STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2010
v	No. 292734 Macomb Circuit Court
GREGORY RYAN TERRY, Defendant-Appellant.	LC No. 2008-001876-FC

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Gregory Terry appeals as of right his jury trial convictions[1] for five counts of assault with intent to commit murder (AWIM)[2] and five counts of possession of a firearm during the course of a felony (felony-firearm).[3] Terry contends that his convictions cannot be sustained based on several incidents of prosecutorial misconduct and the ineffective assistance of counsel. Terry also argues that his pre-arrest silence was improperly used for impeachment and as substantive evidence of guilt. We affirm.

Terry raises several alleged instances of prosecutorial misconduct including the solicitation of testimony from a police officer that a co-defendant was administered a polygraph in order to bolster that witness' credibility. Terry also argues that reference by the prosecutor to the presence of a minor child at the scene of the shootings in his closing argument and at sentencing was targeted to evoke the sympathy of the jury and to improperly sway the trial court in imposing sentence. The prosecutor's reference in his opening statement that various witnesses were afraid to testify was improper, according to Terry, because there was no evidence deduced at trial to support such an assertion. Terry further implies that the cumulative nature of these instances of prosecutorial misconduct deprived him of a fair trial.

[1] Terry was sentenced to 18 to 30 years' imprisonment for each of his AWIM convictions and two years' imprisonment for each of his felony-firearm convictions.

[2] MCL 750.83.

[3] MCL 750.227b.

During the cross examination of Detective Kevin Nelson, defense counsel implied through questioning this witness that the police investigation of the shooting incident was inept and that the identical charges were also brought against a co-defendant; the suggestion being that the co-defendant was the shooter and not Terry. When re-examined by the prosecutor, this witness was directly asked whether the co-defendant submitted to a polygraph. The officer acknowledged a polygraph examination was administered but did not indicate the result of the test. Defense counsel objected and the trial court immediately directed the jury to disregard any reference to the polygraph test indicating, "It's not relevant and has no bearing in this case whatsoever."

Terry asserts that this isolated reference to the administration of a polygraph test necessitated a mistrial and that the failure of counsel to seek such a remedy constituted ineffective assistance. Addressing this matter as an issue of prosecutorial misconduct we note that although reference to the administration of a polygraph test is not admissible in a criminal trial, "not every [such] reference to a polygraph examination requires reversal."[4] "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial."[5] While it was improper for the prosecutor to make this direct inquiry, Terry cannot demonstrate prejudice. This was an isolated reference to the administration of a polygraph test that did not indicate the result. Defense counsel objected to the question and the trial court provided a curative instruction to the jury before any further questioning of this witness resumed. While Terry contends that the prosecutor's question constituted an improper attempt to bolster the credibility of this witness, when viewed in context it appears to have been directed to address defense counsel's implication that the police investigation was not thorough and that Terry's co-defendant was being prosecuted for the exact same acts rather than as an aider and abettor. While this does not excuse the prosecutor from having improperly posed this question to the witness, given its context and limited nature, along with the trial court's curative instruction to the jury, the reference does not rise to the level of necessitating the grant of a mistrial. Based on our determination that this isolated reference to the administration of a polygraph test did not warrant a mistrial, Terry's related assertion of ineffective assistance of counsel for the failure to request such a remedy is not sustainable.[6]

Terry also contends misconduct arising from references made by the prosecutor during closing argument and at sentencing regarding the presence of a minor child at the scene of the shooting even though the child was not identified as a victim in regard to the charges pursued. Terry asserts that such a reference was improper because it was specifically designed to evoke jury sympathy and to sway the trial court in its imposition of a sentence. Although a prosecutor may not appeal to the jury to sympathize with a victim[7], a prosecutor is permitted wide latitude in his arguments regarding the evidence presented and all reasonable inferences arising there

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[4] *People v Kahley*, 277 Mich App 182, 183-184; 744 NW2d 194 (2007).

[5] *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (internal citations omitted).

[6] *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008) ("It is well established that defense counsel is not ineffective for failing to pursue a futile motion.").

[7] *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

from.[8] It is generally accepted that a prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences arising from the evidence in the blandest possible terms.[9]

In the portions of the transcripts relied on by Terry as demonstrating misconduct, the prosecutor was referencing the four-year-old child of one of the victims who was present at the home where the shooting occurred. The child's presence was confirmed during testimony elicited from one of the witnesses during the trial. When viewed in context, the mention of the child by the prosecutor during closing arguments did not comprise an attempt to improperly solicit jury sympathy, but merely referenced a fact established in the record to emphasize the serious nature of Terry's conduct. Although Terry also suggests that the prosecutor's references to this child during sentencing comprised misconduct he fails to explain how such a comment at this point in the proceedings impacted his right to a fair trial. "An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."[10] Even if we were to assume that Terry is seeking this Court to view this contention of error as somehow impacting the propriety of his sentencing, such a position is unavailing. The sentence imposed by the trial court was within the guidelines range and is presumptively valid.[11] There is also no indication in the sentencing transcript that the judge used this information, or any other facts, such as Terry's absconding after the jury rendered its verdict, to enhance his sentence. Because we do not find the prosecutor's reference to the presence of the minor child during closing arguments or at sentencing to constitute misconduct, Terry's assertion of error is rejected.

As further substantiation of his contention of misconduct by the prosecutor, Terry cites to opening statements where the prosecutor indicated that various witnesses were afraid to testify, which was not substantiated at trial. "A prosecutor may not make a statement of fact to the jury that is not supported by evidence."[12] Reversal is not warranted for a prosecutor's statement during opening arguments that certain evidence will be presented even if that evidence is not forthcoming at trial, unless the statements were made in bad faith by the prosecutor or resulted in prejudice to the defendant.[13]

While no evidence regarding the fear of the witnesses to testify was presented at trial, there is also no indication that the prosecutor was acting in bad faith when the comment was made. A review of the transcript reveals that the prosecutor was attempting to explain to the jury why he was unable to precisely describe the anticipated testimony of the witnesses. Even if the statement is construed to have been detrimental to Terry, there is nothing in the record to indicate

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[8] *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

[9] *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

[10] *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

[11] *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000).

[12] *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008).

[13] *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

that it was actually prejudicial or impacted the outcome of the proceedings. The jury had the opportunity to closely observe the witnesses and discern that they lacked any fear in testifying. The trial court also instructed the jury at the conclusion of the proceedings that the statements of the attorneys were not to be construed as evidence. Because "[j]urors are presumed to have followed their instructions, and instructions are presumed to cure most errors," Terry has failed to demonstrate that the prosecutor's statement comprised misconduct or was of sufficient significance to impact the outcome of the trial.[14]

Terry further contends that the cumulative effect of the various instances of the alleged misconduct by the prosecutor merits reversal of his convictions. The cumulative effect of several instances of prosecutorial misconduct warrants reversal only if the effect of the misconduct was so seriously prejudicial that is resulted in denying a defendant a fair trial.[15] Because we do not find an aggregate of errors as alleged by Terry, "a cumulative effect of errors is incapable of being found."[16]

Terry also contends that his counsel was ineffective in failing to object to the provision of expert testimony by a lay witness or address a procedural error regarding his bind over for trial. Whether a defendant has been deprived of the effective assistance of counsel comprises a mixed question of fact and law.[17] Because Terry did not establish a testimonial record regarding his ineffective assistance of counsel claim, our review is limited to mistakes apparent on the record.[18]

Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise.[19] To establish ineffective assistance of counsel, a defendant is required to demonstrate: (1) "that counsel's performance fell below objective standards of reasonableness" under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable.[20] Counsel's performance is to be measured against an objective standard of reasonableness and without the benefit of hindsight, as this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.[21]

Specifically, Terry asserts that his counsel was ineffective for failing to object to a lay witness offering expert testimony. The challenged testimony pertained to a brief exchange at

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[14] *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009).

[15] *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

[16] *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

[17] *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008).

[18] *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

[19] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[20] *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[21] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

trial where a police officer was asked to opine whether it was "scientifically possible" for the co-defendant, who was five feet three inches in height, to have reached over the top of a Chevy Blazer to discharge a weapon while driving the vehicle. The officer's response was equivocal at best, indicating, "I can only guess no." A lay witness may testify regarding their opinion and resultant inferences if: 1) the opinions and inferences are "rationally based on the perception of the witness" and 2) the opinions and inferences are either "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."[22] Contrary to Terry's characterization, the referenced testimony is not the equivalent of a lay witness proffering expert testimony. The opinion solicited is simply premised on the witness' own perception and knowledge of the size of the specific vehicle and the difficulty of driving while simultaneously discharging a firearm. Such testimony could assist the trier of fact in determining who discharged the firearm and from what position within the vehicle. Additionally, the officer's response cannot be interpreted as prejudicial, given the officer's equivocation. The brief nature of the response also renders it unlikely that the jury afforded the opinion any significant weight or that its elicitation impacted the outcome of the proceedings given the plethora of other testimony identifying Terry as the shooter.

Terry also asserts the ineffective assistance of counsel based on the failure of his attorney to seek to quash his bind over because the prosecution failed to orally make the bind over request. Terry does not challenge the actual decision for bind over. We note that Terry cites to absolutely no authority to support his implication that the prosecution is required to make such a motion to bind a defendant over for trial. Contrary to Terry's argument, Michigan law only requires a district court to bind a defendant over for trial when it finds probable cause that a crime was committed and probable cause that defendant committed the crime.[23] As Terry recognizes, while it may be customary practice for a prosecutor to orally request a bind over, the failure to do so does not equate to the violation of a required procedure. The failure of defense counsel to object to a variation in customary practice that had no impact on the outcome of the underlying proceeding cannot be deemed to rise to the level of ineffective assistance of counsel. And, because we find no errors evidencing ineffective assistance on the part of defense counsel to aggregate, Terry's contention of cumulative error must again fail.[24]

Finally, Terry asserts that his right against self-incrimination was violated because of questions posed by the prosecutor pertaining to his pre-arrest silence. While the trial court determined that evidence of pre-arrest silence could be used for purposes of impeachment, Terry contends that the prosecutor used it as substantive evidence of guilt. Specifically, Terry contends that the challenged exchange involving his failure to voluntarily go to police regarding his innocent involvement in the events could not be construed as being used for impeachment, as it did not involve the use of any contradictory statements.

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[22] MRE 701.

[23] MCL 766.13.

[24] *Mayhew*, 236 Mich App at 128.

Contrary to Terry's contention, a defendant may be impeached on cross-examination by inconsistent acts.[25] In addition, "the right against self-incrimination prohibits a prosecutor from commenting on the defendant's silence in the face of accusation, but does not curtail the prosecutor's conduct when the silence occurred before any police contact."[26] "[A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true."[27]

The prosecution's queries were consistent with a recognized use of pre-arrest silence for impeachment and structured to highlight the inconsistency between Terry's failure to go to police and his proclamations of innocence. There was only a very limited reference to his pre-arrest silence, which was not subsequently addressed through further questioning or even mentioned in closing argument. The restricted and limited nature of the inquiry, without any further reference, serves to effectively undermine and fails to support Terry's assertion of the improper use of his pre-arrest silence by the prosecutor.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter

[25] See *Jenkins v Anderson*, 447 US 231, 238; 100 S Ct 2124; 65 L Ed 2d 86 (1980).

[26] *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

[27] *Id.*