STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2004
v	No. 245325 Saginaw Circuit Court
JOHN MAURICE RICHARDSON, Defendant-Appellant.	LC No. 02-021340-FH

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of domestic violence, MCL 750.812; resisting and obstructing a police officer, MCL 750.479(b); possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); and possession of marijuana, MCL 333.7403(2)(d). The Saginaw Circuit Court sentenced defendant to concurrent terms of ninety-three days imprisonment for the domestic violence conviction, thirty to forty-eight months for the resisting arrest conviction, thirty months to eight years for the cocaine possession conviction and one year for the marijuana possession conviction. We affirm.

In this domestic violence case, three police officers who responded to the complainant's 911 call for help in a dispute with her fiancé entered into the complainant's house when they heard screaming and yelling, and caught defendant attempting to punch the complainant in the face as he held her down on the bed.

Defendant first argues that the evidence was insufficient for the convictions because the prosecutor presented fabricated police reports and false witness testimony. In support of this claim, defendant argues that the inconsistencies in the testimony prove that the witnesses testified falsely and the evidence was fabricated.

In reviewing a sufficiency of the evidence question, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992). A trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

In support of his claim that the police officers testified untruthfully and presented false evidence, defendant presents on appeal a list of what he claims to be discrepancies in the testimony of the prosecutor's witnesses. Defendant does not explain how the discrepancies prove that the witnesses were lying or that they fabricated the evidence.

First, the choice of words used by the witnesses to describe where defendant was when the officers entered the bedroom is a distinction without a difference. The testimony clearly indicates that defendant was physically threatening the complainant at a very close proximity to her person. Second, the slight discrepancies in witnesses testimony with respect to when exactly the complainant ran out of the bedroom properly comport with the purpose and language of the standard jury instruction CJI2d 3.6(4), which recognizes that people see, hear and remember things differently. Third, defendant does not explain why it was important to determine the number of calls the complainant made to 911. The most important call was the second one, which prompted the officers to enter into the complainant's house and bedroom without knocking and announcing themselves. At trial, defendant did not dispute that the tape admitted into evidence was a recording of the second call the complainant made to 911. Finally, defendant's claims that he was not searched at the police car, that he was unaware of any drug charges against him until the time of the arraignment, and that he had no drugs within his possession were pure matters of assessing witness credibility. Defendant does not assert that he challenged the drug charges at the time of his arraignment or at any time during the proceedings in this case.

In sum, defendant presents an argument that relates directly to witness credibility and he requests this Court to make a witness credibility assessment which this Court may not. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe, supra* at 514-515; *Vaughn, supra* at 380. On this record, there is nothing to show that the evidence was insufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt. Therefore, defendant fails to support his argument as a matter of law.

Defendant next asserts several instances of prosecutorial misconduct. We review prosecutorial misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Defendant failed to preserve this issue. Absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless a defendant demonstrates plain error that affected his substantial rights, i.e., error that was outcome determinative. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture under the plain error rule, the defendant must demonstrate that: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected the defendant's substantial rights. *Id*., quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first argues that the prosecutor improperly disparaged him in opening statement by accusing him as being someone who lacked respect for others, and in closing argument by describing him as a "bully." Defendant maintains that the disparagement deprived him of a fair and impartial trial because it encouraged the jury to convict him on the basis of his character rather than on the evidence. In opening statement, the prosecutor stated the following:

> So the police get there, and they tackle him. But the defendant is not going out that easy. See, he's already worked up. And the evidence will show

> you that this is a defendant that has absolutely no respect, not only for the woman he's with, but for the police, for anyone else, and he resists them. They have to tackle him. They are in full uniform. They are giving him instructions and commands, don't resist, don't fight, let's go. They have to tackle him, three police officers, have to struggle with him to take him down, to cuff him, and he's not putting [his hands] behind his back, and he's not cooperating one bit.

It is well established that the prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Viewed in context, the lower court record does not demonstrate that the prosecutor engaged in denigrating defendant. The prosecutor was explaining how the evidence would establish beyond a reasonable doubt that defendant committed the offense of resisting and obstructing a police officer. Even assuming the comment were improper, this otherwise brief, inadvertent and isolated reference occurred early on in the proceedings and the remainder of the record reveals no "studied purpose to arouse the prejudice of the jury." *Id*. at 271 (quotation omitted). Accordingly, reversal is clearly not warranted on the basis of this isolated remark, particularly because, had a timely objection been raised, any possible lingering prejudice could have been cured.

With respect to the prosecutor's comment in closing argument that defendant was a "bully," the prosecutor stated the following:

> [Defendant] was very upset about the police being inside his house uninvited. You heard that man testify. That man is controlling. That man wanted to control the questions from me. He wanted to control the conversation. He overtalked me. That man is nothing but a bully. And when she called the police, that outraged him. . . . .
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> And so the police – somehow she called the police again. And there is an open line [when the complainant made the second 911 call]. And you heard the tape. We know that there was an open line. We heard the defendant, yelling at her, where were you at? Where were you at? Where were you at? Where were you at? Where were you at? She doesn't even have a chance to answer. I never had a chance to answer him when I was questioning him.

Viewed in context, the prosecutor was commenting on defendant's conduct during his own testimony at trial and his conduct in committing the charge offenses as testified to by the prosecutor's witnesses. The prosecutor had just finished cross-examining defendant and the record indicates that defendant attempted to control the cross-examination and he repeatedly interrupted both the prosecutor and the trial court. A prosecutor is not required to make his points using the blandest possible terms. *Schutte, supra* at 722. While the prosecutor's comment may be construed as inappropriate, any damage could have been corrected at trial had defendant objected. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). Thus, there was no prosecutorial misconduct for which relief may be warranted.

Defendant finally asserts that the prosecutor made an improper civic duty argument in support of the police and improperly shifted the jury's focus from the proofs to their emotions. A prosecutor may not suggest that the jury convict a defendant as part of its civic duty because such a suggestion introduces issues that are broader than the defendant's guilt or innocence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). "This type of argument unfairly places issues into the trial that are more comprehensive than a defendant's guilt or innocence and unfairly encourages jurors not to make reasoned judgments." *Id.*

The comments defendant challenges on appeal are as follows:

> When [the three officers arrive at the complainant's house following the second 911 call] they hear the yelling and the screaming going on inside. They're going in. They are not waiting for a search warrant. They're not worried about invading somebody's privacy at that point in time. Why are they going in? *We live in a society now where we recognize every day heroes, where we recognize the sacrifices that police and prosecutors – or police and firemen, I'm sorry, make, for every day people.* They went in that house, and they tackled that man off of her. You heard the testimony. He was on top of her. And they tackled him to help her. And upon tackling him, she ran into the other room. Why did she run? Because she was in fear. That woman was in fear of her life that night. [Emphasis added.]

The statements related to the evidence supporting the elements of the charge of assault with intent to do great bodily harm. It should be noted that defendant was not convicted with that charge. Rather, the jury convicted him of domestic violence. In addition, part of the theory of the defense was that the officers illegally entered the complainant's house because they failed to first secure a warrant. The statements explained why the offers entered into the complainant's house without having first obtained a warrant. The prosecutor did not exhort the jury to return a verdict of guilty because of issues outside defendant's guilt. He suggested the jury convict defendant because of his guilt. A prosecutor may ask the jury to convict on the basis of the evidence. *Bahoda, supra*. Even assuming error, it "was cured by a cautionary instruction that 'arguments of counsel are not evidence.'" *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). In sum, we find that no prosecutorial misconduct occurred and any prejudice that might have occurred could have been eliminated had a curative instruction been given following a timely objection. *Schutte, supra* at 720-721.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot