STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2004
v	No. 245497 Wayne Circuit Court
GREGORY JOHNSON, Defendant-Appellant.	LC No. 01-010099

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

PER CURIAM.

Defendant appeals as of right his convictions by jury of carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and two counts of felonious assault, MCL 750.82. The trial court sentenced defendant to serve concurrent terms of imprisonment of 168 months to forty years for the carjacking conviction, two to five years for the felon in possession of a firearm conviction, and two to six years each for the felonious assault convictions, to run consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict of acquittal on one of the two assault with intent to murder charges and that insufficient evidence was presented at trial to support his convictions of two counts of felonious assault because the prosecution presented evidence of only one gunshot being fired. We disagree.

"In assessing a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). Our review of the trial court's decision on a motion for directed verdict is de novo. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002). Further, "[w]hen a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt." *Id.*

In the present case, defendant was charged with two counts of assault with intent to murder, one count each for allegedly assaulting two undercover police officers. The evidence at trial established that two undercover police officers observed defendant carjack the victim at

gunpoint. The officers pursued defendant and during the chase defendant fired one gunshot at the officers while the officers were together in their vehicle. On the basis of this evidence, the jury convicted defendant on two counts of the lesser offense of felonious assault.

In essence, defendant argues that one shot fired at two officers in a vehicle cannot support separate assault charges on each officer. Assault is defined as "'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could quite reasonably infer that a single gunshot could place more than one person in reasonable apprehension of receiving an immediate battery. Accordingly, we conclude that the trial court properly denied defendant's motion for a directed verdict of acquittal on one count of assault with intent to murder and that the evidence was sufficient to support both felonious assault convictions.

Defendant next argues that the trial court erred in allowing the prosecution to impeach him with his post-arrest, post-*Miranda* assertion of his constitutional right to silence. We agree, however, we conclude that defendant is entitled to no relief because the error was harmless. We review constitutional issues de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Ordinarily, when defendants exercise their constitutional right to silence, that exercise cannot be used against them at trial. *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). However, a defendant who takes the stand in his own defense waives the privilege against self-incrimination. *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996). Such defendants may be impeached with silence both pre- and post-arrest so long as this silence occurred before they were advised of their *Miranda* rights. *Dixon*, *supra* at 405-406. However, the Fourteenth Amendment right to due process bars a defendant's silence *after* having been advised of *Miranda* rights from being used as impeachment. *Id.* at 406. An exception exists, however, where a defendant claims to have told the police an exculpatory story at arrest or that the trial was the first opportunity to tell his story. *Id.*; *People v Crump*, 216 Mich App 210, 214-215; 549 NW2d 36 (1996).

Twice during the trial defendant's counsel endeavored to introduce evidence that defendant attempted to tell a police officer, in whose police car defendant was being held shortly after his arrest in connection with this incident, his version of what had happened. The first time was during cross-examination of the officer and the other was during direct examination of defendant. Both times the prosecutor raised hearsay objections that the trial court sustained, thus preventing defendant from establishing the extent of his efforts to explain his non-involvement in the incident that gave rise to the charges made against him. In contrast, the prosecution, over defendant's objection, was permitted by the trial court to introduce the fact that after defendant was transported to a police station, defendant was interviewed by a police sergeant and did not say or volunteer any information about the carjacker. Consequently, the prosecution "had it both ways." It was able to exclude the evidence of defendant's attempt to volunteer a statement about the carjacker, but was allowed to show at another point that defendant invoked his right to remain silent. We believe that these circumstances constitute a clear violation of defendant's constitutional right to remain silent.

However, the existence of constitutional error does not necessarily entitle a defendant to relief in the form of a new trial. Nonstructural constitutional error, which is at issue here, *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990), see also *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994), is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error, *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001). The party who benefited from the error must demonstrate, beyond a reasonable doubt, that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *Anderson, supra* at 406. Here, we are persuaded that the error in admitting defendant's silence did not contribute to defendant's conviction. Even though the trial court prevented defendant from revealing to the jury the details of what he was trying to tell to the officer in the police car shortly after his arrest, he was able to convey to the jury the fact that he was attempting to explain the situation, but that the officer refused to listen to him. And defendant's counsel argued that point to the jury in his closing argument. On the prosecution side, we note that the trial court severely limited the evidence that the prosecutor could admit regarding defendant's silence at the police station and the prosecutor did not argue or rely on this evidence in his closing argument. Moreover, the evidence of defendant's guilt presented at trial was overwhelming. Under these circumstances, we find that the error was harmless.

Defendant next argues that he was denied a fair trial by several instances of prosecutorial misconduct. We disagree. Concerning preserved issues of prosecutorial misconduct, this Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

It is misconduct for a prosecutor to denigrate defense counsel with prejudicial remarks; the focus must remain on the evidence, not on the personalities involved. See *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995); *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996). However, a prosecutor need not confine argument to the blandest of terms. See *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

In this case, defendant maintains that the prosecutor denigrated defense counsel in two ways. The first claim is that the prosecutor questioned defense counsel's veracity and suggested that he was trying to mislead the jury by cross-examining defendant based on apparent inconsistencies between defendant's testimony on direct examination and defense counsel's opening statement. Apparently, defendant relies on the fact that the prosecutor's questions to defendant referenced whether defendant heard his defense attorney's assertions when delivering his opening statement to the jury. But defendant fails to explain how these references to the opening statement of defense counsel in any way disparages defendant's counsel, or for that matter, constitutes impermissible cross-examination. Thus, defendant has essentially abandoned the argument. See *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999) ("A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim."). In any event, read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial, we cannot say the complained of remarks prejudiced defendant. *People v Ackerman*, 257 Mich App 434, 452-453; 669 NW2d 818 (2003).

Next, defendant argues that the prosecutor's assertion in his rebuttal argument that the claims made by defense counsel in his closing argument contained "absolute damn lies"

undermined the fairness of the trial. Because no objection was made to this comment, it is unpreserved; therefore, we review this claim for plain error that affected his substantial rights. *People v Thomas*, __ Mich App __, __; __ NW2d __ (2004) [Docket No. 243817, issued February 3, 2004]. To reverse, we must determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings" regardless of innocence. *Ackerman, supra* at 448-449. Although the comment may have constituted an overly harsh characterization of defense counsel's argument, we cannot conclude that the comment caused defendant's conviction or seriously affected the proceedings.

Finally, defendant objects to the prosecutor referring to defendant in his closing argument as "the one who's consistently giving me hard looks during the trial." However, the comment was objected to and the trial court sustained the objection and ordered the remark stricken and instructed the jury to not consider the remark.

The purpose of registering objections is to afford the trial court the opportunity to cure any potential prejudicial effect of a prosecutor's comment and in that way preventing a miscarriage of justice. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Although defendant argues that the damage was done despite the trial court's sustaining the objection or ordering the comment stricken and disregarded, we believe that defendant suffered no prejudicial effect under the circumstances, and consequently, defendant was not denied a fair trial. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

In sum, defendant has not established entitlement to relief on the basis of the alleged instances of prosecutorial misconduct.

Finally, defendant argues that he must be resentenced because offense variable (OV) 12 was improperly scored. However, we need not address the merits of defendant's challenge to the scoring of OV 12 because even were we to agree, defendant is not entitled to be resentenced. As scored at sentencing by the trial court, the guideline range was 126 to 262 months. If OV 12 were rescored at zero, as defendant maintains on appeal is appropriate, the guideline range would be 108 to 225 months. In this case, the trial court imposed a minimum sentence of 168 months, which is comfortably within the guideline range of each scoring. Further, the comments of the trial court at sentencing reveal that it gave considerable thought to the particular circumstances presented in arriving at its sentence. Under these circumstances, we are persuaded that resentencing would not result in the trial court imposing a different sentence. Cf. *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly