STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2012
v	No. 301207 Cheboygan Circuit Court
LARRY CHARLES STACKHOUSE, Defendant-Appellant.	LC No. 10-004182-FH

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Larry Stackhouse, appeals as of right from his jury conviction of domestic assault, third offense.[1] Following the jury trial, the trial court sentenced Stackhouse, as a habitual offender fourth,[2] to serve a term of imprisonment of three to 15 years. We affirm.

I. FACTS

Melissa Brilly testified that in April 2010, she and her boyfriend, Stackhouse, with whom she was living at the time, had an argument. Brilly claimed that Stackhouse had been talking to another woman, and Brilly wanted to see his phone. Stackhouse resisted, but Brilly persisted, the result of the struggle being that the phone broke in half. Brilly testified that Stackhouse then pushed her against some steps, knocked her down, and struck her arm with a metal dog cage. Brilly continued that after she stood back up, Stackhouse started choking her. Brilly elaborated that she could not breathe and so dug into his arm with her nails, to which Stackhouse retaliated by biting her on the top of her hand, breaking the skin. Brilly testified that the fracas continued into the kitchen, where Stackhouse dumped chicken grease on her, she slipped on the floor, and Stackhouse kicked her all over her body, including her head. Brilly stated that she retreated to a bedroom, where she called a friend. Brilly explained that she initially hesitated to talk to the police because she had an outstanding warrant related to some bad checks and because she did not want to get Stackhouse into trouble.

[1] MCL 750.81(2); MCL 750.81(4).

[2] MCL 769.12.

Stackhouse now appeals his jury conviction of third offense domestic assault.

II. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Stackhouse argues that he was denied a fair trial because of certain alleged prosecutorial misconduct. A defendant bringing an unpreserved claim of error, as are Stackhouse's claims here, must show a plain error that affected his substantial rights.[3] Even where plain error has taken place, this Court should nonetheless reverse only where the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.[4]

B. CONDUCT DURING JURY SELECTION

Stackhouse complains of an incident during jury selection, that commenced with the prosecuting attorney asking one prospective juror, "What if I ran up to you and snatched your bag and ran out of the courtroom and you all see me and I'm on videotape and do I still have a right to a trial if I'm charged with a crime for that?" When the juror responded in the affirmative, the prosecuting attorney agreed and then added, "Is that automatically in and of itself evidence that I'm innocent?" The juror responded in the negative. Stackhouse argues that the prosecuting attorney thereby suggested that he was not to be presumed innocent.

In seeking and receiving a negative response, the prosecuting attorney asked if a defendant's right to a trial itself was "evidence that I'm innocent." The choice of wording indicates that the prosecuting attorney was speaking of actual innocence, not the legal presumption of innocence. The prosecuting attorney in fact preceded that colloquy by reminding the jurors that Stackhouse "has rights," including "the right to a trial" and "the right to be presumed innocent throughout the entire trial." The prosecuting attorney was thus merely making the point that, if being on trial was not evidence of guilt, neither was the presumption of innocence itself *evidence* of innocence.

Further, the trial court instructed the jury that it was to decide the case solely on the basis of the evidence and that Stackhouse's being on trial itself was not evidence. The trial court additionally instructed the jury that Stackhouse must be presumed innocent and thus had no duty to prove his innocence or otherwise rebut the prosecution, that the statements of counsel were not evidence, and that "[i]f a lawyer has said something different about the law, follow what I say." Accordingly, not only were the challenged remarks of prosecuting attorney benign, but the trial court's instructions should have avoided any misapprehension on the part of the jurors. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors."[5]

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[3] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[4] *Id.*

[5] *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008).

C. VOUCHING FOR COMPLAINANT

Stackhouse asserts that the prosecuting attorney improperly vouched for Brilly's credibility and points to the following remarks in closing argument:

> She was honest and she was truthful.
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> * * *
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> [Brilly] knew all along that she could be arrested on the outstanding warrant that she had and go to jail, which she did and she pled guilty . . . to and took responsibility for, so I think that . . . that case doesn't mean that she's being untruthful with you today about what happened . . . and I think she deserves some credit for holding herself accountable for her own poor choices in the past. . . .
>
> [S]he told you the truth about this experience and you can believe her.

"[T]he prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness."[6] However, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence.[7] The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment out of deference to the prosecutor or police.[8]

We conclude that, in this instance, the prosecuting attorney was properly arguing from the evidence, but offhandedly resorted to the language of personal impressions in saying "*I think* . . . that case doesn't mean that she's being untruthful," and "*I think* she deserves some credit for holding herself accountable."[9] Although those first-person references did characterize those moments of argument as being of a somewhat personal nature, those momentary lapses fell short of implying personal knowledge beyond the evidence or invoking the prestige of the prosecutor's office. And any prejudice that may nonetheless have occurred should have been cured by the trial court's instructions to decide the case solely on the basis of the evidence and that the remarks of counsel were not evidence.

D. ARGUING FACTS NOT IN EVIDENCE

Stackhouse argues that the prosecuting attorney improperly argued facts not in evidence when, after admitting during closing argument that Brilly had some difficulties remembering specific times or sequences of events, then stated, "let's remember that this woman was kicked in the head okay? She told you she was kicked in the head repeatedly, had a lot of pain, which was

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[6] *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

[7] *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987).

[8] *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

[9] Emphasis added.

documented by the doctor." In particular, Stackhouse protests that there was no evidence that Brilly suffered any memory impairment in the matter.

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case."[10] In this case, that Brilly had been kicked in the head was a fact in evidence, and that such an injury could have affected her memory was a reasonable inference from that evidence. Indeed, such argument comported with the trial court's instruction to the jurors to "use . . . common sense and general knowledge in weighing and judging the evidence."

In sum, we conclude that the prosecutor's conduct did not amount to misconduct and, therefore, Stackhouse was not denied a fair trial for the reasons asserted.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Stackhouse argues that he was denied a fair trial because his defense counsel provided ineffective assistance. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance."[11] The defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different.[12]

B. FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT

In arguing that he was convicted without benefit of effective assistance of counsel, Stackhouse first complains of counsel's failure to object to any of the alleged prosecutorial misconduct. However, because we find no merit to Stackhouse's claims of prosecutorial misconduct, defense counsel was not ineffective for failing to object.[13]

C. FAILURE TO RENEW OBJECTION DURING SENTENCING

Stackhouse argues that defense counsel was ineffective by failing to make objections to the reading into the record of a highly prejudicial and inflammatory statement purportedly from Brilly.

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[10] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

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

[12] *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

[13] *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

This issue initially arose in connection with discussion on the scoring of offense variable (OV) 4, which concerns psychological injury to the victim.[14] The prosecuting attorney expressed the intention to present an "oral impact statement" from Brilly, which would speak to her anxiety and need for counseling. Defense counsel objected on the grounds that the statement was addressed to a victim advocate and signed by other than Brilly herself. The trial court agreed with defense counsel that an evidentiary hearing was in order. But after a brief continuance, the parties turned to discussing OV 13, which concerns patterns of felonious activity.[15] Upon the resolution of that discussion, defense counsel withdrew objections concerning OV 4, and expressed no further concerns relating to the statement attributed to Brilly.

The victim advocate then read the statement, which included that Brilly was "abused both mentally and physically" throughout her two-year relationship with Stackhouse, through the course of which she also gave up many possessions and suffered isolation from friends and family. The statement continued that, because of fear, Brilly "had to check all of the locks in [her] house several times a night," was not sleeping well, and was seeking a mental-health counselor. The statement opined that Stackhouse "deserves the maximum allowable punishment because he shows no remorse for what he has done" and "would do it again if given the chance."

Given Brilly's trial testimony, a full evidentiary hearing on the statement attributed to her would more likely have confirmed its authenticity or veracity than thrown it into doubt. Defense counsel thus had no strategic reason to proceed with an evidentiary hearing, or otherwise to maintain objections to the scoring of points for OV 4. "Trial counsel is not required to advocate a meritless position."[16] Moreover, we observe that the statements read on behalf of Brilly were no more dramatic or emotional in nature than countless other statements of victims of assaultive crimes when they are invited to address a sentencing court.

For these reasons, Stackhouse's claim of ineffective assistance of counsel must fail.

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly

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[14] See MCL 777.34.

[15] See MCL 777.43.

[16] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).