

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 15, 2012

v

MIHAI MACOVEI,

No. 305577
Oakland Circuit Court
LC No. 2011-235269-FH

Defendant-Appellant.

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant Mihai Macovei of operating a motor vehicle while intoxicated, third offense in violation of MCL 257.625(1). Defendant's offense was discovered when police came to the scene of a five-car accident in which defendant was involved. The defense theory was that defendant's friend, Vasile Pieptanar, was actually driving the vehicle but fled on foot before the police arrived. Defendant challenges the propriety of various prosecutorial comments and the effectiveness of trial counsel for failing to object. Because the prosecutor's comments and questions were not so unduly prejudicial as to affect the outcome or integrity of the proceedings, we affirm.

I. BACKGROUND

During the evening rush hour on January 13, 2011, defendant's truck was the fourth vehicle in line in a five-car string rear-end collision. That afternoon, defendant had consumed cognac and wine with Pieptanar at the home of Mircea Tranca. Defendant and Tranca testified that Pieptanar drove defendant's truck when Pieptanar and defendant left Tranca's home.

Kimberly Bull drove the third vehicle in the line of colliding cars. She claimed that two men approached her immediately after the accident and one asked her not to contact the police. Bull indicated that the man had a foreign accent, but she could not identify him. Defendant is a Romanian immigrant with a thick accent. Defendant testified that Pieptanar is also a Romanian immigrant and has an even stronger accent.

Na Liang drove the second vehicle in the line. Liang telephoned 911 about five minutes after the crash. Liang testified that defendant then approached her car and asked her "in a pleading voice" not to call the police. Neither Bull nor Liang, nor the driver of the first vehicle

in the line, saw who was driving defendant's truck during the accident. The witnesses also saw no one leave the scene on foot.¹

Officers responding to the scene testified that defendant told them he was driving his truck during the accident and did not mention Pieptanar. Defendant had possession of the keys when a tow truck arrived on the scene. Defendant agreed to take a breath test, revealing a blood alcohol content of 0.15 or 0.16. Defendant was unable to recite the alphabet in English or count backward from 97 to 83, and claimed he could not stand on one leg due to back and hip pain. Defendant could, however, walk a straight line.

II. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor committed misconduct by introducing evidence that defendant had been driving without insurance since 2005, denigrating the defense, and bolstering his own witness's credibility. "Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial." *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Defendant failed to preserve the bulk of his challenges, however, "by making a timely, contemporaneous objection and request for a curative instruction." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Our review of those comments is limited to plain error, supporting reversal only when the error "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"[T]he 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). A prosecutor compromises a defendant's right to a fair trial when he "interjects issues broader than the defendant's guilt or innocence." *Id.* at 63-64. We must read a prosecutor's statements as a whole, and evaluate the statements in light of the evidence presented at trial and the defendant's argument. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

A. EVIDENCE OF DRIVING WITHOUT INSURANCE

Defendant argues that the prosecutor improperly introduced evidence of defendant's other bad acts, specifically driving without insurance. At trial, the prosecutor engaged in the following colloquy with defendant on cross-examination and without objection from defense counsel:

Q. Did you contact Farmer's Insurance and tell them what happened.

A. Yeah, I tried.

¹ The prosecution could not locate the driver of the fifth vehicle who actually rear ended defendant's truck.

Q. Did you tell them the truth?

A. Yeah, I say the truth. My insurance, he told me when I called, and which one I know is the plan, and nobody responded to me; or some lady, they make – or when I make the insurance. The next day, I called a guy. He say you no continue to pay. Your insurance being cancelled.

Q. Did you tell them that you were driving or did you tell them that allegedly [Pieptanar] was driving?

A. To who?

Q. The insurance company.

A. I no say nothing. I say got an accident to car. I not say.

* * *

Q. You attempted to file a claim with your insurance company?

A. No. Yeah, I – I thought he say my insurance is cancelled; that's it.

Q. *Your insurance had been cancelled since 2005, correct?*

A. No.

Q. That's not correct?

A. I paid the – I paid first – he told – I ask him. I pay first, when he – I talk to him. I pay first to what's his name, and the deposit or whatever, like a hundred something dollar, and not – he no send me the – the –

Q. They didn't honor your claim, correct?

A. I'm not to claim; I don't do nothing after.

Q. So you never talked to Farmer's Insurance after that, after they told you that they're not going to honor it?

A. No. [Emphasis added.]

The prosecution interjected a completely irrelevant issue into defendant's trial. The prosecutor attempted to elicit testimony that defendant had told his no-fault insurer that he was driving his truck at the time of the accident, to impeach his trial testimony that Pieptanar was driving. The prosecutor did not get the answer he wanted; instead, defendant indicated that he provided no accident details to the insurer because the agent told him that the policy had been cancelled. There was no reason to suggest that defendant had not had no-fault insurance since 2005. That statement, regardless of its truth, had no relevance to what defendant told the insurer in 2011. Moreover, the failure to maintain no-fault insurance for a vehicle driven on the road is a

misdemeanor. MCL 500.3102. Accordingly, the prosecutor implicated defendant's guilt beyond the scope of this trial.

However, the prosecutor's question does not merit reversal. The trial court instructed the jury that the lawyer's statements, arguments, and questions to the witnesses were not evidence. The jury is presumed to follow that instruction. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). It is unlikely that the result of the trial would have been any different had the prosecutor refrained from asking this question. The irrelevant information comprised only one question in the trial.

B. COMMENTS ABOUT THE CREDIBILITY OF THE WITNESSES AND DEFENSE

Defendant asserts that the prosecutor improperly commented on the credibility of defendant's witness, bolstered his own witness's testimony, and degraded the defense's argument. Defendant faults the prosecutor for questioning defense witness Tranca about his failure to tell the police that Pieptanar was driving the truck rather than defendant. Following the accident, defendant telephoned Tranca, who came to the scene to assist his friend. Tranca spoke to two of the drivers involved in the accident as well as a police officer on the scene. The prosecutor questioned Tranca as follows:

Q. You never told the police at the scene that this Defendant was the passenger, did you?

A. I did – I did not have the chance.

Q. Well, you just told the jury that you approached the officer on two occasions.

A. Yes, this is not –

Q. Did you say to the officer, excuse me, Officer, I know this may not be my business, but I need to tell you some important information about what I think might have happened; did you ever do that?

A. I didn't do what you said but I tried to talk with him and he said, go, go, go to the car.

* * *

Q. And then you talked to him a second time is what you said, correct?

* * *

A. The last time when he came to me, he was walking to my car from his car, and he told me go home. And I said what is accusation of Mihai?

Q. Did you tell him at that time this crucial information that you had that, hey Officer, you're making a mistake. This person left my house. They had an agreement. I don't think he was driving. Did you tell them any of that?

A. No, sir, I didn't but I ask him what is accusation.

* * *

Q. My point is, you had important information, correct?

A. Yes, I do.

* * *

Q. You never told the police on the 13th of January what you told this jury today, correct?

* * *

Q. You didn't tell them, correct?

A. No, I didn't.

* * *

Q. Did you tell them the next day? Did you go down to the police station and indicate to them . . . I have important information that you need to know about the crash that occurred on Long Lake Road. Did you do that the next day?

A. I didn't do that. It wasn't—

Q. Did you write the police?

* * *

Q. – let them know the crucial information that you had?

A. No, I didn't.

Q. You never did that at all, correct?

A. Correct

* * *

Q. But you never told anybody [that Pieptanar was driving] until today, correct?

A. Nobody asked me.

The prosecutor's line of questioning was not improper. "[N]o special foundation is necessary before the trier of fact may be apprised that an alibi witness failed to come forward earlier with exculpatory information." *People v Gray*, 466 Mich 44, 47; 642 NW2d 660 (2002). The Michigan Supreme Court decided in *Gray*, contrary to defendant's argument, that the prosecution did not have to establish that it was natural for a witness to come forward earlier before it could question the witness on the subject. *Id.* Rather, if there is a reasonable explanation for the witness to refrain from speaking to the police, that information must be elicited on redirect. *Id.* Tranca did provide his explanation to the jury—he was from a communist country where the police force was "dictatorial" and he was therefore nervous.

Defendant argues that the prosecutor improperly bolstered the credibility of prosecution witness Liang by stating in rebuttal closing argument, "Do you think that nice lady who raised her right hand and swore to tell the whole truth and nothing but the truth, just because her vehicle was damaged is going to come in here and lie to you?" "A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). However, a prosecutor may argue from the facts in evidence whether a witness is worthy of belief. *Dobek*, 274 Mich App at 67. The prosecutor's comments did not imply that he had special knowledge of Liang's truthfulness, but rather simply pointed out that Liang did not have a motive to falsely accuse defendant of asking her to refrain from calling the police.

Defendant also contends that the prosecutor asserted his personal opinion regarding defendant's guilt, denigrated defendant and his defense, and inflamed the jury's prejudices. During rebuttal closing argument, the prosecutor stated:

You heard the witnesses. You can judge their credibility, and even in [defense counsel's] own words, prove the case beyond a reasonable doubt. That's what happened. That's what the evidence has shown, using your common sense and your everyday experience, judging the credibility of those witnesses. You can't [sic] believe Liang because if you believe Liang, then he's guilty, ladies and gentlemen, and that's exactly what he is.

I'm not here saying he's public enemy number one. I'm not here saying he's a bad guy and you should punish him, but he committed this crime. He got drunk, he got behind the wheel of the car, he crashed into those other cars, and now he wants to tell you, it wasn't me. I was covering for my buddy. That's just not true, and that's an affront to justice, and that's not justice, ladies and gentlemen, if you come back with a verdict of not guilty because the evidence in this case has shown beyond a reasonable doubt.

The only person in this courtroom that admitted lying is this Defendant. But now, he wants you to believe.

The prosecutor did not improperly denigrate the defense. The prosecutor simply argued based on the evidence presented that the defense theory was incredible. "A prosecutor may . . . argue from the facts . . . that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Moreover, the prosecutor's assertion

that Liang's testimony was more worthy of belief than that of defendant was responsive to defense counsel's assertion to the contrary in closing argument.

Defendant characterizes as a "foul blow" the prosecutor's comment that the defense theory was "an affront to justice." However, "[t]he prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66. The prosecutor was merely commenting on the strength of the record evidence of defendant's guilt and the unlikelihood of defendant's claim that Pieptanar was driving during the accident.

C. PROSECUTION QUESTION TO DEFENDANT REGARDING LIANG'S CREDIBILITY

Defendant contends that the prosecutor improperly questioned him about Liang's credibility. On cross-examination, the prosecutor asked defendant, "You can't tell this jury any reason why [Liang] would make something up about you, can you?" and "Can you tell this jury any reason why Ms. Liang would have something against you sir?" The trial court overruled defense counsel's objection that the prosecutor improperly asked defendant to "comment on the credibility of another witness."

The prosecutor improperly asked defendant to comment on Liang's credibility and the trial court should have excluded that evidence. "[I]t was improper for the prosecutor to ask defendant to comment on the credibility of prosecution witnesses. Defendant's opinion of their credibility is not probative of the matter." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). See also *Dobek*, 274 Mich App at 71 ("It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury.").

The prosecutor's improper questioning of defendant does not warrant reversal, however. "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *People v Blackmon*, 280 Mich App 253, 262; 761 NW2d 172 (2008). The prosecutor's improper comments were brief and isolated. Defendant merely answered that he did not understand why Liang falsely testified, or so he claimed, that he asked her not to call the police. Given Liang's identification of defendant as the individual who spoke to her after the accident and defendant's inability to present Pieptanar, the alleged driver during the accident, it is unlikely that the prosecutor's improper question tipped the scales against defendant.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that trial counsel was ineffective in failing to object to the alleged instances of prosecutorial misconduct. Defendant failed to preserve his challenge by requesting a new trial or an evidentiary hearing to consider the matter. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). As such, "our review is limited to errors apparent on the record." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

Ineffective assistance of counsel claims are mixed questions of law and fact. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). We review a trial court’s findings of fact, if any, for clear error, and the ultimate constitutional issue de novo. *Id.*

To prove a claim of ineffective assistance of counsel, the defendant must establish that counsel’s performance fell below objective standards of reasonableness, and but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different. [*Id.* at 643.]

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise.” *Id.*

Defense counsel was not constitutionally ineffective. As noted above, the majority of defendant’s prosecutorial misconduct challenges lack merit and counsel was not ineffective for failing to raise such futile objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Although the prosecutor improperly suggested that defendant had not maintained no-fault insurance since 2005, it would be a reasonable strategy for defense counsel to avoid drawing attention to the subject through an objection. “Certainly there are times when it is better not to object and draw attention to an improper comment.” *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Moreover, defense counsel did object when the prosecutor improperly asked defendant to comment on the credibility of prosecution witness Liang.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra