

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN CHARLES SCHERER,

Defendant-Appellant.

UNPUBLISHED

February 25, 2010

No. 290554

Delta Circuit Court

LC No. 08-008030-FH

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of possession of an analogue controlled substance (Alprazolam, i.e., Xanax), MCL 333.7403(2)(b), for which he was sentenced to six months in jail. We affirm.

A vehicle owned by Dennis Herp, driven by Jared Barthart, and carrying defendant as a passenger, was stopped by Escanaba Public Safety Sergeant Robert LaMarche, who had determined that defendant had outstanding arrest warrants. LaMarche informed defendant that defendant would be taken into custody. According to LaMarche, defendant then stated, "I have to get some things out of my pocket." Defendant leaned back and started digging both hands into his pockets. As defendant pulled his hands out of his pockets, LaMarche noticed a plastic wrapper sticking out of defendant's left hand. While LaMarche ordered defendant to place his hands on the dash, defendant moved his hand towards the console of the car and appeared to drop the wrapper. LaMarche removed defendant from the vehicle and searched the area between the passenger seat and the console where he thought defendant had dropped the plastic. He located and seized a sealed plastic wrapper that contained little blue pills. LaMarche also found defendant's keys in that location. Tests revealed that the pills contained Alprazolam.

Defendant's defense was that he did not possess the pills and that they belonged to Herp, who had a prescription for them. Herp testified that he had left the pills in the car after a trip to Escanaba with defendant and Barthart, and that he had let defendant and Barthart borrow the vehicle while he slept. Herp maintained that the pills were packaged in the cellophane because he did not want to take his whole bottle on the trip. Defendant testified and denied that the pills were his and that they were in his pockets when the officers stopped the car. He said the pills were on the center console, and may have fallen to the floor when his keys hit them after he dropped them in response to LaMarche's order to do so.

Defendant argues that the prosecutor improperly vouched for the credibility of LaMarche during rebuttal, and that this unfairly prejudiced defendant and denied him a fair trial. He further argues that trial counsel's failure to object to this prosecutorial misconduct was objectively unreasonable and constituted ineffective assistance of counsel. Defendant failed to object to the alleged prosecutorial misconduct; thus, this issue is not preserved. An unpreserved claim of prosecutorial misconduct is reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant did not move for a new trial on the basis of ineffective assistance of counsel or request a *Ginther*¹ hearing before the trial court; therefore, his claim of ineffective assistance of counsel is also not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed de novo. *Id.*

Defendant argues that the following statement made by the prosecution during the prosecution's rebuttal closing argument was improper:

The judge will tell you that cases are not won and lost by the number of witnesses, and it makes sense. If you have one credible person versus three who are not credible, the number of witnesses never carries the day. It's the truth of the witness, it's their credibility, it's their honesty testifying under oath. And I suggest to you that the witness here is Sergeant LaMarche and his testimony above all is to be believed (sic), and on that basis I ask you to find the defendant guilty."

"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. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The prosecution's comment was not improper. Prosecutors are generally afforded great latitude regarding their arguments and conduct at trial, and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id.* at 276. Nor may the prosecutor use the prestige of his office, or that of the police, to suggest that the defendant is guilty. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988); *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). However, a prosecutor is free to argue that a trial witness is not credible, or that a prosecution witness should be believed. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Here, the prosecutor did not suggest that the jury should accept LaMarche's testimony because the prosecutor had some special knowledge that it was truthful. Nor did the prosecutor use the prestige of his office or of the police to suggest that defendant was guilty or that LaMarche was testifying truthfully. The fact that the prosecutor "suggested" to the jury that LaMarche should be believed does not render this a case of improper vouching. "Where the prosecutor's argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office, the words 'I believe' or 'I want you to convict' are not improper." *Swartz*, 171 Mich App at 370-371 (citations omitted); see also *Cowell*, 44 Mich App at 628. The prosecution was responding to defendant's assertion during closing argument that defendant and Herp were telling the truth about who owned the Xanax and that LaMarche was mistaken in what he saw when he stopped defendant. The prosecutor's response was an argument that the jury should believe LaMarche's testimony and reject the testimony given by defendant and Herp. Because the prosecutor's statement was made in reference to the specific evidence at trial, we find that defendant has not shown plain error.

We thus also find that defendant has failed to support his claim for ineffective assistance of counsel. "Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *McGhee*, 268 Mich App at 625, quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*, quoting *Solmonson*, 261 Mich App at 663-664.

Here, counsel did not act unreasonably when he did not object to the prosecutor's comment. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). ("[C]ounsel does not render ineffective assistance by failing to raise futile objections.").

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Alton T. Davis