

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEON BRYANT,

Defendant-Appellant.

UNPUBLISHED

May 6, 2010

No. 282606

Wayne Circuit Court

LC No. 07-011146-FH

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 14 to 25 years' imprisonment for the assault with intent to murder conviction, seven to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm his convictions, remand for correction of the judgment of sentence for assault with intent to commit great bodily harm less than murder, and affirm his remaining sentences.

Defendant was present when Alicia Newsom, the mother of his child, became involved in a physical altercation with Carlita Haynes. Defendant and Jerrod Webb separated the women. Before leaving the area, Newsom brandished a weapon that she was licensed to carry in the course of her employment. Defendant and Newsom left the scene in a vehicle, but returned, and shots were fired from the vehicle. Webb was shot in the heel, and several eyewitnesses identified defendant as the shooter. After Webb was taken to the hospital, Haynes was standing outside. She was shot in the hand and hip. Haynes identified defendant as her shooter.

Defendant first contends that he was deprived of a fair trial by the prosecutor's improper remarks during rebuttal closing argument. We disagree. Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A prosecutor may argue the evidence and all reasonable inferences arising therefrom as it relates to his theory of the case, but "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). A

prosecutor may not question defense counsel's veracity, suggest that defense counsel is intentionally attempting to mislead the jury, personally attack defense counsel, or denigrate the defense. *Watson*, 245 Mich App at 592; *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). However, a prosecutor may point out deficiencies in defense counsel's arguments in light of the evidence. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Thus, a comment that might otherwise qualify as improper "may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Kennebrew*, 220 Mich App at 608.

Defendant argues that he was deprived of a fair trial by the prosecutor's misconduct in improperly denigrating defense counsel during his rebuttal closing argument. At trial, Newsom testified that Raymone Milton was also present at the scene of the crime and that he was carrying a gun. In her closing argument, defense counsel referenced this testimony. She suggested that Raymone was the shooter and that the witnesses who identified defendant as the perpetrator were biased because Raymone was their friend and they were motivated to protect him. In his rebuttal closing argument, the prosecutor argued that the defense implicating Raymone was a "strategy" and a "tactic," and that defense counsel was presenting the jury with "foolish illogical" arguments to confuse them.

Here, the prosecutor's remarks were in direct response to defendant's closing argument, which focused mainly on Raymone. The defense implicating Raymone was not particularly strong given that no witness observed Raymone take part in the altercation or fire the gun that he allegedly was carrying. The prosecutor's characterization of the defense as foolish, illogical, and a purposeful attempt to confuse, although possibly nearing the outer bounds of appropriateness, does not constitute impropriety in light of the context. See *Watson*, 245 Mich App at 592-593 (finding no prejudicial error where the prosecutor argued that defense counsel tried to "distract" the jury with "red herrings"); *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996) (holding that the prosecutor's remark that defense counsel was trying to "confuse the issue" did not constitute a personal attack of defense counsel or shift the jury's focus from the evidence to defense counsel's personality, and thus, was not error). Also, the jury was instructed to consider only the evidence, which did not include the attorneys' arguments. This instruction cured any prejudice stemming from the prosecutor's challenged remarks. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (stating that "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors.").

Defendant next argues that the trial court erred in ordering the reimbursement of attorney fees without first determining that he had the ability to pay. We disagree. Defendant's unpreserved claim of error is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

Although the trial court issued two orders, each requiring defendant to reimburse the court in the amount of \$500 for court-appointed attorney fees, the orders were not signed. MCR 2.602(A)(1) provides that "all judgments and orders must be in writing, signed by the court and dated with the date they are signed." Generally, until a judgment or order is reduced to writing and signed, the judgment or order does not become effective. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). Given that the challenged orders were unsigned, MCR 2.602(A)(1)

supports a finding that they are unenforceable. Thus, defendant has not been aggrieved, and he is not entitled to relief.¹

Finally, defendant argues and the prosecutor concedes that the sentence for assault with intent to commit great bodily harm violates the “2/3 rule” set forth in *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). Defendant received a sentence of 84 to 120 months (seven to ten years) for his assault with intent to commit great bodily harm conviction. The statutory maximum for this offense is ten years. MCL 750.84. In light of the concession of error, the appropriate remedy is to direct the trial court to reduce the minimum sentence to 2/3 of the maximum sentence. *People v Thomas*, 447 Mich 390, 393-394; 523 NW2d 215 (1994). Accordingly, we remand to the trial court for it to correct defendant’s judgment of sentence by reducing his minimum sentence for assault with intent to commit great bodily harm from 84 months to 80 months.

We affirm defendant’s convictions, remand to the trial court for it to correct defendant’s judgment of sentence by reducing his minimum sentence for assault with intent to commit great bodily harm from 84 months to 80 months, and affirm his remaining sentences. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

¹ Additionally, we note that the ability to pay determination is only required once the imposition of the fee is enforced. *People v Jackson*, 483 Mich 271, 275; 769 NW2d 630 (2009).