

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK A. WILSON,

Defendant-Appellant.

UNPUBLISHED

June 20, 1997

No. 188030

Oakland Circuit Court

LC No. 95-137699-FC

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to four to fifteen years in prison. Defendant now appeals as of right and we affirm.

At trial, it was undisputed that defendant stabbed Demont Jones in the chest. The key witnesses were Demont and his sister Gwendolyn. Demont testified that the attack was entirely unprovoked. Gwendolyn testified that defendant and Demont exchanged words and that Demont “jumped at” defendant prior to the stabbing and then stopped.

I

On appeal, defendant contends that error requiring reversal occurred when the prosecutor elicited evidence indicating that Demont had made a prior consistent statement to the police. Generally, prior consistent statements of a witness are not admissible as substantive evidence. *People v Stricklin*, 162 Mich App 623, 627; 413 NW2d 457 (1987). However, defendant did not object to the allegedly improper testimony. Therefore, this issue is reviewed only to the extent that a substantial right of defendant’s was affected. MRE 103(a)(1); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

A

Defendant contends that the prior consistent statement improperly bolstered Demont's testimony, thereby diminishing Gwendolyn's credibility. Although Demont offered a different account of the incident from Gwendolyn's, both witnesses testified that defendant stabbed Demont in the chest with a steak knife. In fact, defense counsel admitted that his client committed the assault. Accordingly, there is no reasonable possibility that defendant would have been acquitted regardless of whether the jury believed Demont or Gwendolyn.

Nor is there any reasonable possibility that defendant would have been convicted of a lesser offense had testimony regarding Demont's prior consistent statement been excluded. Defendant was originally charged with assault with intent to commit murder. As noted, he was convicted of assault with intent to commit great bodily harm less than murder. In addition to those offenses, the jury was instructed with regard to the lesser offenses of felonious assault and aggravated assault. Both of the lesser offenses require that the defendant committed an assault without the intent to commit murder or great bodily harm less than murder. See MCL 750.81a; MSA 28.276(1); MCL 750.82; MSA 28.277.

In the instant case, there was overwhelming evidence suggesting that, at a minimum, defendant committed an assault with the intent to commit great bodily harm less than murder. It was undisputed that defendant stabbed Demont in the chest. It was also undisputed that, at least one time during the incident, defendant asked Demont whether he wanted to die. The wound was located six or seven centimeters from Demont's heart. Demont suffered a collapsed lung as a result of the assault. Under these circumstances, we find that the error in admitting evidence of Demont's prior consistent statement was harmless at most. Accordingly, the error did not affect defendant's substantial rights.

B

Defendant further argues that his trial counsel was ineffective in failing to object to the admission of evidence concerning Demont's prior consistent statement. To establish ineffective assistance, defendant must show that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different and the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

As demonstrated above, defendant did not suffer prejudice as a result of the erroneous admission of evidence regarding the prior consistent statement. Moreover, the jury appeared to accept defense counsel's theory of the case despite the improper evidence. Defense counsel argued that the jury should believe Gwendolyn's account of the incident and convict defendant of the lesser offense of assault with the intent to commit great bodily harm. That is precisely what occurred.

II

Defendant alleges that he is entitled to a reversal of his conviction because the prosecutor committed various acts of misconduct. We disagree.

A

Defendant first argues that the prosecutor committed misconduct during his direct examination of Sergeant Terry Howard. As noted above, the prosecutor asked Howard to comment on Demont's prior consistent statements. In addition, the prosecutor elicited testimony from Howard indicating that Gwendolyn made several prior inconsistent statements following the stabbing. According to defendant, the prosecutor used Sergeant Howard as a "human lie detector."

Defendant did not object to the alleged misconduct at trial. Appellate review of improper remarks is generally precluded absent a timely objection by counsel unless a curative instruction could not have eliminated the prejudicial effect, or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No miscarriage of justice would result from our refusal to consider this issue.

The prosecutor did not question Sergeant Howard regarding whether he believed the testimony of the witnesses, nor did he express an opinion concerning their credibility. Cf. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985) (witness may not express opinion regarding the credibility of other witnesses). Rather, Howard was asked whether the trial testimony offered by Demont and Gwendolyn was consistent with the prior statements. Although Howard referred to Demont's trial testimony as "correct," it is clear from the context of the remark that he merely intended to convey the notion that Demont's testimony was consistent with his prior statement. Accordingly, reversal is not warranted on this basis.

Nor is there any merit to defendant's ineffective assistance of counsel claim. Counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Moreover, defendant has failed to establish that the result of the proceeding would have been different had counsel objected to Howard's testimony. *Stanaway*, *supra* at 687. As noted above, overwhelming evidence existed to support the jury's verdict.

B

Next, defendant contends that the prosecutor committed reversible error by impugning defendant's employment status. Once again, defendant failed to object to the alleged misconduct and no miscarriage of justice would result from our refusal to consider this issue.

Although there is no per se rule prohibiting the admission of evidence regarding a defendant's unemployment or poverty, such evidence must be scrutinized because of its potential prejudicial impact. *People v Henderson*, 408 Mich 56, 62-63; 289 NW2d 376 (1980). This is because evidence regarding a defendant's financial condition tends to discriminate against the poor. *Id.* at 64-65. In the instant case, however, the prosecutor was not trying to stigmatize defendant based on his financial status. Rather, it appears the prosecutor was merely attempting to show defendant's state of mind on the day of the stabbing. By proving that defendant had lost his job and his girlfriend immediately before the incident occurred, the prosecutor apparently hoped to suggest that defendant was likely to be irritable and, thus, prone to violence.

Moreover, defendant did not suffer prejudice as a result of the prosecutor's conduct. The initial comment was a brief reference to defendant's unemployment during opening statement. Although the prosecutor later questioned Gwendolyn about defendant's employment status, the witness denied that defendant had recently lost his job. No evidence was introduced to impeach Gwendolyn with regard to that fact, nor did the prosecutor refer to defendant's employment status in his closing argument. Under these circumstances, we find that defendant was not denied a fair trial as a result of the prosecutor's remarks. Because defendant has failed to establish that the result of the proceeding would have been different had counsel objected to the prosecutor's conduct, defendant's ineffective assistance of counsel argument must also fail. *Stanaway, supra* at 687.

C

Defendant next argues that the prosecutor denigrated the defense when he called defendant a "squid" during his rebuttal argument. No miscarriage of justice would result from our failure to review this unpreserved issue. We agree that the term "squid" may carry a pejorative connotation and caution the prosecutor not to engage in such rhetoric in the future. Nevertheless, reversal is not warranted on this basis.

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). In the instant case, the prosecutor did not use the term "squid" in a pejorative sense. Rather, he analogized defendant's theory of the case to the defense mechanisms of various animals, including the squid. By arguing that defense counsel was attempting to shift the focus away from the overwhelming evidence of guilt, the prosecutor was merely responding to defense counsel's argument and trying to persuade the jurors to ignore the minor inconsistencies in the testimony. The prosecutor did not insinuate that defense counsel was intentionally trying to mislead the jury, nor did he imply that defense counsel was lying.

Defendant's ineffective assistance of counsel argument is also without merit. The decision to object was a matter of trial strategy which this Court should not second guess on appeal. *People v Ferguson*, 208 Mich App 508, 513; 528 NW2d 825 (1995). Defense counsel may have decided that an objection would have only served to draw attention to the prosecutor's comment. *People v Bahoda*, 448 Mich 261, 287; 531 NW2d 659 (1995). Moreover, in light of the overwhelming evidence of guilt, defendant has failed to establish that the result of the proceeding would have been different had counsel objected to the prosecutor's remark. *Stanaway*, at 687.

D

Next, defendant argues that the prosecutor attempted to introduce facts not in evidence. Defense counsel objected to both instances of alleged misconduct and the objections were sustained. The jury was properly instructed to disregard testimony that was excluded during the course of trial. Accordingly, we find that defendant's rights were adequately safeguarded.

III

Finally, defendant argues that he was denied a fair trial because the trial court failed to instruct the jury on self-defense. Defense counsel did not object to the jury instructions or request a self-defense instruction. Consequently, our review is limited to the issue of whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Manifest injustice occurs where the omitted instruction pertains to a basic and controlling issue in the case. *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996).

In light of defendant's theory of the case, an instruction regarding self-defense would not have been relevant to any basic or controlling issue. Lawful self-defense will excuse a defendant's conduct. See CJI2d 7.15(1). Yet, defense counsel did not ask the jury to acquit his client. Rather, he argued that the facts did not warrant a conviction of assault with intent to commit murder. Defense counsel asked the jury to convict defendant "on the charge that fits the facts and that's assault with intent to commit serious injury." Accordingly, manifest injustice did not result from the trial court's failure to instruct the jury regarding self defense.

Nor was defendant denied the effective assistance of counsel on this basis. Because defendant did not move for a new trial or an evidentiary hearing regarding his ineffective assistance of counsel claim, this Court's review is limited to errors apparent on the record. *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). Based on the evidence, defense counsel may likely have decided that he would have little chance of succeeding on a self-defense claim. Defendant has failed to overcome the strong presumption that counsel's assistance constituted sound trial strategy. *Stanaway* at 687.

Affirmed.

/s/ Janet T. Neff

/s/ Myron H. Wahls