

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON BORYA BILLINGSLEA,

Defendant-Appellant.

UNPUBLISHED

July 19, 2012

No. 304937

Wayne Circuit Court

LC No. 10-012650-FH

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a habitual offender, third offense, MCL 769.11, to one to ten years' imprisonment for the felon in possession conviction, two years' imprisonment for the felony-firearm conviction, and five years' probation for CCW. Defendant appeals by right. We affirm.

Defendant first argues that the evidence was insufficient to prove his guilt of the charged offenses. To address this claim, this Court considers the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find each element proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). "Unsupported eyewitness testimony, if believed by the trier of fact, is sufficient to convict." *People v Richards*, 76 Mich App 695, 698; 256 NW2d 793 (1977); see also *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976). The credibility of identification testimony presents a question of fact for the jury. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Defendant was convicted of three offenses. However, he does not contest the individual elements of the offenses, but rather his identification as the perpetrator. In a criminal prosecution, the identity of the defendant is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). A review of the record reveals there was sufficient evidence to convict defendant of all three offenses. The jury was presented with two opposing theories and chose to believe the prosecution's theory, presented through the testimony of Detroit police officers Alam and Gardner. Officer Alam testified that he saw a man standing next to a white Cadillac at a gas station, holding his waist as though he had a gun or drugs

concealed. The gas station was lit, and the officer observed the man for about 15 seconds. Then the man jumped into his car and drove away at a high rate of speed. He was the only occupant of the car. Officer Alam saw the man's face and identified him as defendant. Officer Alam and his partner, Officer Gardner, pursued. They stopped when they came to the white Cadillac, which was parked with the door open, engine running, and keys in the ignition. Officer Alam pursued defendant on foot. He called to him to stop, but defendant kept running. Then defendant tried to jump a six-foot fence and dropped his gun. Officer Alam testified that he stopped to pick up the gun and lost sight of defendant for a short time. Officer Alam searched for the person on foot, maintaining radio contact with Officer Gardner, who stayed with the squad car waiting to see the man at a cross street. The two officers met up and continued to look for defendant in the car. About five minutes later, they came upon defendant and arrested him. Both officers identified the person as defendant and said he was the same individual they saw jumping fences. He was wearing a grayish-blue and white striped shirt. Although there were minor discrepancies in the descriptions of the man's clothing, these were matters for the jury to resolve. *Davis*, 241 Mich App at 700.

Defendant next argues that he was deprived of a fair trial by the assistant prosecutor's improper remarks and questioning. In closing, the prosecutor termed the defense theory and testimony "damn lies." Defendant had testified that, on the night in question, he and his friend John were downtown at a strip club and then decided to go to an after-hours party. Defendant went to urinate in the bushes before going inside to the party. John apparently went in without him, and the police found defendant standing on the sidewalk alone. On cross-examination, the prosecutor asked defendant where his friend John was and why John did not come to court. In closing, in addition to the "damn lies" remark, the prosecutor referred to John as a "mythical creature" who was not there.

Defendant cites no authority to support his argument that the prosecutor's remarks constituted reversible error. The prosecutor may argue the evidence and reasonable inferences from the evidence. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Prosecutors are afforded great latitude in arguments and conduct at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The arguments are examined on a case-by-case basis and evaluated in context of the entire record. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). The test is whether the allegedly improper remarks deprived the defendant of a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002).

Although the prosecutor's "damn lies" remark was improper, defendant was not deprived of a fair and impartial trial. *Id.* The court cautioned the jury that the attorneys' statements and questions were not evidence; the evidence came from witnesses and exhibits. Viewed in the light of all the evidence and the prosecutor's overall conduct, defendant is not entitled to appellate relief.

Finally, defendant argues that he was denied the right to effective assistance of counsel by his attorney's failure to object to the prosecutor's improper closing argument. Effective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Constitutional issues and questions of law are reviewed de novo, while findings of fact are reviewed for clear error. *Id.* To prevail on a claim of ineffective assistance, the defendant must show that counsel's performance was defective, and that the deficient

performance was prejudicial and deprived the defendant of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999). To show prejudice, the defendant must establish that, but for counsel's error, there is a reasonable likelihood that the result would have been different. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

In the case at bar, defendant argues that his counsel was "asleep at the switch" and should have immediately objected and requested a mistrial in response to the prosecutor's improper closing argument. However, it is sometimes better to refrain from objecting to avoid drawing attention to an improper comment. *People v Bahoda*, 448 Mich at 287, n 54; *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). In *People v Matuszak*, 263 Mich App 42, 54-57; 687 NW2d 342 (2004), where this Court found improper the prosecutor's argument belittling the defense and extolling the prosecution, the Court nonetheless did not find reversible error because the defendant had not overcome the strong presumption of trial strategy and the court instructed the jury that attorneys' remarks were not evidence. The same situation applies here. Defendant has failed to show any "serious error" depriving him of a fair trial or of the right to effective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello