STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2010
v	No. 292496 Kent Circuit Court
JEFFREY CRAIG JEROME GLUPKER, Defendant-Appellant.	LC No. 08-008514-FH

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and assault with a dangerous weapon, MCL 750.82. He was sentenced to concurrent terms of three to ten years' imprisonment for his assault with intent to do great bodily harm less than murder conviction and to 1-½ years to four years' imprisonment for the felonious assault conviction, with credit for 312 days served. Defendant appeals as of right. We affirm.

I. BASIC FACTS

The record indicates that on July 17, 2008, defendant and the victim had been dating for over two years. Late that evening, the victim and her daughter went on a walk, and as they returned, the victim contemplated going to defendant's apartment, located across the street from the daughter's apartment. Based on his behavior earlier that day, the victim anticipated that defendant would be angry and possibly violent. As a prophylactic measure, she turned the two-way radio function to her cellular telephone to the "on" position as she entered defendant's apartment and asked her daughter to listen from across the street. Not long after the victim entered defendant's apartment, defendant became violently angry, and threw empty Mason jars at her, resulting in bruises. He also yelled at her, accused her of cheating, and called her and her daughter derogatory names. The victim's daughter heard these statements, and the sound of defendant throwing objects at the victim, via the two-way radio function. At some point, a mirror struck the victim's left eyeball, and an approximately two- to three-centimeter shard of mirror became stuck in, and protruded from, the center of her eyeball. The impact also resulted in a 14-centimeter gash along her forehead. Defendant walked out of the apartment. The victim subsequently underwent multiple operations for her injuries and ultimately her left eyeball was removed.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the jury verdict was against the great weight of the evidence. We disagree. "We review for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). An abuse of discretion exists if the trial court's decision falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Our review of the record indicates that although defendant testified that the victim attacked him and that her injuries were accidental, the victim and her daughter testified to the version of facts summarized above. Assessing the credibility of the witnesses was entirely the province of the jury, and we defer to its conclusion. See *Unger*, 278 Mich App at 232 ("Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial."). Moreover, the trier of fact, not this Court, determines what inferences may be drawn from the evidence and the weight to be given those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). As the jury verdict clearly comports with the testimony of the victim and her daughter, which the jury chose to believe, we conclude that the evidence does not "preponderate[] so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219.

III. RIGHT TO PRESENT A DEFENSE

Defendant argues that the trial court limited his right to present a defense. We disagree. "This Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

We first address defendant's sole preserved argument, which is that he should have been allowed to present evidence that the victim was previously convicted of arson and ordered to pay $140,000 in restitution. The trial court allowed defendant to present evidence that on September 9, 2007, he and the victim engaged in a physical altercation, and that during a subsequent investigation of that incident, defendant informed the investigators that the victim previously committed a crime. To assist the investigators in investigating that crime, defendant wore a wire/microphone and captured the victim making statements that led to her conviction. She was ordered to pay a significant amount of restitution as a result. Defendant argued that this evidence demonstrated the victim's motive to lie to the officers about the events on July 17, 2008, and implicate defendant in the instant crime. While defendant was not allowed to elicit that the conviction was arson and that the restitution was $140,000, he was not denied his right to present his motive defense. The specifics of the events would not have advanced defendant's argument in anyway.

We next address defendant's three unpreserved arguments regarding his defense for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). First, defendant argues that he should have been allowed to present evidence that after the victim's arson conviction, she consumed alcohol in violation of the terms of her

probation, and that she lied to defendant for the first six months of their relationship by not telling him that she was married. Defendant wanted to present this evidence to show the victim's character for dishonesty. However, despite the trial court's ruling excluding this evidence, defense counsel elicited testimony from defendant that the victim did not tell him of her marriage for the first five to eight months of their relationship. Defendant also called eight witnesses, not including defendant, who testified specifically that the victim had a reputation and character for being untruthful and dishonest. On this record, we conclude that defendant presented ample evidence to impeach the victim's credibility, and that the trial court did not deny defendant's right to present a defense by limiting the testimony in these two minor instances.

Second, defendant argues that he should have been allowed to present evidence that the victim was charged with assault after a physical altercation on September 9, 2007. He intended to use the evidence to counter the victim's testimony that defendant bruised her during the altercation.

> [A] witness [can] be questioned about an arrest not resulting in a conviction when
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> > the evidence is being offered to show the witness' interest in the matter, his bias or prejudice, or his motive to testify falsely because that witness has charges pending against him which arose out of the same incident for which defendant is on trial.
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> [*People v McGhee*, 268 Mich App 600, 640; 709 NW2d 595 (2005), quoting *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).]

Here, defendant's proffered reason for admitting the evidence does not comport with the requirements of *McGhee* and *Yarbrough*, and, as such, the evidence was inadmissible. Nevertheless, defendant presented several witnesses who testified that the victim attacked and beat defendant on September 9, 2007, and that she was violent toward him on other occasions as well. Thus, although he did not present evidence of the actual charge, he clearly achieved his objective of countering the victim's version of the incident. The trial court did not deny defendant his right to present a defense.

Third, defendant argues that the trial court should have issued a first-degree home invasion jury instruction, which, he contends "was what the complaining witness was doing on the night in question." At trial, defendant argued that because the victim attacked him in his home, he did not have a duty to retreat, and the proffered instruction would have allowed him to argue that there was a "heightened aspect" to his right to not retreat. The record indicates that the trial court issued several jury instructions regarding defendant's right to self-defense. One instruction in particular specifically stated: "[A] person is never required to retreat if attacked in his own home . . . nor if the person is subject to a sudden, fierce, and violent attack." In light of this instruction, and the several other instructions regarding self-defense, we find that the trial court's refusal to issue a home invasion jury instruction did not impede defendant's ability to argue that he did not have a duty to retreat. In fact, the instruction that was issued was more persuasive for defendant because it would have allowed him to argue that he did not have a duty to retreat even if the victim was not committing a felony. In this way, the issued instruction provided a more "heightened aspect" than the one defendant requested.

VI. PROSECUTORIAL MISCONDUCT

We next address defendant's preserved claims of prosecutorial misconduct. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and a prosecutor's comments must be viewed in context of the pertinent portions of the record, *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). The test is whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

First, defendant argues that the prosecutor asked the victim's daughter to "regurgitate" facts from a police report after she indicated that the report did not refresh her recollection. Contrary to defendant's argument, the transcript clearly indicates that the victim could not recall all the derogatory names she heard defendant call her and the victim as she listened on the two-way. The prosecutor handed her a police report to refresh her recollection, and the daughter again indicated that she could not recall what defendant said. However, the daughter then indicated that her memory was refreshed and testified to defendant's statements. Thus, the prosecutor properly asked the witness to testify from her memory.

Second, defendant argues that during closing argument the prosecutor improperly remarked on defendant's right to silence. "A prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact." *McGhee*, 268 Mich App at 634. "A defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[1] warnings have been given." *Id.* Here, the facts in the record are insufficient to enable us to determine whether the prosecutor referred to defendant's silence before a custodial interrogation took place and before his *Miranda* warnings were given. Thus, we cannot conclude that the challenged remark was improper. Nevertheless, immediately after the remark, the trial court issued a curative instruction that remedied any prejudice that might have occurred. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). No misconduct requiring reversal occurred.

Third, defendant argues that during closing argument the prosecutor improperly shifted the burden onto defendant to prove a reasonable doubt. "[A] prosecutor may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Here, in his rebuttal argument, the prosecutor recounted facts and arguments presented by defendant and then stated: "That's what the defense is giving you for reasonable doubt." Defense counsel objected, and the trial court stated, "I understand. I'm going to be giving some additional instructions." Immediately after the prosecutor ended his rebuttal argument, the trial court instructed the jury that the prosecutor's statement "was an inaccurate statement. It's not the law." It explained that the law did not require defendant to prove his innocence or to do anything, that he has no burden to create reasonable doubt, and that the burden is on the government to prove each element beyond a

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

reasonable doubt. Assuming that the trial court was correct in its conclusion that the prosecutor gave a misstatement of the law, the trial court's curative instruction remedied any prejudice that defendant may have suffered. *Seals*, 285 Mich App at 22.

Defendant also raises several unpreserved claims of prosecutorial misconduct. We review these claims for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

First, defendant argues that on cross-examination of defendant the prosecutor misstated the law and implied that he had a duty to retreat by asking him why he did not move to another room in his apartment when the victim entered. The prosecutor asked defendant, "Now, you're not required to, but you could have gone into your bedroom or bathroom, correct?" Based on the plain reading of this question, it appears that defendant has misconstrued the record, as the prosecutor's question actually emphasized that defendant did not have a duty to retreat. Moreover, as previously indicated, the trial court instructed the jury that a person does not have a duty to retreat in their own home, and jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Second, defendant argues that during cross-examination of a witness the prosecutor alluded to a recorded conversation between the witness and defendant that would have impeached the witness, but then failed to produce the recording. The record clearly indicates that the prosecutor attempted to play the recording, but because of a technical difficulty, the recording would not play for the jury. As a result, the prosecutor ceased his line of questioning. The prosecutor's inability to play the record was the result of technological misfortune, not misconduct. Plain error did not occur.

Third, defendant argues that the prosecutor presented unnecessary evidence that the victim suffered from depth perception problems as a result of losing her eye, which, defendant contends, improperly encouraged the jury to sympathize with the victim. Defendant is correct that "[a] prosecutor may not appeal to the jury to sympathize with the victim." *Unger*, 278 Mich App at 237. However, "[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *Id.* at 236. "Case law is clear that a prosecutor has the discretion to prove his case by whatever admissible evidence he chooses." *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002). Here, on cross-examination of the victim, defense counsel attempted to minimize the amount of swelling she sustained by suggesting that she bruised easily and was anemic. Defense counsel also pointed out that the victim had bruises on her arms at the time of trial. In response, the victim stated that she sustained the bruises because she often bumped into things as a result of her depth perception. On redirect-examination, the prosecutor elicited testimony from the victim that her depth perception problems were a result of the loss of her eye. The challenged testimony was relevant to clarify why the victim suffered bruises at the time of trial and to counter defense counsel's suggestion that she bruised easily.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that he was denied effective assistance of counsel. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that

the representation so prejudiced defendant that he was deprived of a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, a defendant must show that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

First, defendant argues that defense counsel failed to discuss the case or witnesses with him before trial. Other than defendant's affidavit, which was implicitly rejected by the trial court in ruling on defendant's new trial motion, nothing in the trial transcript or lower court file supports this conclusion. We find that defendant has failed to prove that his counsel's conduct fell below an objective standard of reasonableness. *Gonzalez*, 468 Mich at 644.

Second, defendant argues that trial counsel failed to interview witnesses before trial. To support his argument, defendant points to two statements made by defense counsel during the first day of trial testimony in which counsel indicated that he did not yet know which witnesses would testify to prior acts of abuse and violence committed by the victim against defendant. Although the statements appear to indicate that defense counsel was unprepared, the record otherwise demonstrates that he subsequently called several witnesses to testify to the victim's history of abusing defendant and eight character witnesses, not including defendant, who testified to the victim's character and reputation for being untruthful and untrustworthy. Moreover, during closing argument, defense counsel argued that the victim was violent to defendant in the past, that she was untruthful, and that defendant acted in self-defense. He also argued that because defendant assisted in the investigation that led to the victim's criminal conviction and restitution order, the victim was motivated to lie and incriminate him. Thus, it is apparent from the record that defense counsel adequately investigated the case and presented witnesses that supported his theory of the case. Moreover, the mere assertion that there might be some evidence out there, somewhere, does not adequately substantiate a claim of ineffective assistance of counsel. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). Accordingly, we conclude that defendant has not met his burden of proving that defense counsel's conduct fell below an objective standard of reasonableness. *Gonzalez*, 468 Mich at 644.

Third, defendant argues that defense counsel's "lack of familiarity with the witnesses became painfully evident when he elicited character evidence from several witnesses, regarding reputation in the community, only to have the prosecutor demonstrate on cross that the community consisted of only 2 or 3 people." The record indeed indicates that two of the character witnesses, who testified to the victim's character and reputation, testified on cross-examination that their opinion of the victim was based solely on conversations with two other persons. Nevertheless, the decision to call the witnesses to testify to the victim's character was trial strategy, and although the prosecutor might have detracted from the positive impact their testimony might have had, this Court will not second guess the strategy simply because it did not have the desired effect. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); see also *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008) ("A failed strategy does not constitute deficient performance.").

Fourth, defendant argues that defense counsel was ineffective because he expected counsel to present evidence of a 911 emergency telephone call in which the victim's daughter allegedly complained that her mother could not gain entrance into defendant's apartment.

However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey*, 237 Mich App at 76. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza*, 246 Mich App at 255. Accordingly, defendant has not met his burden of proving that defense counsel's conduct fell below an objective standard or reasonableness. *Gonzalez*, 468 Mich at 644.

Fifth, defendant argues that defense counsel was ineffective for failing to object to the unpreserved instances of alleged prosecutorial misconduct. However, as previously indicated, the prosecutor's conduct was not improper. A trial counsel's failure to lodge an objection will not be considered deficient conduct if the objection would have been futile. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

VI. CUMULATIVE ERROR

Finally, defendant alleges that the cumulative effect of the combined errors denied him a fair trial. We assumed that one error occurred when the prosecutor stated during closing argument that defendant had not proved a reasonable doubt, and we found no other error. As there was only one possible error, defendant was not denied a fair trial based on cumulative errors. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003) ("Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial."); *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007) (nonexisting errors cannot be cumulated).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens