

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL R. RICHMOND,

Defendant-Appellant.

UNPUBLISHED

February 9, 2001

No. 219280

Wayne Circuit Court

LC No. 98-009541

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced defendant to a term of 5-10 years' imprisonment for the assault with intent to rob conviction, a term of 5-20 years' imprisonment for the first-degree home invasion, and a term of 1-4 years' imprisonment for the felonious assault conviction. Defendant appeals as of right. We affirm.

The prosecutor's case in chief involved the testimony of two witnesses, the complainant and the arresting officer. The complainant testified that defendant forcibly entered his apartment under the pretense that he had a firearm and that defendant robbed and assaulted him inside the apartment. Upon discovering that defendant was armed with a tire iron and not a firearm, the complainant was able to overpower defendant and hold him down until police arrived. The arresting officer testified that he searched the defendant when he arrived at the scene, and that he discovered the complainant's wallet and jewelry in defendant's pocket. On cross-examination, the officer testified that he did not question defendant at the scene, but indicated that defendant did make some statements to police. Defense counsel did not ask the officer what those statements were. Rather, he highlighted the officer's failure to record defendant's statements in the police report.

Defendant then testified on his own behalf, presenting a different version of events. Defendant testified that he arrived at the complainant's apartment building in search of a woman named Bridgett, whom defendant had met the previous week. Although defendant had neither Bridgett's telephone number nor her address, defendant testified that he decided to look for her in the complainant's apartment building because he saw people standing outside. Defendant claimed that he entered the apartment building and that the complainant and an unidentified man

assaulted him, without warning or provocation, and that the unidentified man fled before police arrived. Defendant denied that he possessed the complainant's wallet or jewelry at the time of his arrest.

After defendant testified, the prosecutor recalled the arresting officer as a rebuttal witness. The officer then testified regarding the statements that defendant made to police at the time of his arrest. According to the officer, defendant stated that the complainant was a homosexual who had tried to offer defendant sex. The officer testified that defendant said nothing about searching for a woman named Bridgett. Defendant's trial counsel then vigorously cross-examined the officer regarding his failure to record defendant's statements in the police report.

Defendant first argues that the prosecutor improperly introduced the arresting officer's rebuttal testimony and that the error deprived defendant of a fair trial. We disagree.

Because defense counsel failed to object to the police officer's rebuttal testimony at trial, we review this issue only for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). The admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *Id.* at 399, quoting *People v Delano*, 318 Mich 557, 570; 28 NW2d 909 (1947).

Defendant contends that the officer's testimony did not constitute proper rebuttal because the prosecutor could have elicited the officer's testimony regarding defendant's statements during the prosecutor's case in chief. However, that is not the proper test for the admission of rebuttal evidence:

The test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal. [*Figgures, supra* at 399 (internal citations omitted).]

We conclude that the police officer's testimony was properly responsive to a theory developed by the defendant. When testifying on his own behalf, defendant claimed that he entered the complainant's apartment building in search of a woman named Bridgett, where he was attacked by an unidentified man. The officer's testimony that defendant did not mention a woman named Bridgett at the time of his arrest tended to rebut defendant's version of events. Therefore, we conclude that the trial court did not abuse its discretion in admitting the police officer's rebuttal testimony, and conclude that no manifest injustice occurred.¹

¹ Defendant also argues that the police officer's rebuttal testimony tended to imply that defendant was homosexual, and that the prosecutor introduced the rebuttal testimony in order to prejudice
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Defendant next argues that prosecutorial misconduct denied him a fair trial. Defendant contends that, during rebuttal closing argument, the prosecutor impermissibly denigrated defense counsel and impermissibly bolstered the credibility of prosecution witnesses. We disagree.

Defendant challenges the following comment which the prosecutor made in rebuttal closing argument: “It’s my job to conduct a fair trial. It’s his job to win.” Defendant contends that the prosecutor’s comment implied that defense counsel had no duty to ensure a fair trial. Defendant concludes that this comment impermissibly bolstered the prosecutor’s credibility and ethics and denigrated defense counsel. Moreover, defendant challenges the prosecutor’s comment that the police officer had testified truthfully because it was “his job to come in here and tell the truth.” Defendant argues that the prosecutor’s comment effectively vouched for the credibility of the witness. Defendant concludes that these remarks prejudiced the jury and deprived him of a fair trial.

Appellate review of a prosecutor’s allegedly improper remarks is precluded if the defendant fails to timely and specifically object to such remarks, unless a curative instruction could not have eliminated possible prejudice or unless a failure to review the issue will result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Because defendant’s trial counsel failed to object to the prosecutor’s comments, we review this unpreserved issue for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Instances of prosecutorial misconduct are decided on a case by case basis, *Kelly, supra* at 637, and this Court must examine the pertinent portion of the record and evaluate the prosecutor’s remarks in context. *Schutte, supra* at 721. Reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant’s innocence. *Id.* at 720.

Our review of the trial court record convinces us that the prosecutor’s remarks constituted proper response to defense counsel’s closing argument. Defense counsel argued that it was the prosecutor’s job to win a conviction. He also argued that the officer had an interest in helping the prosecutor convict defendant. Therefore, he argued that the officer was “testifying in a way that supports his efforts to convict my client.” Taken in context, it is evident that the prosecutor’s comments were made in response to allegations made by defense counsel. Accordingly, we find that no prosecutorial misconduct occurred.

Finally, defendant argues that his trial counsel rendered ineffective assistance because his failure to object to the rebuttal testimony and to the prosecutor’s statements arose from

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the jury against defendant. Defense counsel misconstrues the rebuttal testimony. According to the officer, defendant stated that the *complainant* was homosexual, and that the *complainant* had tried to force sexual relations on him. This testimony did not raise any implication that *defendant* was homosexual. Further, any potential prejudice which might have been created by this testimony would have been directed at the complainant, not defendant. Accordingly, we reject defendant’s claim of error.

insufficient knowledge of the facts and the applicable law needed to meet the legal challenges likely to be encountered at trial. We disagree.

Defendant failed to move for new trial or an evidentiary hearing on the ground of ineffective assistance of counsel. Therefore, we review this issue only to the extent that the appellate record contains sufficient detail to support the defendant's claim. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and so prejudiced the defendant that he was denied the right to a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In doing so, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *Id.* A demonstration of prejudice requires a showing that, but for counsel's unprofessional errors, the results of the proceeding would be different. *Id.* at 302-303.

As discussed above, we conclude that the introduction of rebuttal testimony and the prosecutor's comments did not constitute error. We cannot conclude that defendant's trial counsel rendered ineffective assistance when he failed to object to those issues because trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, defense counsel used the police officer's rebuttal testimony to impeach the officer's credibility. Indeed, defense counsel used the inconsistencies between the police report and the officer's testimony as a central component of his defense. Therefore, it is reasonable to infer that his failure to object to the officer's rebuttal testimony must have been trial strategy. This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R. Gage