STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2012
v	No. 304860 Jackson Circuit Court
RONALD ALLEN, Defendant-Appellant.	LC No. 10-006186-FH

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant of assaulting a jail employee, MCL 750.197c. The trial court sentenced defendant as a fourth-offense offender, MCL 769.12, to a prison term of 19 to 240 months. Defendant appeals as of right. We affirm defendant's conviction, but remand for resentencing.

During a strip search of defendant in the bathroom at the Jackson County Jail, corrections deputy Eric Kennedy observed a small, dime-sized bag containing a white substance fall out of defendant's boxer shorts. When Kennedy stepped on the bag, defendant shoved him backward into a wall. Kennedy saw defendant reach for the bag and move toward the toilet. The two men struggled as Kennedy tried to pull defendant away from the toilet to prevent him from flushing the bag. Kennedy eventually had to use a taser on defendant to subdue him. As a result of this incident, defendant was charged with assaulting a jail employee.

Defendant argues that he was denied a fair trial due to three instances of prosecutorial misconduct. Because defendant failed to preserve this issue, we review it for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64.

First, defendant argues that prosecutor improperly asked the jurors to convict as part of their civic duty when the prosecutor made the following statement:

> It's important for the officers who have to run the jail that you don't have contraband in the jail. I mean, that can cause problems among the inmates. You don't want to have inmates having any type of weapons because someone could be assaulted, . . . an officer could be assaulted, a fellow inmate could be assaulted.
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> This is an important charge because it does have consequences. What the corrections officers do is important, and the policy of not having them assaulted by an inmate, even if it's a shove with two hands is important. . . .

When read in context, the prosecutor's statements did not improperly ask the jury to disregard the evidence and convict defendant because it was their civic duty. See *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). The prosecutor discussed the elements of the crime and the requisite standard of proof, and then opined that although this was a "very simple case," it nonetheless "has importance." It is in this context that the above quoted statement was made. This is not an appeal to the jury to fulfill an obligation as citizens to support the corrections officers in what they do. Rather, the prosecutor was simply explaining the case is important. He states that jail corrections officers have an important job to maintain order, accomplished in part by keeping contraband out of the jail setting. He then states what may be a self-evident observation, i.e., that it is important to not have corrections officers assaulted, "even if it is a shove with two hands." In other words, he is offering an explanation why assaulting a corrections officer, no matter how slight the physical contact might be, is a criminal offense.

Second, defendant argues that the prosecutor denigrated defense counsel when he stated in rebuttal that "A lot of these arguments from the defense are kind of like red herrings. They're like rabbit trails. Send someone on a jury off on a trail, well, it's a reasonable doubt because what about this." "A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury," *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001), nor "personally attack defense counsel," *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010) (internal quotation marks and citation omitted), judgment rev'd on other grounds ___ Mich ___(Docket Nos. 141154, 141181, 141513, decided July 31, 2012). However, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defense counsel argued that most of the testimony did not make sense. As an example, counsel asserted that there should have been powder on the floor from when Kennedy stepped on the bag, and then wondered aloud why no one attempted to find trace evidence (presumably of the powder) on Kennedy's boots. Counsel also noted that no one heard the toilet flush. The prosecutor responded on rebuttal that the evidence did not support most of defense counsel's arguments. The prosecutor stated that discrepancies in the evidence do not necessarily create reasonable doubt because witness credibility is an issue for the jury to decide. The prosecutor then stated that defense counsel's arguments were red herrings intended to lead a jury to believe that reasonable doubt existed. He then cited defense counsel's argument regarding the lack of trace evidence as one of these fallacious arguments In context, the prosecutor's remarks are understood as coming in response to defense counsel's closing argument. See *Dobek*, 274 Mich

App at 67. Accordingly, they do not "rise to an error requiring reversal." *Kennebrew*, 220 Mich App at 608.

Lastly, defendant argues that the prosecutor improperly elicited opinion testimony from Sergeant Benson when he asked Benson if he believed that that contraband was flushed down the toilet. Lay testimony in the form of an inference or an opinion is allowed if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701. Benson's statement is not rationally based on his perception of the events that took place. Rather, it was based on information provided by Kennedy. Further, Benson's testimony was not helpful to a clear understanding of his testimony or a determination of fact in issue. The jury could have reached its own conclusion based on Kennedy's testimony.

However, there is nothing in the record to suggest that the prosecutor acted in bad faith. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) ("[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence."). Further, defendant has failed to show that the error was outcome determinative. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Kennedy, who testified before Benson, stated that he saw what appeared to be contraband fall from defendant's boxer shorts. When Kennedy stepped on the contraband, defendant pushed him, grabbed the bag, and reached for the toilet. Kennedy stated that this resulted in an altercation, and eventually he had to taser defendant. Afterward, Kennedy stated, he could not find the contraband. A reasonable jury could infer from Kennedy's testimony alone that the contraband had been flushed down the toilet.

In his primary brief on appeal, defendant argues that the cumulative impact of the above claimed errors denied him a fair trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not. However, in order to reverse on the basis of cumulative error, 'the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.'" *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003), quoting *People v Knapp*, 244 Mich App. 361, 388; 624 NW2d 227 (2001). Having identified only one error, which was harmless, defendant has failed to establish his cumulative effect argument.

Defendant also argues that defense counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct. However, there was no basis for defense counsel to object because, as stated above, there was no prosecutorial misconduct. Defense counsel cannot be deemed ineffective for failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In his standard 4 brief, defendant argues that the above instances of prosecutorial misconduct constitute jury tampering by the prosecutor. However, jury tampering involves instances where the jury considers extraneous facts or influences not introduced as evidence in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). The prosecutor's proper closing remarks and harmless elicitation of improper opinion testimony do not constitute extraneous influences required for jury tampering.

Next, defendant argues that the trial court erred in scoring 25 points for offense variable (OV) 13. The prosecutor concedes that OV 13 was improperly scored and that zero points should have been scored for OV 13. The trial court sentenced defendant to 19 to 240 months of imprisonment under the belief that the statutory sentencing guidelines set forth a minimum sentence of 19 to 76 months. However, the subtraction of 25 points from the OV score reduces the OV level from V to III, and results in a minimum range of 14 to 58 months. Thus, the trial court sentenced defendant to a minimum of 19 months under a misapprehension of the guidelines range. The prosecutor concedes that defendant is entitled to resentencing under these circumstances. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006) ("If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing *absent an error in scoring the sentencing guidelines* . . ." [emphasis in original]. Indeed, the trial court's comment at sentencing that defendant's conduct was not "anything especially aggravating" and that it was going to sentence defendant at the lower end of the guidelines suggests that the trial court would not have imposed the same sentence had the guidelines been correctly scored.

Lastly, defendant argues that the prosecutor failed to prove that defendant was lawfully confined at the time of the charged offense. Because the parties stipulated to this fact at trial, there was sufficient evidence to support the crime. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007).

Defendant's conviction is affirmed, but we remand for resentencing. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra