STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 2, 2009
v	No. 281012 Washtenaw Circuit Court
TAMARA ANN MCCRACKEN, Defendant-Appellant.	LC No. 06-000903-FH

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of embezzlement, MCL 750.174(5)(a); and larceny in a building, MCL 750.360. She was sentenced to seven days in jail with two days credit, 60 months' probation, 100 hours of community service, and restitution of $121,165 for embezzlement, and to 60 months' probation and 100 hours community service for larceny in a building. Defendant appeals as of right. We affirm.

Defendant was convicted of embezzling the cash payments received, from September 2003 until January 2006, by the health care clinic where she worked as the office manager. Her larceny from a building conviction arose from her theft from the clinic of documentation relating to the amount of cash payments received during that period of time. Testimony established that, in her role as office manager, defendant had sole responsibility for depositing cash and checks received by the clinic into the clinic's bank account, as well as for providing monthly financial information to the clinic's accountants for reconciliation of the clinic's finances. Defendant was the only employee of the clinic to have access to both the cash payments received by the clinic and the documentation relating to those payments.

Traci Gage, who worked "checkout" at the clinic, testified that the clinic received cash payments every day, ranging from one hundred to three, or perhaps, four hundred dollars. Information about the amount and type of patient payments was recorded throughout each day on patient encounter forms; this information was also entered into the clinic's computer system. All of the cash, checks, and credit card slips from the day were balanced with the amounts shown on the patient encounter forms; receipts were then placed in a white envelope and bundled with a daily balance sheet and the encounter forms and placed in a lockbox. Additionally, the daily receipts and encounter forms were balanced with the amounts entered in the computer system.

Candace Sargo, who worked first as a "checkout" clerk and then as the clinic's billing manager, shared an office with defendant during part of the time in question. She testified that when preparing the clinic's bank deposits defendant would separate the cash from the checks, would list the checks on a deposit slip and would put the deposit slip and checks in the bank deposit bag. Sargo never saw defendant list any cash amounts on the deposit slips or place any cash in the deposit bag. Both Sargo and Gage testified that defendant would make change for the clinic from cash in her purse. Another clinic employee, Jennifer Goodwin, testified that, on one occasion, she asked defendant why there was so much cash in her purse and defendant told her that she believed that the cash was safer in her purse than in the deposit bag. Goodwin and Sargo testified that they regularly observed defendant with a large amount of cash in her purse. Sargo and Goodwin became suspicious that defendant was stealing cash from the clinic, so they looked through the deposit records. After observing that no cash was listed in the deposit records, eventually Goodwin alerted another employee, Amy Roehrig to their suspicions. Roehrig[1] reviewed daily logs, encounter sheets, and deposit records for a six-week period, and she, too, observed that cash was coming in to the clinic daily but was not being deposited in the clinic's bank account. She then alerted defendant's supervisor, Julie Walden, who verified that the clinic's bankbooks for a 10- to 12-month period showed no cash being deposited. As a result, Walden requested that the clinic's outside auditor conduct an audit of the clinic's cash receipts. Sargo testified that in the days before this an audit was to be conducted, defendant took boxes of documents from the clinic to her home to "go through them." Goodwin indicated that defendant was "frantic" in the days leading up to the audit; she was very concerned about the paperwork to be examined in the audit and worked "very hard and very privately" going through the encounter forms and "getting them in order" for the audit. And, Walden testified that encounter forms that were present when she requested that the cash audit be conducted were missing at the time the audit was conducted. Following their review of the clinic's documents and records, the clinic's outside auditors concluded that $121,165 in cash was received by the clinic in the form of cash payments from patients, but was not deposited in the clinic's bank account.

Additional noteworthy testimony established that defendant discouraged Sargo and Goodwin from speaking to Walden directly by telling them that Walden did not like them, that defendant removed all of her personal belongings from her workspace before the audit was conducted, that defendant called in sick on the days that the auditors were present at the clinic, that defendant offered no explanation regarding the missing money or documents and made no attempt to assist in determining what may have happened to them, and that defendant did not seem surprised when her employment was terminated. It was also stated that defendant had commented that she never had to wear the same clothes more than once, and there was testimony tending to indicate that defendant's lifestyle was not commensurate with her salary.

Defendant first argues that she received ineffective assistance of counsel at trial. Because no evidentiary hearing was held, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on her claim,

[1] As noted above, defendant was the clinic's office manager; Roehrig was the clinic's nurse manager. Roehrig and defendant served at parallel levels in defendant's management structure and both reported to Walden, the clinic's executive administrator.

defendant must show that her attorney's performance fell below an objective standard of reasonableness and was so prejudicial that she was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). She must show "'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Johnnie Johnson Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). To prove ineffective assistance of counsel, a defendant must also overcome the strong presumption that her counsel's actions constituted sound trial strategy under the circumstances. *Id*.

First, defendant argues that during jury selection defense counsel failed to question Juror Kilkenny to determine if he was biased, failed to identify a juror who made a statement on the record, and failed to remove the jurors who exhibited clear bias. "The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially[,]" so that that a defendant may be tried by a fair and impartial jury. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). However, jurors are presumptively impartial, and the party alleging disqualification for bias bears the burden of proving its existence. *People v Benny Johnson Jr*, 245 Mich App 243, 256; 631 NW2d 1 (2001). A prospective juror may be removed for cause if the challenging party shows that the juror has a bias against a party, a state of mind that will prevent the juror from rendering a just verdict, or if the juror has opinions that would improperly influence the juror's verdict. MCR 2.511(D)(2), (3), and (4). "[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy[.]" *Johnson*, *supra* at 259.

Defendant's contention that defense counsel was ineffective during jury selection is without merit; there simply is no basis to suggest that the jury was not impartial. The prosecution and defense counsel both examined the potential jurors for bias. Juror Kilkenny's indication that, despite a single visit to the clinic five years previous, he could fairly and impartially perform his juror duties, was sufficient to permit him to sit as a juror. *Johnson*, *supra* at 256; *People v Lee*, 212 Mich App 228, 248-252; 537 NW2d 233 (1995). Furthermore, while defense counsel may not have identified for the record the potential juror whose comment appears in the record, none of the potential jurors indicated that they were willing to convict defendant solely based on her arrest and all agreed that they could fairly and impartially judge the evidence presented at trial to determine defendant's guilt or innocence of the charges against her. Accordingly, defendant has failed to prove any bias that would justify disqualification of any of the potential jurors, and therefore, the jury is presumptively impartial and defense counsel's jury selection is properly considered to have been a matter of trial strategy. *Johnson*, *supra* at 256-259.

Second, defendant argues that defense counsel was ineffective in the questions he asked witnesses and in failing to call other witnesses. The manner in which defense counsel questioned witnesses and presented the evidence at trial is presumed to be a matter of trial strategy that this Court will not second-guess upon appeal. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In addition, the failure to present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

This was a contentious trial, during which defense counsel presented a vigorous defense that challenged virtually every point raised by the prosecution. Defense counsel: pointed out inconsistencies in witness testimony; demonstrated repeatedly that all employees, as well as some community groups that made use of the building in which the clinic was located, had access to the lockbox where the money was kept and to the key to that lockbox; presented evidence, through documents and expert witness testimony, that the amount of the money allegedly embezzled was within the data entry error rate for the clinic, based on a review and testing of the documents copied by Roehrig and thus, that the prosecution had not established beyond a reasonable doubt that any money was actually missing; addressed limitations in the auditors' conclusion based on the procedures employed in conducting the audit; challenged, by way of witness testimony, the assertion that defendant lived a lavish lifestyle or had otherwise changed her habits and expenditures after the embezzlement allegedly began; and presented evidence to refute that defendant carried large sums of cash or kept clinic cash in her purse and to show that defendant had other sources for the money that she did have in her possession. Throughout the course of the trial, defense counsel made clear that defendant denied committing the charged offenses, that the prosecution could not and did not establish beyond a reasonable doubt that any crime actually occurred and that, if a crime had occurred, it was committed by someone other than defendant.

Despite counsel's efforts to present a vigorous defense, defendant claims that defense counsel was ineffective in that he failed to ask Candace Sargo about what she considered to be "large" amounts of cash in defendant's purse, why it was suspicious that defendant had "large" amounts of cash in her purse, and why she assumed that the cash in defendant's purse came from the clinic. However, based on the record before us, we conclude that defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. *Toma*, *supra* at 302. Contrary to defendant's claim, defense counsel did closely examine Sargo's suspicions that the money in defendant's purse came from the clinic. Counsel made the point clearly that Sargo did not count the money in defendant's purse and did not know whether the amount was out of the ordinary or whether defendant "just had some money with her that day." He also presented testimony establishing that any money defendant may have had in her purse on a given day was from legitimate sources. We will not second guess the cross-examination with the benefit of hindsight as to what additional or different questions could have been asked. *Rockey*, *supra*.

Defendant also claims that defense counsel failed to ask follow-up questions of Sargo and defendant while they were testifying, depriving defendant of evidence that would have proved that her extra money came from an inheritance or a side business. However, Sargo testified that defendant indicated that she obtained money from an inheritance, and during cross-examination, counsel reiterated that at the time Sargo observed money in defendant's purse, she had been told that defendant had inherited some money from her grandmother, which she spent on clothing. In addition, defendant testified that she had a side business supplementing her income from the clinic. Counsel's questioning established the nature of that business, the amount defendant earned from that business, and the duration of the basis. Therefore, the jury was presented with evidence that defendant's extra money might have come from a source other than the clinic, and defendant cannot establish that she was deprived of any substantial defense by defense counsel's decisions in questioning the witnesses. *Daniel*, *supra* at 58.

Defendant next contends that defense counsel failed to demonstrate to the jury the inconsistencies discovered in Kimberlee Williams's testimony.[2] However, defense counsel questioned Williams at length regarding whether the auditors compared the encounter forms to the computer printout to determine if cash was missing. Williams admitted that she did not compare the deposit slips to the encounter forms. Defendant has failed to overcome the presumption that defense counsel's questions were trial strategy. *Rockey, supra*.

Defendant next claims that defense counsel failed to call a handwriting expert. A "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *Hoag, supra* at 6. Here, defendant has failed to attach any offer of proof as to what relevant, admissible, and helpful evidence a proposed handwriting expert could have provided. She has failed to demonstrate that such a witness would have offered exculpatory testimony. Therefore, defendant has failed to rebut the presumption of sound trial strategy accorded trial counsel's decision to not call a handwriting expert. Moreover, defendant cannot establish that she was denied a substantial defense because of defense counsel's failure to call a handwriting expert because defense counsel questioned others on the difference in handwriting appearing on various documents, thereby presenting the jury with information to allow them to conclude that defendant was not responsible for all of the handwriting in question.

Defendant finally briefly mentions an additional issue that defense counsel asked a litany of incomprehensible and incomplete questions. Reviewing the entirety of defense counsel's examination of the witnesses, we do not find defense counsel's questioning to have been incomprehensible or incomplete when considered in context. Rather, defendant points to instances in which defense counsel stopped to reword a question, or in at least two instances, where there appears simply to be an error in punctuation in the transcript. Defendant's attempt to isolate certain statements or partial statements by defense counsel, removing them from the context in which they were spoken, lacks merit.

Third, defendant contends that she received ineffective assistance of counsel because defense counsel was unprepared for trial. Defense counsel may be found ineffective when unprepared for trial. *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998); see also *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). However, to succeed on such a claim, defendant must demonstrate "that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited defendant's case." *Bass*, *supra* at 253. First, defendant asserts that defense counsel failed to obtain the computer printout of the billing software before trial. However, defendant's expert, Martin Sviland reviewed the printout the day he testified and was able explain to the jury its limitations in calculating whether cash was missing. Second, defendant argues that defense counsel failed to provide Sviland with an encounter form before he testified; however, Sviland was aware of the encounter form after examining the auditor report and was able to testify as to its role in the clinic's cash flow. Defendant has simply failed to establish that because counsel did not obtain the printout before trial, Sviland was unable to present "valuable evidence that

[2] Williams was a staff auditor at the firm that served as defendant's outside auditor.

would have substantially benefited" defendant's case, and thus, defendant's claim that defense counsel was ineffective in this regard is without merit. *Id*.

Fourth, defendant argues that in total, the effect of several minor errors committed by defense counsel coupled with the trial court's chastisement of defense counsel before the jury resulted in a loss of credibility, denying defendant the effective assistance of counsel. A combination of minor errors may cause defense counsel's overall performance to fall below the level guaranteed by the Sixth Amendment. *People v Reed*, 449 Mich 375, 392 n 14; 535 NW2d 496 (1995); *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). However, we do not find that such occurred here. Defendant notes that the trial court stopped defense counsel from attempting to individually question the potential jurors and for exploring with them the burden of proof and the level of proof required to satisfy that burden during voir dire. However, that the trial court advised that it wished defense counsel to question the jury as a group rather than individually to save time, is not an indication of any error on defendant's part. Additionally, plaintiff notes that defense counsel asked numerous leading questions throughout direct examination, each time producing an objection from the prosecution and a correction from the trial court. And, defense counsel was argumentative with several witnesses and was admonished by the trial court to be less argumentative. Defendant also claims that defense counsel gave an overall "sloppy performance" by confusing witnesses' names, taking a prolonged period of time to retrieve witnesses, returning from a lunch break late, and asking incomprehensible questions. Based on our review of the record, we conclude that defendant has failed to establish a factual predicate to sustain a claim of ineffective assistance of counsel. *Hoag*, *supra* at 6. Certainly, defense counsel did ask leading questions on occasion, did get argumentative with the prosecution's expert briefly, and did misspeak on a few occasions. However, our review of the record revealed that these instances were by no means pervasive or out of proportion to similar instances on the part of the prosecutor, nor did they impact defense counsel's presentation of a vigorous defense on behalf of his client. While defense counsel was late returning from lunch on one occasion, he explained to the jury that he had gotten lost running an errand pertinent to the case, apologized, and asked the jury not to hold his lateness against his client. There is no basis to conclude that this had any effect on the jury's determination of defendant's guilt. Thus, defendant has failed to establish that she was prejudiced by the sum total of these minor errors. Further, the trial court repeatedly instructed the jury to not consider its rulings or the attorney's statements as evidence but to rely only on witness testimony in considering whether the prosecution had established defendant's guilt. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003); see also *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the prosecutor committed several incidents of misconduct. "'Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.'" *Unger*, *supra* at 234-235, quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). When the challenged prosecutorial statements are not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error. *Id*. at 235; see also *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in

context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *Rodriguez*, *supra* at 30. Accordingly, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996); *People v Simon*, 174 Mich App 649, 655, 436 NW2d 695 (1989). Prosecutors are afforded great latitude regarding their arguments and conduct at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "Further, we cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Unger*, *supra* at 235 (internal citations omitted).

First, defendant argues that the prosecutor suggested that defense counsel was intentionally trying to mislead the jury and frequently disparaged defense counsel's reputation. "A prosecutor cannot personally attack the defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence." *Kennebrew*, *supra* at 607. In addition, "'prosecutors may not suggest that defense counsel is intentionally attempting to mislead the jury.'" *Unger*, *supra* at 236, quoting *Watson*, *supra* at 572. We agree that several times throughout this contentious trial, the prosecutor impermissibly and personally attacked defense counsel and suggested that defense counsel was intentionally attempting to mislead the jury. However, we conclude that these improper remarks do not rise to an error requiring reversal because the prosecutor was responding to defense counsel's arguments. *Kennebrew*, *supra* at 608. For example, the prosecutor's comment that defense counsel was "blatantly lying" during the opening statement was in direct response to defendant's claim that the prosecution refused to make evidence available. In addition, during closing statements, the prosecutor's comments concerning defense counsel's intent was again in direct response to defense counsel's assertion that evidence was not being provided and that the evidence shown contained inconsistencies. More importantly, however, the trial court gave the jury repeated instruction to only consider the witnesses' testimony as evidence and not consider the attorneys' statements, and these jury instructions were sufficient to cure the prejudicial effect of the inappropriate statements. See *Unger*, *supra* at 235.

Second, defendant argues that the prosecutor deliberately asked misleading questions and misstated the facts of the case. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982). A prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, but he is free to argue reasonable inferences from the evidence. *Watson*, *supra* at 588.

Defendant first claims that the prosecutor mischaracterized testimony by asking Sargo whether she ever asked defendant why she carried deposit money in her purse. Admittedly, Sargo did not testify that defendant carried the deposit money in her purse; however, Jennifer Goodwin testified that she noticed that defendant had a lot of cash in her purse and once asked

her why she carried the cash that way. Defendant responded that the cash was safer in her purse than the bank bag. The prosecutor was free to argue reasonable inferences, including that the money in defendant's purse was from the clinic, from this testimony. *Watson*, *supra*.

Defendant next contends that the prosecutor mischaracterized defendant's testimony during cross-examination by referring to her as "a hell of an employee," and indicating that she never stole the money. Although the prosecutor's use of the phrase "a hell of an employee" was untraditional, a prosecutor "may use 'hard language' when it is supported by the evidence and [is] not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Defendant testified that she was "an excellent employee," and the prosecutor rephrased her statement in an attempt to use that to establish that defendant would have noticed that the money was missing. In light of defense arguments and the role that defendant's job performance played in knowing whether cash was missing, we find that the prosecutor did not improperly mischaracterize defendant's statement. See *Watson*, *supra*. The prosecutor was merely trying to establish that defendant made deposits, including noteworthy sums of cash, in August 2003, and would have noticed a significant drop in the cash receipts in September 2003.

Defendant thirdly argues that, during closing argument, the prosecutor impermissibly appealed to emotions in order to convince the jury to convict defendant. Prosecutors are afforded great latitude in their closing arguments. *Bahoda*, *supra* at 282. Moreover, a prosecutor is "not required to state inferences or conclusions in the blandest terms possible," *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *Ullah*, *supra* at 678, and he "may use emotional language during closing argument," *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). However, it is improper for a prosecutor to use arguments that only appeal to the jury's emotions or sympathy. *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987). In addition, a prosecutor may not make arguments that appeal to the fears and prejudices of the jurors because this injects issues broader than the guilt or innocence of the accused into the trial. *Bahoda*, *supra* at 282-283. Nevertheless, such arguments can be cured by a cautionary instruction that "'arguments of counsel are not evidence.'" *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993), quoting *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989).

Read as a whole, we agree that some of the prosecutor's comments were impermissible. See *Bahoda*, *supra* at 282-284. The prosecutor told the jury that it should be "offended that defense counsel was trying to trick them," and asserted that defense counsel must think that the jurors were "stupid." This statement was not a commentary on the evidence but rather an attack on defense counsel. The prosecutor later issued a "call to convict" when he asked the jury not to let defendant "get away with it," emphasizing that "she stole the average U.S. salary for those years." A "call to convict" as a matter of duty is impermissible. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). However, the prosecutor's errors were cured by the trial court's jury instructions. *Stimage*, *supra* at 30. The trial court interrupted the prosecution's argument and instructed the jury not to consider "counsel's remarks" as evidence and to only consider the witness testimony. Moreover, the trial court instructed the jury at the beginning and end of the trial to not consider its rulings or the attorney's statements as evidence but to rely on witness testimony. Jurors are presumed to follow instructions. *Abraham*, *supra* at 279.

Defendant next argues that the trial court erred in denying her motion for mistrial based on prosecutorial misconduct. We disagree. A trial court's decision on a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). "A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). As noted previously, "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Unger*, *supra* at 235 (internal citations omitted).

Defendant's claim that the trial court erred in denying her motion for a mistrial for alleged prosecutorial misconduct is without merit. As we have discussed, there were occasions when the prosecutor overstepped the usual boundaries of acceptable behavior and acted inappropriately. Nonetheless, a mistrial would have been inappropriate because, as discussed above, the prosecutor's comments that defense counsel was lying or misleading the jury were in response to defense counsel's argument that the prosecution withheld evidence from him, *Kennebrew*, *supra* at 608, and the trial court instructed the jury that it should not consider the trial court's rulings or the attorney's statements as evidence but to solely rely on witness testimony in determining defendant's guilt. The trial court's instruction was sufficient to remove the prejudicial effect of any error. *Unger*, *supra* at 235; *Horn*, *supra* at 36.

We affirm.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro