

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PARNELL PEOPLES,

Defendant-Appellant.

UNPUBLISHED

September 12, 2000

No. 210116

Oakland Circuit Court

LC No. 97-153691-FH

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of unarmed robbery, MCL 750.530; MSA 28.798, and false personation of a public officer, MCL 750.215; MSA 28.412. Defendant pleaded guilty to being an habitual offender, third offense, MCL 769.13; MSA 28.1085. Defendant was sentenced to five to thirty years in prison for the unarmed robbery conviction and one year in prison for the false personation of a public officer conviction. We affirm.

First, defendant contends that the prosecution failed to present sufficient evidence of unarmed robbery because it failed to show that defendant used force and violence to accomplish the taking of the complainant's property. We disagree. "The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). Whether property was taken as a result of fear is determined from the victim's perspective. *People v Hearn*, 159 Mich App 275, 281; 406 NW2d 211 (1987). The inquiry is whether the victim reasonably believed that she would be injured if she failed to comply with the demand. *Id.*

Here, the prosecutor presented sufficient evidence to establish that defendant took property from the complainant by force or violence or putting her in fear. *Johnson, supra*. Under the circumstances, the complainant had a reasonable belief that she would be injured if she failed to comply with defendant's demands. The complainant was seventy-five years of age at the time of the incident and was traveling alone. She testified that she did not know if defendant had a weapon, and that she was scared during the incident because she did not know what was going to happen. The complainant would not have stopped or exited her vehicle if defendant had not acted as he did. Defendant told the

complainant to get out of her vehicle and he pulled on her shirt as he walked her toward his vehicle. Once the complainant left her vehicle, defendant was able to enter her vehicle and take her wallet. Viewing the evidence in a light most favorable to the prosecution, a reasonable juror could conclude that defendant took the complainant's wallet by force or by putting her in fear. Therefore, there was sufficient evidence to support the unarmed robbery conviction.

Defendant also maintains that the prosecution failed to present sufficient evidence to support his conviction of false personation of a public officer because it failed to show that defendant acted as an officer or required the complainant to aid and assist in a matter pertaining to the duty of an officer. We disagree. MCL 750.215; MSA 28.412 provides in relevant part:

Any person who falsely assumes or pretends to be a . . . police officer . . . , and shall take upon himself or herself to act as such, or to require any person to aid and assist him or her in any matter pertaining to the duty of a . . . police officer . . . shall be guilty of a misdemeanor

Contrary to defendant's assertion, the evidence shows that defendant did more than merely state that he was a police officer. The complainant testified that, as defendant was traveling behind her, he pointed at her car, waved his hand, blew the horn of his vehicle, and acted as though he was a police officer who was telling her to pull over. When the complainant denied hitting defendant's vehicle, defendant responded by saying, "Well get out of your car, and I will show you." Defendant pointed to an area of blue paint and said that the complainant hit his vehicle. Defendant returned to the complainant's car, sat in the driver's seat, and said that he wanted a pencil to write down her information. Defendant rummaged through the car and said that he was a police officer. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find that the elements of false personation of a police officer were proven beyond a reasonable doubt. The evidence established that defendant pretended to be, and acted as though he was, a police officer. We therefore conclude that the prosecutor presented sufficient evidence to convict defendant of false personation of an officer.

Defendant next contends that the prosecutor engaged in conduct that deprived defendant of his right to a fair trial. In reviewing claims of prosecutorial misconduct, this Court must examine the record and evaluate the challenged remarks in context. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). "The test is whether defendant was denied a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, error requiring reversal will not be found if the prejudicial effect of prosecutorial comments could have been cured by a cautionary instruction. *People v Schutte*, 240 Mich App 713, 720-721; __ NW2d __ (2000). Moreover, because defendant did not object at trial to the challenged conduct, defendant can avoid forfeiture of this unpreserved issue only by demonstrating a plain error that affected his substantial rights, i.e., that the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999); *Schutte, supra* at 720.

Defendant first argues that he was denied a fair trial because the prosecutor misrepresented the evidence in her opening statement. We disagree. Where the prosecutor states that evidence will be

introduced and the evidence is not presented, reversal is not warranted unless the prosecutor acted in bad faith or the defendant is prejudiced. *People v Wolverton*, 227 Mich App 72, 75-77; 574 NW2d 703 (1997). While we agree that the evidence presented did not correspond with the prosecutor's opening statement, the prosecutor's failure to present evidence in support of the statement did not result in prejudice to defendant. While there was no evidence that defendant exerted the type of force that the prosecutor indicated in her opening statement, the evidence established that he did use force to accomplish the taking of the complainant's wallet, and that the force was sufficient to establish the force element of unarmed robbery. Furthermore, the jury was instructed that it must make its decision on the basis of the evidence presented, and that the arguments of counsel are not evidence. Defendant has not shown that the prosecutor's conduct constituted plain error that affected his substantial rights. *Carines, supra*; *Schutte supra*.

Defendant also contends that the prosecutor misrepresented the evidence during her closing argument. We disagree. A prosecutor may not make a statement to the jury that is unsupported by the evidence, but a prosecutor is free to argue the evidence and all reasonable inferences from the evidence, as they relate to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Schutte, supra* at 721. Prosecutorial comments must be evaluated as a whole in light of defense arguments and their relationship to the evidence admitted at trial. *Schutte, supra* at 721.

In her closing arguments, the prosecutor argued the facts that supported her theory that defendant took the complainant's wallet through the use of force and fear, and that he falsely impersonated an officer. The prosecutor's argument was responsive to defense counsel's argument that defendant was not guilty of unarmed robbery because he did not use force or fear to take the complainant's wallet. Furthermore, except for the prosecutor's statement that defendant pulled the complainant from her car, the prosecutor's argument was supported by the evidence. While there was no evidence that defendant pulled the complainant out of her car, any prejudice resulting from the prosecutor's statement could have been cured by a cautionary instruction. *Schutte, supra* at 720-721; *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Evaluating the prosecutor's remarks in context in relation to defense counsel's arguments, we find no plain error that affected defendant's substantial rights. *Carines, supra*; *Schutte, supra* at 720.

Next, defendant claims that the prosecutor improperly appealed to the sympathy of the jury when she informed the jury that, as a result of the instant crimes, the complainant is fearful when she goes out, that she no longer likes to drive, and that she has to park her car in the garage due to her fear. Prosecutorial arguments that are "little more than an appeal to the jury's sympathy for the victim are improper." *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988). However, we find that the prosecutor's comments regarding the effect the crimes had on the complainant were an appropriate response to defendant's argument that the complainant was not placed in fear and that no force was used. Additionally, the trial court instructed the jury that its decision was not to be influenced by sympathy, that only admitted evidence was to be considered, and that the attorneys' arguments were not evidence. Jurors are presumed to follow the instructions given. *People v Graves*, 458 Mich 476,

486; 581 NW2d 229 (1998). Thus, we find no error in the prosecutor's arguments regarding the effect of the instant crimes on the complainant.

Defendant also argues that the prosecutor misrepresented the law during her rebuttal argument regarding the force required for an unarmed robbery conviction. Defendant contends in his brief on appeal that the proper definition of force is "any use of physical force against another person so as to harm or embarrass him or her." We conclude that the challenged portion of the prosecution's rebuttal does not misrepresent this definition. Further, defendant concedes in his brief on appeal that the trial court correctly instructed the jury on the force element of unarmed robbery. Jurors are presumed to follow the instructions given. *Graves, supra* at 486. Thus, defendant has not demonstrated plain error that affected his substantial rights. *Carines, supra*.

Because we have concluded that no prosecutorial misconduct occurred, we find no merit in defendant's argument that the cumulative effect of the prosecutor's errors denied him a fair and impartial trial.

Next, defendant contends that he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.* at 687.

Defendant first asserts that his counsel failed to present his side of the story. Defendant maintains that, if he had been called as a witness, he would have explained that he took his car to the dealership for repairs on the day in question, that the decision to take the complainant's wallet was not premeditated, and that he was earning approximately \$650 per week at his job. However, the main dispute at trial was whether defendant used force, violence, or fear to take the wallet and defendant's proffered testimony would not have negated the element of force or fear established by the complainant's testimony. Therefore, defendant has not shown that he was prejudiced by defense counsel's representation.

Defendant also claims that defense counsel was ineffective because he failed to object to the prosecutor's misstatements of the evidence during her opening statement. We disagree. There is a strong presumption that the actions of counsel are sound trial strategy. *People v Torres (On Remand)*, 222 Mich App 411, 424; 564 NW2d 149 (1997). Despite defense counsel's failure to object to the misstatements, defense counsel challenged the prosecutor's misstatements by explaining to the jury that defendant did not put the complainant in fear and did not use force at any time during the incident. Defense counsel told the jury to listen carefully to the complainant's testimony and focus on the existence of force, violence, or assault. Therefore, defendant has not overcome the presumption that his counsel's decision to address the misstatements in his opening statement, rather than by objection, was sound trial strategy.

Defendant also claims that defense counsel was ineffective because he failed to object to the prosecutor's misstatements of the law and the evidence made during the closing and rebuttal arguments. However, in light of our conclusion that the prosecutor's arguments were proper, any objection to these arguments would have been meritless. Defense counsel is not required to raise a meritless objection. *Torres, supra* at 425. We are satisfied that counsel's failure to object to the prosecutor's misstatement regarding defendant pulling complainant from the car did not affect the outcome of the trial.

Defendant's final argument is that the trial court erred in denying defense counsel's motion to withdraw. We disagree. A trial court's ruling on a motion to withdraw as counsel is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368-369; 592 NW2d 737 (1999). An abuse of discretion occurs when there is no justification for the trial court's ruling in light of the facts presented. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

When reviewing a trial court's denial of defense counsel's motion to withdraw, we consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *Echavarria, supra* at 369.

We conclude that the trial court did not abuse its discretion by denying defense counsel's motion to withdraw. Defense counsel stated that he had been fired two times prior to the day of trial and defendant had questioned his competency on numerous occasions. Although it is unclear from the record when the previous firings occurred, the transcript indicates some ongoing contention between defendant and defense counsel. In light of these facts, defendant was negligent in failing to assert his right prior to the day of trial. Furthermore, defendant did not advance a legitimate reason, such as a bona fide dispute, for his assertion of the right. Defense counsel had been fired on two previous occasions, yet continued to represent defendant. When the trial court asked defendant if he was going to represent himself, defendant replied, "No, I am going to let him [defense counsel] represent me." Neither defendant nor defense counsel indicated that there was a bona fide dispute.

Defendant also failed to demonstrate prejudice resulting from the trial court's denial of the motion to withdraw. Defense counsel presented a defense that challenged the prosecution's claim that defendant took the complainant's wallet by force or by putting complainant in fear. In furtherance of this defense strategy, defense counsel cross-examined the complainant regarding defendant's demeanor, the extent of the physical contact, and the fear she experienced. Defense counsel contended during his closing arguments that there was no evidence of defendant's attempt or desire to inflict injury, arguing that the touching of the complainant's shirt was not a forceful and violent act. Defendant has not shown that defense counsel failed to represent him effectively.

In light of the facts presented, the trial court did not abuse its discretion in denying defense counsel's motion to withdraw.

Affirmed.

/s/ Helene N. White

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell