

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMIEN RAPHAEL JOHNSON,

Defendant-Appellant.

UNPUBLISHED

May 18, 2010

No. 290461

Genesee Circuit Court

LC No. 08-023378-FC

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Defendant was convicted of carjacking, MCL 750.529a, and armed robbery, MCL 750.529, following a jury trial. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the carjacking conviction, and 25 to 50 years' imprisonment for the armed robbery conviction. Defendant now appeals as of right. We affirm.

Sara Reazor testified at trial that at 4:00 a.m. on July 29, 2008, following her shift at Washington Inventory Service in Flint, she drove her 1998 Pontiac Montana van to her former boyfriend's home to check on his cats. She parked her vehicle in the driveway, leaving it running with the car door open. Discovering the house was locked, she returned to the vehicle, and noticed defendant coming towards her, hunched over, with his arm behind his back.

She ran to the passenger's side to get in and quickly lock the door, however, defendant got into the vehicle on the driver's side at the same time. He pointed a gun at Reazor's head and then struck her with it. Defendant then pushed her out of the van and drove off. Reazor's purse, a change container, and other personal belongings were in the van.

Shortly thereafter, dispatched officers observed a van matching the description of the stolen vehicle parked in the driveway near the location of the carjacking. As the cruiser's spotlight shone on the vehicle, the driver door opened and the occupant ran away. Officers pursued the occupant on foot into the woods. Within minutes, they found defendant kneeling down at the edge of the woods. A BB gun was found three feet away.

Reazor's statement to the police immediately after the incident varied somewhat from what she testified to at trial. Reazor told officers that she had been driving slowly past her ex-boyfriend's house with her window rolled down when a man ran up to the window and placed a

gun to her head. She stated that the man pulled her out of the car on the driver's side and hit her with the gun.

Reazor was unable to positively identify defendant in a line-up conducted in the jail several hours after the incident. However, she positively identified defendant as the carjacker at his Preliminary Examination on August 15, 2008.

On appeal, defendant claims that he was denied effective assistance of counsel due to his attorney's failure to object to Reazor's in-court identification of defendant, and her failure to call an expert witness regarding the reliability of eyewitness identification. We disagree.

Because this issue was not considered by the trial court and is not preserved, our review is limited to mistakes apparent on the record. See *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. The court must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed de novo. *Id.*

To prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The decision to call an expert witness is a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The failure to call a witness at trial constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In the instant case, defendant was not deprived of a substantial defense as a result of defense counsel's actions. Defense counsel utilized a strategy of attacking Reazor's truthfulness, her inability to accurately recall the events of the evening of the carjacking, and inability to identify defendant shortly after the incident in order to create reasonable doubt. Defense counsel's closing argument was replete with references to Reazor's differing accounts of the incident immediately after the carjacking and on the witness stand. Counsel also went into significant detail regarding her failure to identify defendant in the line-up. Counsel fully presented a defense based on the unreliability of Reazor's identification of defendant. While this strategy was ultimately not successful, it did not fall below an objective standard of reasonableness.

Furthermore, the issue of whether Reazor's memory would be more accurate shortly after the event or weeks later is one that a jury could decide for itself even without expert testimony.

See *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986) (suggesting expert testimony is unnecessary where layperson would be qualified to determine the issue without enlightenment from one having specialized understanding). Even if an expert had been called to state that Reazor's identification, made weeks after the event, was less reliable than one made immediately after the event, it is unlikely that such testimony would add to the jury's knowledge or affect the outcome of the trial. Accordingly, defense counsel's performance was not deficient and defendant is not entitled to reversal of his convictions on this basis.¹

Defendant next argues that he was denied a fair trial because the prosecutor attempted to evoke the jury's sympathy for Reazor and appealed to the jurors' civic duty to convict defendant. Again, we disagree.

Because defendant did not preserve this issue by objecting before the trial judge, it is not preserved. Our review is limited, therefore, to "plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). A defendant must show that an error occurred, the error was plain, and the plain error affected the defendant's rights, i.e., caused prejudice that must have affected the outcome of the proceedings. *Id.*

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Id.* at 63-64. The alleged improper statements must be considered on a case-by-case basis, examining the record and the remarks in context, and in light of defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Furthermore, curative instructions "are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant argues that the prosecutor improperly appealed to the jurors' sympathy for Reazor by telling the jury that he "spoke for" Reazor and that her testimony should be believed because to do so would be consistent with justice. Appeals to the jury to sympathize with the victim can constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). A prosecutor may, however, argue that a witness is credible or worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

¹ Defendant has requested a remand for an evidentiary hearing on this issue. Defendant failed to request a hearing before the trial court. This Court may grant a motion to remand for this purpose if the defendant files an affidavit or offer of proof regarding the facts to be established on remand. MCR 7.211(C)(1)(a)(ii). Defendant has neither filed a motion to remand with this Court nor provided an affidavit or other offer of proof. Furthermore, defendant's brief includes only general references to theories on the reliability of eyewitness identifications. Defendant has failed to "set forth any additional facts that would require development of a record to determine if defense counsel was ineffective." *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Therefore, remand for an evidentiary hearing is not warranted.

Here, the challenged remark that “Sara is worth believing and justice is worth believing” was made during closing arguments and in rebuttal to defense counsel’s repeated references to Reazor being a liar. Even an otherwise improper remark may not rise to error requiring reversal when the prosecutor is merely responding to defense counsel’s argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Furthermore, the remark was isolated. Isolated remarks and appeals that are not blatant will not rise to the level of prosecutorial misconduct. *Watson*, 245 Mich App at 591. In this context, the remark was not improper.

Defendant next argues that the prosecutor improperly appealed to the jurors’ civic duty by stating:

I ask you this in the name of Sara Reazor. I ask you this in the name of the police department and in the name of the Genesee County prosecutor’s office and in the name of the People of the State of Michigan, but most importantly, most importantly, here because justice demands a verdict of guilty.

A prosecutor may not tell the jury that it should convict as part of its “civic duty.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). In *People v Truong*, 218 Mich App 325, 340; 553 NW2d 692 (1996), a panel of this Court found that a prosecutor’s comment that “on behalf of the Wyoming Police Department and on behalf of the State of Michigan, I am asking you to convict,” was not a “civic duty” argument because it neither injected issues broader than the defendant’s guilt or innocence of the charges nor encouraged the jurors to suspend their powers of judgment. The prosecutor’s statements in this case are very similar to those in *Truong*, and cannot, therefore, be considered improper civic duty arguments.

The prosecutor’s exhortation for the jury to convict “because justice demands a verdict of guilty” was also not improper. In *People v Perry*, 172 Mich App 609, 617; 432 NW2d 377 (1988), the prosecutor stated in closing argument:

I’m going to ask you for one thing, though. I’m going to ask you for justice. I think justice is deserved in this case. I think the [using the victim’s name] of this world demand consideration, demand justice. I think the victims of this world like [using the victim’s name] demand fair consideration.

Although reversal was ostensibly based on other factors, the Court nonetheless cautioned the prosecutor to “refrain from making the improper remarks” on remand. *Id.* at 624. Although the prosecutor in this case similarly used “justice” as a reason for the jury to convict defendant, the gravamen of his closing argument was that the evidence of defendant’s guilt was overwhelming. Accordingly, unlike in *Perry*, the remarks did not go so far as to invite the jurors to suspend their powers of judgment and convict simply out of a sense of civic duty.

Finally, defendant points to the prosecutor’s statement at the end of his closing argument:

Now, this is the City of Flint. Okay. Most reasonable People would infer that there is crime in Flint. In fact that there’s violent crime in Flint. This kind of crime.

Of all the alleged errors cited by defendant, this remark comes closest to injecting issues beyond defendant's guilt or innocence. In *People v Williams*, 65 Mich App 753, 756; 238 NW2d 186 (1975), a panel of this Court reversed a conviction after the prosecutor had argued to the jury that it could affect the drug traffic in the city of Detroit by finding the defendant guilty. The Court stated:

We recognize, too, that jurors share the average citizen's desire to eliminate the narcotics traffic. In such an emotion-laden situation, sensibilities are easily inflamed. Because emotional reaction to social problems should play no role in the evaluation of an individual's guilt or innocence, prosecutors must exercise special care to avoid arousing jurors' emotions concerning such issues.

In the instant case, by arguing that the jurors had an 'opportunity to effect [sic] the drug traffic in this city', the prosecutor appealed to the jurors' fears and encouraged them to go outside the evidence and decide the case on the basis of their desire to alleviate the drug problem.

In this case, the prosecutor's reference to "violent crime in Flint. This kind of crime," arguably encouraged the jurors to go outside the evidence and decide the case on the basis of fear of the overall crime problem in Flint. Moreover, this comment was not made in response to any argument by defense counsel regarding crime in the city of Flint.

Nonetheless, reversal in such cases is only warranted when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The prosecutor in this case presented substantial evidence of defendant's guilt and focused almost exclusively on that evidence in making his closing remarks. The error, therefore, if any, cannot be said to have resulted in the conviction of an actually innocent person or to have compromised the integrity of the judicial process. Furthermore, the court's curative instruction that "lawyers' statements and arguments are not evidence," was sufficient to cure any prejudicial effect of the statement. Accordingly, no reversal is warranted on the basis of prosecutorial misconduct.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder