

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALID A. HAMAOU,

Defendant-Appellant.

UNPUBLISHED

December 14, 2004

No. 247032

Wayne Circuit Court

LC No. 02-010544

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

PER CURIAM.

Defendant was convicted, following a jury trial, of three counts of felonious assault, MCL 750.82. He was sentenced to one-year probation. Defendant appeals as of right, and we affirm.

Defendant's convictions arise out of his assault of three victims with a handgun in front of the Forest Apartments in Detroit. The encounter between defendant, a former Detroit Police Officer, and the victims, Wayne State University football players, began when the car in which the victims were traveling was forced into oncoming traffic to avoid a collision with defendant's vehicle, when it cut into their lane of travel. Ultimately, the victims were exiting their vehicle in front of their apartment building when defendant pulled up, displayed a weapon, displayed a badge, and exchanged words with the victims. On the contrary, defendant's friend testified that one of the victims approached defendant's vehicle while "fidgeting" with his shirt and cursing. As a result of the gestures, defendant displayed his weapon at his side and identified himself as a Detroit Police Officer. The jury rejected the self-defense theory and convicted defendant as charged.

Defendant first alleges that the trial court erred by allowing the prosecutor to rehabilitate a victim's testimony through admission of prior consistent statements. We disagree. The admission of evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). The trial court's decision to admit this evidence was not an abuse of discretion because the victim testified at trial and the prior statement was offered to rebut the defense's allegations of fabrication or improper influence. See MRE 801(d)(1); *People v Rodriguez (On Remand)*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996).

Defendant next alleges that nine instances of error occurred which constituted prosecutorial misconduct. We disagree. A claim of prosecutorial misconduct is a constitutional

issue reviewed de novo by this Court. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved claims of prosecutorial misconduct, however, are reviewed by this Court for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). No error occurred if a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review the prosecutor's conduct on a case by case basis, examining the record and evaluating remarks in context and in light of the defense arguments, to determine whether the defendant was deprived of a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). A prosecutor may argue the evidence and all reasonable inferences arising there from as it relates to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant's contention that it was improper for the prosecutor to rehabilitate a victim's testimony with a prior consistent statement is without merit. The admission was proper where the victim was present at trial to defend or explain the statement. *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1369 n 9; 158 L Ed 2d 187 (2004). Similarly, defendant's contention that the prosecutor improperly questioned the defense witness regarding his motive and the timing of his statement to police is without merit. *People v Gray*, 466 Mich 44, 47; 642 NW2d 660 (2002).

We reject the remaining claims of prosecutorial misconduct that include claims that the prosecution unfairly attacked defendant and defense counsel, that the defense was distorting the evidence to mislead the jury, that facts not in evidence were argued to the jury, that the prosecutor questioned the self defense claim and the timing of the claim, and that the prosecutor questioned the lack of a police report. Upon review of the entire record, we note that the prosecutor did argue facts in evidence or reasonable inferences arising from the evidence and responded to arguments or evidence raised by the defense. *Thomas, supra*. The prosecutor, in his role as advocate, need not phrase argument in the blandest of terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Moreover, the trial court's instructions that the lawyer's statements and arguments were not evidence is sufficient to dispel any prejudice. *People v McPherson*, 263 Mich App 124, 140; 687 NW2d 370 (2004).

Defendant next alleges that he received ineffective assistance of counsel. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because no testimonial record was established at a *Ginther*¹ hearing, this Court's review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To support a claim of ineffective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional

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

norms, and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *Id.*

Defendant contends that trial counsel was ineffective for failing to advise him of his right to testify in his own defense, failing to call witnesses, and failing to move to disqualify the jury venire based on the comment of a potential juror. Defendant has failed to meet his burden of establishing ineffective assistance of counsel. *Solmonson, supra*. The trial court concluded that defendant had special knowledge as a police officer and conferred with counsel throughout trial. We cannot conclude that this finding is clearly erroneous. *LeBlanc, supra*. Moreover, the decision regarding what evidence to present and whether to call or present witnesses is presumed to be a matter of trial strategy for which we will not substitute our judgment or assess with the benefit of hindsight. *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). As the trial court noted, the prosecutor had a strong case with the presentation of five witnesses with minor disparities in their recollection of the incident. Thus, the defense submitted its theory of self defense through the testimony of defendant's friend. Additionally, the potential juror did not improperly bolster the credibility of one of the victims. Rather, the juror noted that he was familiar with one of the names of the victims and that he did not allow his son to move to the apartment building where this incident occurred. This challenge is without merit.

Defendant next alleges that one conviction was against the great weight of the evidence, and there was insufficient evidence to support the other two convictions. We disagree. It is the role of the trier of fact, not the appellate court, to determine the inferences that may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The assessment of credibility, when presented by two diametrically opposed versions of events, rests with the trier of fact. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). We do not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 amended 441 Mich 1201 (1992).

In the present case, the jury was presented with two different versions of events. The cumulative testimony of the victims and two witnesses indicated that defendant was alone in his vehicle, pointed a gun at the victims, and exchanged words with the victims following a traffic incident. On the contrary, defendant's friend testified that he was in the car with defendant and one of the victims approached cursing and making furtive gestures that caused defendant to present his weapon at his side. The jury resolved this issue in favor of the victims, and we do not interfere with the jury's determination. *Wolfe, supra*.²

² Because we have found no single error on any issue, there can be no cumulative effect of multiple errors. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood