

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATASHA LANAI LATHAM,

Defendant-Appellant.

UNPUBLISHED

November 16, 2004

No. 248950

Wayne Circuit Court

LC No. 02-014475

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions of possession of a firearm during the commission of a felony, MCL 750.227b, and felonious assault, MCL 750.82, for which the trial court sentenced her respectively to serve two years' imprisonment consecutive to and followed by one year's probation. We affirm.

Defendant was charged in connection with allegations that she, in the course of an argument between her boyfriend and the complaining witness, pointed a gun at the complainant and threatened to kill her. On appeal, she argues that defense counsel frustrated her desire to testify in her own behalf, that the prosecutor improperly commented on defendant's silence, and that defense counsel was ineffective.

I. Whether to Testify

The decision whether to testify is ultimately the defendant's to make personally, and counsel must respect that decision. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987). Accordingly, if the accused expresses the desire to testify, the trial court must permit him or her to do so, even if defense counsel objects. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). However, no formal proceeding is required to waive the right to testify. See *id.* at 684. Instead, if the defendant "acquiesces in his attorney's decision that he not testify, the right will be deemed waived." *Id.* at 685 (internal quotation marks and citation omitted). Given the absence of any indication on the record that defendant wished to exercise her right to testify, defendant waived that right.

II. Prosecutorial Misconduct

Defendant complains that the prosecutor improperly made use of her decision not to testify. See *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993), citing MCL 600.2159. Defendant argues that only she could have provided evidence to contradict the prosecutor's witnesses, and thus that commenting on the lack of such contradiction was effectively commenting on defendant's silence. However, neither of the complained of remarks drew any defense objections. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Commentary to the effect that the prosecution's evidence went un rebutted can act as a reminder that the defendant chose not to testify and should be reviewed in context to determine whether the comments were "manifestly intended to be . . . of such a character that the jury necessarily took them to be a comment on the failure of defendant to testify." *People v Guenther*, 188 Mich App 174, 179; 469 NW2d 59 (1991). Our review of the entire argument reveals that the prosecutor's remarks about certain evidence being uncontroverted did not at all focus attention on defendant's silence. Instead, the argument emphasized the strength of the prosecution's case, not any weakness on the part of the defense.

Moreover, the trial court instructed the jury to decide the case solely on the evidence, that the statements of counsel were not evidence, and, most importantly for present purposes, that defendant had no obligation to prove anything and thus that her silence in court could not be used against her. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). For these reasons, defendant's claim of prosecutorial misconduct must fail.

III. Assistance of Counsel

Defendant also casts her arguments in terms of ineffective assistance of counsel. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Because defendant did not move for a new trial or a *Ginther*¹ hearing below, this Court's review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

A defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *Id.* Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be sound strategic

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

decisions. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). To overcome that presumption, a defendant must show that counsel's failure to prepare for trial resulted in counsel's remaining ignorant of substantially beneficial evidence that accordingly did not get presented. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Defendant first asserts that counsel was ineffective in failing to call her to testify. This Court will not assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Defendant points out that she could have testified that she was carrying a cellular telephone instead of a firearm, and that the jury would then have been able "to assess her testimony and demeanor," but fails to acknowledge that she would then have been subject to the prosecutor's cross-examination, let alone explain why this Court should presume that her attorney's direct examination would have been more beneficial to her than the prosecutor's cross-examination would have been detrimental. Defendant fails to overcome the presumption that defense counsel's decision against her testifying was not sound trial strategy.

Defendant additionally argues that defense counsel's failure to object to the parts of the prosecutor's closing argument discussed above constituted ineffective assistance. However, the prosecutor's comments were not improper. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Defendant further argues defense counsel failed to call witnesses whose names had been brought to his attention, to object to prejudicial testimony, to impeach the complainant with a prior inconsistent statement, and that he asked irrelevant or improper questions. Defendant has failed to provide support for the majority of these claims. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Last in defendant's litany of alleged attorney errors is the assertion that defense counsel stated that there was no definition of "reasonable doubt." During closing argument, defense counsel admonished the jury to find defendant not guilty if they were left with some doubt about the prosecutor's case. Counsel was obviously hoping to persuade the jurors to give sway to any doubts that they might harbor regarding defendant's guilt; the remarks could hardly have caused the jurors to become less mindful of their duty to find defendant not guilty if they held reasonable doubts over any of the elements of the crimes.

Moreover, the trial court instructed the jury on reasonable doubt and instructed the jurors that they must apply the law as given by the court, and that such information coming from the court must trump anything contrary coming from the attorneys. For these reasons, we must reject defendant's claim of ineffective assistance of counsel.

IV. Cumulative Error

Defendant finally argues that if no single claim of error itself warrants reversal, such relief is required in the face of the cumulative effect of all such errors. See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). However, where defendant has failed to show

any error at all, there was no accumulation of error of which to make issue. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski