# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 9, 2002 |
| v | No. 229093<br>Oakland Circuit Court |
| SCOTT ENNIS WINWARD,<br><br>Defendant-Appellant. | LC No. 99-169609-FC |

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of unarmed robbery, MCL 750.530. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to three years' probation with the first year to be served in jail. We affirm.

Defendant first challenges the admission of an audiotape of a 911 call, made by an unknown caller, indicating that complainant said he had been robbed at knifepoint. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

We find that the trial court did not abuse its discretion in admitting the tape recording of the 911 call that caused the police to go to complainant and defendant's apartment building. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). In this case, the audiotape recording was not hearsay because it was not introduced to prove the truth of the matter asserted therein, but rather to show why the police responded to the scene of a crime. *Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1995); *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982). Further, when the prosecutor was allowed to play the tape recording, complainant's testimony establishing the facts in issue had already been read into the record.

Defendant argues that he was denied a fair and impartial trial because of several instances of alleged prosecutorial misconduct. We disagree. "Prosecutorial misconduct issues are decided case by case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Our review of

the record reveals that, viewed as a whole and in context, *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995), none of the challenged conduct rises to the level of error requiring reversal. Some of the alleged misconduct was preserved for appellate review, while some was not.

Defendant first argues that the prosecutor asked a police witness impermissible questions, including whether he thought complainant made a "credible complaint" and whether complainant appeared serious. Because defendant failed to object at trial to this line of questioning, we review for plain error. *Schutte, supra* at 720. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

It is improper for the prosecutor to ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, reversal is not required here because any prejudice resulting from the questioning could have been cured by a timely objection and an appropriate limiting instruction. *Schutte, supra* at 720-721. Moreover, the trial court instructed the jury that it was to assess and determine the credibility of the witnesses.

Defendant also argues that the prosecutor improperly asked defendant's mother questions implying that defendant was a drug user. Defense counsel objected and the trial court sustained the objection. The court immediately instructed the jury to disregard the prosecutor's inference, that the prosecutor's questions are not evidence, and that there was no evidence to support the prosecutor's questions. The prosecutor did not pursue the subject further or mention it during closing argument. In its jury instructions, the court directed the jury to ignore excluded evidence, to follow its instructions, and to decide the case based only on the evidence. Under these circumstances, we conclude that the prosecutor's questions did not deny defendant a fair trial. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

Defendant further argues that the prosecutor improperly asked defendant's mother a question implying that defendant had a "drunk driving" record. However, the transcript citation provided by defendant does not contain questions asked on the matter by the prosecutor, but by *defense counsel*. Defendant may not "assign error on appeal to something which his own counsel deemed proper at trial." *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988). We also note that defendant was not prejudiced by the witness' answer, which did not indicate that defendant had a "drunk driving" record.

We also reject defendant's claim that the prosecutor denied him a fair trial by appealing to the jury's sympathy for complainant during closing argument. Defendant did not object to the challenged conduct. Although appeals to the jury to sympathize with the victim constitute improper argument, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984), the

comments at issue occurred at the end of a lengthy discussion of the evidence, were isolated, and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Moreover, the trial court's instructions that the jury should not be influenced by sympathy or prejudice, and that the lawyers' comments are not evidence were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001).

Defendant also claims that, during closing argument, the prosecutor mislead the jury when he indicated that defendant could not be tried for receiving and concealing stolen property after the instant case. Defendant did not object to this comment below, so we review for plain error. *Carines, supra*.

Defendant quotes at length from the prosecution's closing argument. However, we can only identify a brief reference that parallels his claim of error. When arguing defendant's lack of credibility, the prosecution made the following comments: "He knows something. He knows it's all or nothing here. He knows that at the conclusion of this case it's over. It can never be tried again on any of the incidents that we talked about in this case. Conveniently then he'll admit to you everything that he knows can't come back to haunt him."

It appears that defendant is making the argument that the prosecution misstated the law of double jeopardy. However, he never specifically indicates that this is his argument, nor does he cite any case law addressing the double jeopardy issue. We cannot supply an argument for defendant when he has chosen not to make one. Further, viewed in context, the prosecutor's comment was fleeting and made in the midst of a discussion of the evidence. In addition, the trial court instructed the jury that the lawyers' comments are not evidence, that the case should be decided on the basis of the evidence, and that the jury was to follow the law as instructed by the court. In sum, defendant has failed to show a plain error affecting his substantial rights. *Carines, supra*.

Next, defendant argues that the trial court erred by supplying the jury with the transcript of complainant's preliminary examination testimony, which had been read into the record but was not admitted as an exhibit. We review the trial court's decision whether to grant the jury's request to review certain testimony for an abuse of discretion. See MCR 6.414(H); *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

"A trial court is not to provide the jury with unadmitted evidence." *Id.* at 57. However, even if it was error to provide the jury with a copy of the transcript, any error would be harmless because the transcript furnished to the jury contained only the testimony that had previously been read into the record in the jury's presence. *People v Williams*, 179 Mich App 15, 22; 445 NW2d 170 (1989), rev'd on other grounds 434 Mich 894 (1990). "[W]e see little difference in the impact on the jury between having the transcript read to the jurors or having them read it themselves." *Id*. Despite defendant's assertion on appeal, there is no evidence that the jury may have speculated regarding the redacted portions of the transcript, or that the testimony was misread into the record. Defense counsel was provided with a copy of the transcript before it was read into the record, followed along as it was read, and read those questions he had posed on cross-examination at the preliminary examination. (Tr III, pp 107-108.) Accordingly, this claim does not warrant reversal.

Defendant also contends that the trial court erred by denying his request for an instruction on the lesser-included misdemeanor offense of assault and battery. (Tr IV, pp 181-183.) See MCL 750.81 and CJI2d 17.2. We disagree. "[T]he decision to grant or deny a requested lesser included misdemeanor instruction will be reversed on appeal only upon a finding of an abuse of discretion." *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982).

A trial court must instruct on a lesser-included misdemeanor when, *inter alia*, the instruction is supported by a rational view of the evidence adduced at trial. *Id.* at 262-263; *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). The evidence of the differentiating elements must be factually disputed to the extent that a jury could rationally reject the existence of the greater offense and accept the existence of the lesser misdemeanor offense. *People v Steele*, 429 Mich 13, 20-21; 412 NW2d 206 (1987). The failure to give an appropriate instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

We hold that the trial court did not abuse its discretion in finding that the requested instruction was inappropriate. The elements of assault and battery are: (1) that the defendant committed a battery on the victim; and (2) that the defendant intended either to injure the victim or make the victim reasonably fear an immediate battery. See CJI2d 17.2. Defendant requested an instruction on the misdemeanor offense of assault and battery on the basis of his admission that he punched complainant *in self-defense* when complainant wanted to renege on a business transaction, and his denial that a robbery occurred. However, given the evidence and defendant's version of the events, the crime of assault and battery was not supported by a rational view of the evidence. "[D]efendant cannot seek reversal on the basis of the trial court's refusal to instruct the jury on an offense inconsistent with the evidence and his theory of the case." See *People v Wilhelm (On Rehearing)*, 190 Mich App 574, 577; 476 NW2d 753 (1991). Moreover, given the evidence and defendant's self-defense theory, an instruction on assault and battery may have confused the jury and caused a compromise verdict. *Steele, supra* at 18-19; *Corbiere, supra*.

Finally, we reject defendant's assertion that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors were identified that deprived defendant of a fair trial, reversal under the cumulative effect theory is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter