STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 19, 2002
V	No. 229369 Kent Circuit Court
TOMMIE JAMES EZELL, Defendant-Appellant.	LC No. 99-009706-FC

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted as charged of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.11, to concurrent sentences of 22½ to 75 years' imprisonment on the armed robbery conviction, 17½ to 40 years' imprisonment on the first-degree home invasion conviction, 3 to 8 years' imprisonment on the felon in possession of a firearm conviction, and a consecutive two-year sentence on the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant and a partner broke into a residence in Grand Rapids, where they assaulted and robbed Marvin Trotter and Michael Kukawski. Defendant asserted at trial that the robbery was a hoax, concocted by Trotter, and that Trotter and Kukawski were beaten because the robbery had to look real. Defendant stated that Trotter owed drug money to a local gang and thought that the debt would be forgiven if the gang knew that Trotter had been robbed. Defendant testified that he went along with the plan because Trotter threatened to tell one of the gang members that defendant had identified him to the police in connection with a murder.

On appeal, defendant first argues that this case should be remanded for a *Ginther*[1] hearing in order to take the testimony of his trial counsel. However, on November 20, 2001, we denied defendant's motion for remand for this same purpose and defendant has presented no basis for reconsideration of that decision. Therefore, we turn to the merits of defendant's

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

ineffective assistance of counsel claim; our review is limited to the facts on the record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).[2]

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was 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. *Cronic, supra*, at 657; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant, *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987), or by showing a failure to meet a minimum level of competence, *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980).

Defendant asserts that his trial counsel was ineffective because she failed to call a witness who would have corroborated the defense theory that the armed robbery was a hoax. According to affidavits submitted below, the witness would have testified that on the night of the robbery, he overheard a conversation between defendant and Trotter in which Trotter told defendant to "come through the side door and make it look good." The witness would have also testified that he asked Trotter what the conversation was about and that Trotter responded, "Nothing, just something we've got going on tonight."

The failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court will not substitute its judgment for that of counsel in a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Here, it is apparent from the record that defendant's trial counsel knew of the existence of the witness. However, defendant does not assert that his trial counsel refused to call the witness, who, at the time of trial was incarcerated for a felony conviction, against defendant's desires. Moreover, while the witness' testimony could be construed as corroborative of defendant's theory, it was ambiguous and not exonerating. Given the credibility issues stemming from the witness' criminal history and the ambiguous nature of the proposed testimony, we conclude that defendant has not overcome the presumption that not calling the witness constituted sound trial strategy. Therefore, we hold that defendant was not denied effective assistance of counsel on that ground.

Defendant next argues that several remarks made by the prosecutor during closing argument denied defendant a fair trial and violated his due process rights. Because defendant failed to object to the challenged comments below, we review these claims for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are

---

[2] Because we conclude that a remand is unwarranted, we will not address defendant's argument that a different judge should hear the remand.

decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Watson*, *supra*. "'No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.'" *Id*., quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant first asserts that the prosecutor impermissibly shifted the burden of proof to defendant when she argued that the defense had failed to offer sufficient evidentiary support for its theory that the robbery was a hoax. We disagree.

When a defendant advances a theory in defense of the charges, a prosecutor's comment upon a defendant's failure to call a witness who supports that theory merely points out the weakness of the defendant's case and does not shift the burden of proof because a defendant cannot be convicted on the basis that he failed to affirmatively prove his defense; thus, due process is not offended. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). Here, in making the challenged remarks, the prosecutor was simply commenting on defendant's failure to call supporting witnesses. Accordingly, the prosecutor's remarks were not improper.

Defendant also argues that the prosecutor impermissibly misrepresented facts when she stated that defendant concocted the hoax theory only after the prosecution refused to give him "the deal he wanted."[3] Although a prosecutor may argue reasonable inferences from the evidence, she may not mischaracterize the evidence. *Watson*, *supra* at 588. Here, we agree that the prosecutor's statement mischaracterized the evidence because defendant testified that he told police when he was arrested that the robbery was a hoax and two officers on the scene testified that they heard defendant state the same. However, because a cautionary instruction prompted by an objection below would have cured any prejudicial effect of the prosecutor's statement, defendant is not entitled to relief on this claimed error. *Id*. at 586. In any event, we are satisfied that the trial court's instruction to the jury that the arguments of the attorneys are not evidence dispelled the minimal prejudice that may have arisen from this isolated comment. See, e.g., *Schutte*, *supra* at 721-722.

Defendant next contends that the prosecutor impermissibly called defendant a liar. However, a prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, in making the challenged comment, the prosecutor essentially attacked defendant's credibility by arguing that, based on the evidence presented by the prosecution to the jury, defendant's theory of the case was not believable. Accordingly, we find no error in challenged remarks. In any event, although repeated expressions in closing argument that convey the prosecutor's opinion that a defendant is lying can be error mandating reversal, see *People v Thangavelu*, 96 Mich App

[3] Although defendant also contends that this statement was improper because "the prosecutor [spoke] from [her] own knowledge of facts regarding the policy of making a deal with the defendant," defendant has failed to brief the merits of that claim. Accordingly, we decline to address the matter. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, . . . and then search for authority either to sustain or reject his position.").

442, 452; 292 NW2d 227 (1980), we note that, here, the challenged remark was an isolated incident the prejudicial effect of which, if any, could have been cured by a cautionary instruction. *Watson*, *supra*.

Finally, defendant asserts that the prosecutor impermissibly argued that defendant lied about having a gun during the incident. In making this argument, however, defendant mischaracterizes the prosecutor's statements. The prosecutor stated that defendant told the police that he was wearing the holster to scare people. The prosecutor then argued that the implication of defendant's explanation was that defendant was trying to indicate to the police that he really did not have a gun with him. A prosecutor may argue the evidence and draw reasonable inferences from it. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Accordingly, we conclude that the prosecutor's argument was proper and that, therefore, defendant was not denied a fair trial as a result of prosecutorial misconduct.

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra