

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RENAULT FAIR,

Defendant-Appellant.

UNPUBLISHED

June 17, 2004

No. 244283

Wayne Circuit Court

LC No. 02-002415

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction and 125 to 240 months' imprisonment for the armed robbery conviction. Defendant appeals as of right, and we affirm.

Defendant was charged with the armed robbery of the victim, who lived in the neighborhood where defendant owned two homes. In the early morning hours of January 22, 2002, defendant, armed with a gun, encountered a female as she was leaving her home. After she reported that she did not have any money in her purse, defendant took her 1993 burgundy Mercury Cougar. The victim observed a burgundy Cougar driving down his street as he prepared to leave for work. Defendant exited the vehicle, pulled a gun on the victim, and took cash from the victim's wallet, but threw the wallet back at the victim. The victim did not report the theft until he returned home that evening and saw a sketch of defendant on television after the media reported several robberies in the area of the victim's home. The victim identified defendant in a line-up the day after the armed robbery.

Defendant first alleges that he was deprived of his right to due process when the prosecutor committed misconduct by vouching for the credibility of the victim. We disagree. Our review of this unpreserved claim of prosecutorial misconduct is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Claims of prosecutorial misconduct are reviewed case by case, examining the challenged remarks in context to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 n 7; 531 NW2d 659 (1995). A prosecutor cannot vouch for the credibility of his witness by implying that he has some special knowledge of the witness' truthfulness. *Id.* at 276. However, a prosecutor may comment on the credibility of his own witnesses, especially when there is conflicting evidence, and the question of defendant's guilt

turns on which witness the jury believes. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992). The record must be read as a whole and the allegedly impermissible statements judged in the context they were made. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). A prosecutor may argue the facts and reasonable inferences from the facts relative to the theory of the case. *Bahoda, supra* at 282.

Review of the statements made in context reveals that the prosecutor did not improperly vouch for the credibility of the victim. In opening arguments, it was established that each party's theory of the case hinged on the victim's identification of defendant. While the prosecutor asserted that the victim had sufficient opportunity to observe the man who committed the robbery, the defense questioned the victim's delay in reporting the offense and the limited time that the victim observed his assailant. The prosecutor's comments merely reflected proper commentary on the evidence and reasonable inferences therefrom. *Bahoda, supra*. Consequently, defendant failed to establish plain error affecting his substantial rights. *Carines, supra*.

Defendant next alleges that he was denied the effective assistance of counsel when counsel elicited a prior bad act and failed to investigate and call alibi witnesses. We disagree. A testimonial record was not made in the trial court, and therefore, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

During cross examination, defense counsel did not move to strike a witness' unsolicited answer that defendant had been on tether. Defendant has failed to meet his burden of proof with regard to ineffective assistance of counsel where inaction appeared to be reasonable trial strategy. *Knapp, supra*. The comment was inadvertent and any motion to strike would have highlighted the testimony before the jury. Additionally, the introduction of other robberies was *initially* mentioned in the defense opening argument. Both parties elicited evidence regarding uncharged robberies. The prosecutor did not elicit the uncharged offenses as improper MRE 404(b) evidence, but rather to explain the circumstances underlying the charged crimes. *People v Scholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Rather, the prosecutor utilized the testimony to explain the course that police took in response to robberies that could be traced to an area in which defendant owned two homes. Moreover, the defense elicited testimony from Dearborn Heights police that fourteen fingerprints were removed from a different vehicle, and defendant did not match any of the prints. The elicitation of this testimony was clearly trial strategy. *Knapp, supra*.

Lastly, defendant's challenge to the failure to present alibi witnesses is not substantiated by the existing record. *Ginther, supra*. There is no indication that a witness list was filed by the defense in the lower court file. However, at trial, defense counsel noted for the record that he had communicated with two potential alibi witnesses and determined that they would not be

called to testify at trial because their testimony was contradictory and inconsistent. On the record, defendant acknowledged that the witnesses would not be called to testify at trial under the circumstances.¹

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

¹ Defendant recently filed a standard 11 brief, wherein he asserted that trial counsel was ineffective for failing to consult with him prior to trial and failing to challenge the probable cause to arrest defendant. Each challenge is not supported by record evidence, *Ginther, supra*, and defendant failed to meet his burden of establishing ineffective assistance of counsel. *Effinger, supra*. Additionally, defendant does not challenge the search warrant that resulted in the recovery of a gun, knit caps, and police scanner.