks about the evidence as misrepresentations and lies and accused him of trying to poison the jurors' minds, *id.*, but we do not agree that these remarks warrant a new trial.[5] The prosecutor's remarks were an attempt to focus the jury on the details of Sly's testimony and the fact that, contrary to Wofford's trial counsel's arguments, the testimony was consistent with the physical evidence. The jury heard these remarks in this context and likely understood that the prosecution was merely using strong

[5] Although we conclude that these remarks did not prejudice Wofford under the facts of this case, we caution the prosecutor against making such remarks in the future; it is not difficult to imagine a case where those same remarks would warrant a new trial.

language to assert that Wofford's trial counsel's position regarding the physical evidence should not be accepted. See *Allen*, 351 Mich at 544. Thus, even though we find the prosecutor's decision to use this language regrettable, we conclude that any prejudice was minimal and could easily have been cured by a proper instruction to the jury. *Watson*, 245 Mich App at 586. Therefore, there was no error warranting relief.

Although some of the prosecutor's remarks during closing arguments were improper, we conclude that the remarks—individually and when aggregated—did not prejudice Wofford. Indeed, the jury actually acquitted Wofford of the most serious offenses. Hence, it is clear that the jury took its duty seriously and properly held the prosecution to its burden of proof. The jury accepted Sly's testimony that Wofford unlawfully possessed a handgun and that he did so during the commission of a felony, which could include being a felon-in-possession, but rejected his testimony to the extent that implicated Wofford in the deaths of Lewis and Jones and established a conspiracy to commit murder.[6] Given this result and the fact that the prosecutor's comments were not particularly prejudicial when examined in context and in light of Wofford's trial counsel's arguments, *Duncan*, 402 Mich at 16, we conclude that any minimal prejudice does not warrant relief.

Likewise, we must also reject Wofford's claim that his trial counsel's failure to object to some of the prosecutor's arguments rises to the level of ineffective assistance of counsel. Because there was no evidentiary hearing on Wofford's ineffective assistance of counsel claim, we must limit our review to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). Wofford's trial counsel actually objected to some of the prosecution's remarks and the trial court sustained those objections. Further, with regard to those instances where his trial counsel did not object, on this record we cannot conclude that Wofford's trial counsel's decision to not object constituted the ineffective assistance of counsel. Wofford's trial counsel may have determined that, as a matter of trial strategy, it was better to refrain from objecting in those instances. And we are not in a position to second-guess that decision. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004) (stating that "this Court neither

[6] We disagree with Wofford's contention that the jury's verdict is inconsistent. The jury was not required to either accept all Sly's testimony or reject all Sly's testimony. The jury could reasonably have found that Sly's testimony was credible enough to prove that Wofford had a handgun beyond a reasonable doubt, but that his story had sufficient problems to establish reasonable doubt as to whether Wofford participated in the murders of Lewis and Jones or conspired to kill the dealer at the house on Stout. See *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). For that reason, we do not believe that the verdict is evidence that the prosecution's remarks improperly swayed the jury. If anything, the jury's verdict is evidence that the jury disregarded the prosecutor's emotional appeals and rendered its verdict based on the evidence and testimony.

substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight."). Hence, Wofford has failed to overcome the burden of demonstrating that his trial counsel's decision fell below an objective standard of reasonableness. *Yost*, 278 Mich App at 387. Likewise, as we have already noted, the prosecutor's remarks—even though improper in some cases—were not particularly egregious and did not prejudice Wofford's trial. Therefore, even if we were to conclude that Wofford's trial counsel acted unreasonably in this regard, it is not reasonably probable that the failure to object affected the outcome of the trial. *Id.*

There were no errors warranting relief.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly