STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KEVIN JAMES, a/k/a/ PETER BLOXSON,

Defendant-Appellant.

UNPUBLISHED
December 21, 2001

No. 222699
Wayne Circuit Court
LC No. 98-000630

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

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to sixteen to twenty-five years in prison for the carjacking conviction, sixteen to twenty-five years in prison for the armed robbery conviction, and five years in prison for the felony-firearm conviction. The carjacking and armed robbery sentences run concurrently and consecutive to the felony-firearm sentence. Defendant appeals as of right. We affirm.

The complainant, Latonya Wilson, testified that on September 16, 1997 at approximately 2:30 a.m., she drove to a Sunoco gas station in Detroit to get gasoline. Latonya was driving a 1984 Camaro which belonged to her boyfriend. Latonya was with her cousin, Lakeda Wilson. While Latonya pumped the gasoline, Lakeda went to the building to pay for it. Latonya testified that defendant approached her and pointed a gun at her. Defendant asked Latonya for money. Latonya told defendant that she did not have any money. Lakeda returned to the car and saw defendant with the gun. Defendant then demanded the keys to the car. Latonya ultimately complied, and defendant drove away in the Camaro. As he drove away, Lakeda picked up a brick and threw it at the Camaro, breaking the rear window. Latonya and her boyfriend went to the police station later that day and reported the incident.

On December 22, 1997, Latonya was working at a topless bar in Detroit. Defendant came into the bar and Latonya recognized him as the person who had carjacked her. Latonya called the police and defendant was arrested.

On appeal, defendant first argues that he was denied the effective assistance of counsel. Because defendant did not move in the trial court for either an evidentiary hearing or a new trial, our review is limited to errors apparent on the lower court record. *People v Knapp*, 244 Mich

App 361, 385; 624 NW2d 227 (2001); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

In order to establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the strong presumption that the challenged action constituted sound trial strategy. *Toma*, *supra* at 302; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first contends that his trial counsel was ineffective for failing to call Laymon Green to testify and for not allowing defendant to testify. The decision whether to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Failure to call witnesses will only constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *Id.* A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*; *Daniel*, *supra* at 58.

Defendant attaches to his brief on appeal his affidavit regarding the content of his purported testimony, as well as a statement taken from Green. According to his affidavit, defendant would have denied any incident at the gas station. Defendant states that he would have testified that he and his friend met Latonya and Lakeda at a topless bar, and then followed them to a motel where they planned to have sexual relations. Defendant maintains that at the motel they had a disagreement with the women and defendant took back his money and left. According to defendant, the women followed him outside to the parking lot, where Lakeda threw a brick in his direction which struck the rear window of the Camaro. One of the women dropped her car keys, defendant picked up the keys and threw them onto the freeway, and defendant and his friend left in defendant's car. Green's statement indicated that he and defendant followed the women to a motel. At some point defendant told Green that he had to get his money back from the women, and defendant and Green left the motel. Green states that three women chased them and one of the women threw a cinder block that hit and broke a rear car window. Finally, Green states that defendant threw something onto the expressway.

Defendant has not overcome the presumption that defense counsel's decision not to call defendant or Green to testify was sound trial strategy. Defense counsel was aware that if defendant were to testify, evidence of defendant's 1997 armed robbery conviction would be admitted because the trial court denied defendant's motion in limine to exclude the evidence. Green's affidavit shows that, at the time the affidavit was signed, he was incarcerated at the Macomb Regional Facility. Therefore, it is possible that Green, too, would have been impeached with a prior conviction. Also, counsel advanced the theory that the carjacking never happened, or alternatively that if it did occur, that the complainant mistakenly identified defendant. The purported testimony of defendant and Green that they followed the women to a motel to have sexual relations and that a disagreement ensued would have undermined the defense of mistaken identity. Based on the record and the affidavit and statement presented on appeal, defendant has

not overcome the presumption that defense counsel's decision not to call defendant or Green to testify constituted sound trial strategy.

Defendant also contends that defense counsel was ineffective because she did not object when the prosecutor elicited hearsay testimony from Officer Brian Fields regarding Latonya's statements to him when she arrived at the police station to report the carjacking. We disagree. Defense counsel cross-examined Latonya about discrepancies between her prior statements and her testimony at trial. It is not apparent from the record that this strategy was an error that prejudiced defendant. To the extent that Officer Fields' testimony was consistent with Latonya's testimony, it was cumulative. To the extent that Officer Fields' testimony was inconsistent with Latonya's testimony, defense counsel called attention to the inconsistencies on cross-examination.

We conclude that the challenged actions of defendant's trial counsel were matters of trial strategy. As such, we will not assess counsel's conduct with the benefit of hindsight. Because the lower court record does not suggest that defense counsel's representation fell below an objective standard of reasonableness, defendant is not entitled to a new trial and we are not persuaded of the need to remand this matter to the trial court for a *Ginther*[1] hearing.

Defendant also argues in a separate issue that he was denied his constitutional right to testify on his own behalf. Defendant argues that defense counsel failed to inform him that he had an absolute right to testify. See *People v Solomon (Am Op)*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996), citing *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987). If a defendant decides not to testify or acquiesces in his attorney's decision not to testify, the issue is deemed waived. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Based on the record below and defendant's brief on appeal, we find no merit to defendant's claim. Although defendant maintains that he expressed to his attorney his desire to testify at trial, notably, defendant does not assert that he was unaware of his right to testify. See *Simmons*, *supra* at 685-686. Nor does the record contain any indication of defendant's intention to exercise that right. We find no plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999).

Defendant next argues that he was denied a fair trial when the prosecutor engaged in repeated misconduct. Allegations of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). When reviewing allegations of prosecutorial misconduct, this Court examines the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). If a defendant fails to object to the alleged prosecutorial misconduct, this issue is reviewed for plain error that affected the defendant's substantial rights. *Pfaffle*, *supra.*

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973) held that a defendant who wishes to claim ineffective assistance of counsel can be required to seek an evidentiary hearing to establish his claim if the claim depends on facts not of record. *Id.*

The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant contends that the prosecutor improperly questioned Officer Anthony Johnson regarding defendant's use of an alias despite the trial court's prior ruling that the evidence was inadmissible for lack of foundation. Defense counsel objected to the prosecution's question to Officer Johnson about whether he learned the "real identity" of the person who was arrested. The trial court ruled that evidence of defendant's use of an alias was inadmissible for lack of a foundation because Officer Williams, the only witness with personal knowledge, was not questioned about defendant's use of an alias. The prosecution resumed questioning Officer Johnson and again referred to the use of an alias. Defense counsel objected before the witness could answer. Defendant moved for a mistrial based on the court's prior ruling that evidence about defendant's alias could not be admitted. The trial court denied the motion.

A prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Although the trial court had already ruled that the evidence was inadmissible, we do not believe that the prosecution's questioning rises to the level of misconduct. The prosecution's persistence in this line of questioning may have been an attempt to lay a foundation for the evidence, as the court had ruled that the evidence was excluded for lack of foundation. Further, we note that Officer Johnson did not testify that defendant used an alias and the trial court instructed the jury that the questions of counsel are not evidence. Accordingly, defendant was not prejudiced by the prosecutor's questions.

Defendant next contends that during closing argument, the prosecutor improperly appealed to the jury's fear, sympathy, and sense of civic duty. A prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may not inject racial or ethnic remarks into any trial, nor appeal to the fears and prejudices of the jury. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). In this case, the prosecutor argued: "Is a 1984 Camaro worth the risk of your life? She made the right decision and gave up the keys, or we might be here on a homicide." The comment referred to the fact in evidence that defendant put Latonya in fear for her life. The prosecutor's remark was not improper, as it both argued from the facts in evidence and was used to prove an element of the charged crime of carjacking.[2]

The prosecutor's request that the jury "please do justice" did not improperly appeal to the jurors' sense of civic duty. Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *Bahoda*, *supra* at 282. The comment was brief and was not made in the

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[2] A person who by force or violence, or by threat of force or violence, or by putting in fear, robs, steals, or takes a motor vehicle from another, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking. *People v Davenport*, 230 Mich App 577; 583 NW2d 919 (1998).

context of appealing to sympathy or civic duty. Rather, it was made in the context of the prosecutor arguing the elements of the charged crime and then again at the end of the closing argument as an appeal to decide the case fairly on the basis of the evidence. *People v Howard,* 226 Mich App 528, 546-547; 575 NW2d 16 (1997).

Defendant also argues that the prosecutor improperly denigrated defense counsel by characterizing defense counsel's alternative theories of the case as inconsistent:

> Finally, if you recall the last point when Miss Reed for defense on behalf of her client gave her opening statement, it's always troublesome to me; or I find it troublesome when you use what I call the inconsistent defense. But ladies and gentlemen, it's been suggested to you both in opening statement and closing by counsel. Yes this car-jacking didn't even happen. The whole thing is made up. Then, gee, if you believe it happened, Mr. James isn't the one that did it. Kind of like talking out of both sides of your mouth. Didn't happen. Did happen. But he is not the one that did it.

A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson,* 245 Mich App 572, 592; 629 NW2d 411 (2001). 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. *Schutte, supra* at 721. The prosecutor's argument did not suggest that defense counsel was misleading the jury, but rather, pointed out that defense counsel argued alternative theories, which she did. We find no misconduct.

Finally, defendant argues that the prosecutor argued facts not in evidence. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Schutte, supra* at 721; *Bahoda, supra* at 282. He need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *Id.*; *People v Aldrich,* 246 Mich App 101, 112; 631 NW2d 67 (2001).

The prosecutor addressed the issue of why defendant approached Latonya twice before demanding money, stating: "Who knows, maybe there were cars driving by that prevented him from doing it the second time." In this comment, the prosecutor was merely arguing a reasonable inference from the fact that defendant returned to his car before pointing the gun at Latonya. The prosecutor also argued, regarding witness Issam Zahr, "He doesn't remember anything about that night because he wasn't there. . . . He told you that he doesn't know if he was there, and he told you that." Here, the prosecutor was merely arguing inferences from the evidence presented at trial. Zahr gave equivocal testimony about whether he was at the station on the night of the incident. He also testified that he did not remember anything specific about that night. The prosecutor's remarks do not constitute misconduct.

In closing argument, the prosecutor also referred to a juror's response in voir dire:

> Don't get off into, again, could have, would have should have or Monday morning quarter backing. Because, ladies and gentlemen, if you recall during the jury selection process, one of your fellow jurors said that they were carjacked, and they went home first; then they went to the police department, and that fellow

> juror indicated even though this happened ten years ago, if he walked in this room today, she could pick him out. She remembers pock marks on his face; remember[s] his complexion, remembers his stature of him being small. He robbed her, took her car at gun point. To this day she remembers him.

This argument was improper as it was not based on the evidence presented at trial, but rather, on a juror's statements during voir dire. However, even if a prosecutor's conduct is improper, the misconduct may be deemed harmless. *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996); MCR 2.613(A); MCL 769.26. The prosecution's brief and single reference to a juror's ability to remember the face of her assailant did little to bolster the credibility of Latonya and Lakeda. As indicated above, the prosecution witnesses presented predominantly consistent testimony. Defendant presented only the testimony of Zahr that he did not remember a carjacking at the gas station on the night in question, nor did he remember the night in question at all. In light of the overwhelming evidence against defendant and the trial court's instruction to the jury that the arguments of counsel are not evidence, the prosecution's improper reference to facts not in evidence was harmless.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot