STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAMAL VINCENT BROWN,

Defendant-Appellant.

UNPUBLISHED
December 14, 2004

No. 251614
Wayne Circuit Court
LC No. 03-005782-01

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

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to thirty-five to fifty years in prison for the second-degree murder conviction, 1 ½ to 5 years in prison for the felon in possession of a firearm conviction and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's first issue on appeal is whether the prosecution failed to present sufficient evidence to support his convictions. Defendant does not challenge the sufficiency of the evidence regarding particular elements of the offenses, but rather, argues that there is insufficient evidence to support his convictions given the inherently incredible testimony of the prosecution's key witnesses, Chavez Smith[1] and Adrian Walker. We disagree.

This Court reviews the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In sufficiency of the evidence claims, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004). The standard of review for sufficiency of the evidence claims is deferential as "'a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.'" *Id.* at 623-624, quoting *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003).

[1] Chavez Smith will be referred to as "Chavez."

We hold that, viewing the evidence in the light most favorable to the prosecution and drawing all credibility determinations in support of the jury verdict, the evidence was sufficient to support defendant's convictions. Although Chavez and Walker contradicted their prior statements and gave conflicting testimony, the jury apparently found the witnesses credible. At trial, Chavez testified that defendant and Mario Smith[2] exchanged angry words. After this exchange, defendant, wearing a black hooded sweatshirt, got into the driver's seat of a green Grand Am. While Chavez was walking home approximately forty-five minutes later, he saw Mario and Walker one block away, standing at the corner of Chalmers and Frankfort. Chavez saw defendant driving the green Grand Am on Chalmers. Defendant stopped the car and pointed a nickel-plated revolver out the driver's side window at Mario. Chavez heard four to six shots and saw Mario run toward Chandler Park. Chavez' assertion that Mario was shot with a revolver was corroborated by police testimony that no casings were found at the scene. Chavez' depiction of events is also supported by the medical examiner's testimony that there was no evidence of close range firing.

After Chavez was arrested for home invasion, he told the police that defendant shot Mario. Chavez offered an explanation for his delayed reporting of this information: he was no longer scared to come forward because he was locked up and defendant could not get to him. When the police re-interviewed Chavez several months later, Chavez recanted. He told the police that he did not see defendant shoot Mario, but rather, Chavez' cousin's girlfriend told him that she saw the shooting and his girlfriend's father told him that Mario was dead. At trial, Chavez explained that he lied to the police because he was threatened and afraid for his family.

Walker's testimony contained similar inconsistencies and contradicted Chavez' testimony in certain respects. On the night of the shooting, Walker saw a green Grand Am parked outside Skateland. Walker heard a man inside the Grand Am tell Mario to get in the car. Mario refused and the car drove away. Walker walked to a gas station to call his grandmother for a ride home. At the gas station, Walker saw the green Grand Am. When the passenger got out of the car, a gun fell from the pocket of his black hooded sweatshirt. The passenger picked up the gun and put it back in his right front pocket. Walker later identified the passenger wearing the black hooded sweatshirt as defendant.

Walker called his grandmother and arranged to be picked up at Skateland. While walking toward Skateland, Walker saw someone at least a block away from him on Frankfort Street near Chalmers. Walker also saw the green Grand Am traveling down Frankfort toward Chalmers. A man got out of the passenger seat and shot Mario.

Officer Lonze Reynolds later interviewed Walker. Walker told Reynolds that he did not see Mario get shot and that he only claimed to have witnessed the shooting because he thought it would help Mario. At trial, Walker explained that when he told Reynolds that he did not see Mario get shot, he meant that he did not see where the bullet hit Mario.

[2] Mario Smith will be referred to as "Mario."

Reynolds re-interviewed Walker and showed him a photograph of defendant. Reynolds testified that Walker initially identified defendant as the driver of the green Grand Am. However, at trial, Walker asserted that he did not say that defendant was the driver, but rather, he told the police that defendant was the passenger. Also, Walker told the police that the person with the gun was wearing a red leather jacket. At trial, Walked claimed that he was confused by the officer's questions, but told the police that the person with the gun was wearing a black sweatshirt.

Despite the deficiencies that defendant highlights in Chavez' and Walker's testimony, the jury was presented with all of the evidence and was free to conclude that they were, nonetheless, credible witnesses. *People v Fletcher*, 260 Mich App 531, 562; 670 NW2d 127 (2004). This Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of witnesses. *Id.* It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Thus, the credibility issues raised by defendant do not render the evidence insufficient to support the verdict.

Defendant's second issue on appeal is whether defendant was denied his rights to due process and a fair trial when a prosecution witness, Officer Reynolds, mentioned that Chavez had taken a polygraph examination. Again, we disagree.

Defendant failed to object to the polygraph reference on the record and did not request a mistrial, therefore, the issue is not preserved. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). An unpreserved challenge to the introduction of polygraph evidence is reviewed for plain error that affected the defendant's substantial rights. *People v Jones*, 468 Mich 345, 354-355; 662 NW2d 376 (2003); *Nash, supra* at 97. "'To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Jones, supra* at 355, citing *Carines, supra* at 763.

"The bright-line rule that evidence relating to a polygraph examination is inadmissible is well established." *Jones, supra* at 355; *Nash, supra* at 97. Although inadmissible, references to polygraph tests do not always constitute error warranting reversal. *Id.* at 98. This Court examines the following factors to determine whether reversal is required:

> "(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness' credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." [*Nash, supra* at 98, quoting *People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981).]

The above factors are useful in determining whether defendant was prejudiced by the reference to the polygraph examination. *Id.*

We hold that, although the reference to the polygraph test constituted plain error, it did not affect defendant's substantial rights. As reference to a polygraph examination is inadmissible, plain error occurred when Officer Reynolds mentioned that Chavez had taken a polygraph examination. However, applying the factors above, defendant was not prejudiced by the reference to the polygraph examination.

First, defendant did not object to the testimony and did not seek a cautionary instruction. Additionally, prior to Reynolds' reference to the polygraph, defendant attempted introduce evidence of Chavez' polygraph. Defendant argued that the jury should know that Chavez recanted when he knew he was heading into a polygraph exam. Reynolds' testimony that he became aware that Chavez had recanted after he received the results of the polygraph was, in effect, what defendant wanted to admit into evidence.

Second, the reference to the polygraph was inadvertent. Defendant argues on appeal that the prosecutor elicited the testimony. However, while questioning Reynolds regarding the polygraph reference, defense counsel explicitly stated, "[w]e are not accusing this counsel [the prosecutor] of anything." Defense counsel also implicitly conceded that the prosecutor did not elicit the reference to the polygraph, asking Reynolds why, in response to the prosecutor's question not pertaining to polygraphs, he mentioned Chavez' polygraph. Similarly, Reynolds testified that his reference to the polygraph test was inadvertent. Reynolds had been warned by the prosecutor not to mention the polygraph test, and he simply made a mistake.

Third, there was only one brief reference to Chavez' polygraph in the presence of the jury. Fourth, the reference was not an attempt to bolster a witness' credibility. Reynolds' neutral, inadvertent reference to Chavez' polygraph examination was made in the context of explaining his awareness that Chavez had recanted. Reynolds' testimony regarding the polygraph was not responsive to the prosecutor's question that called for only a yes or no answer. After the prosecutor asked whether Reynolds was aware that Chavez had recanted, Reynolds explained that he became aware of the change, "when I got the results of the polygraph." Fifth, the results of the polygraph examination were not admitted.

Although the reference to the polygraph constituted plain error, the reference did not affect defendant's substantial rights. Defendant failed to show prejudice. *Carines, supra* at 763; *Nash, supra* at 97. There was no error warranting reversal. The only reference to the polygraph in the presence of the jury was brief, inadvertent, neutral and did not mention results. Given the context of the reference and the other evidence presented against defendant, the reference to the polygraph did not result in the conviction of an innocent defendant or seriously affect the fairness, integrity or public reputation of the judicial proceedings. *Jones, supra* at 355.

Defendant's third argument on appeal is that the trial judge violated his constitutional rights to a fair trial, to confront Chavez and to present a defense by refusing to admit an allegedly threatening letter from defendant to Chavez. We disagree.

The party seeking admission of excluded evidence must make an offer of proof at trial to preserve the issue of the admissibility of the evidence for appeal. MRE 103(a)(2); *People v*

Witherspoon, 257 Mich App 329, 331; 670 NW2d 434 (2003). When defendant read the letter into the record, he made an offer of proof that established the substance of the excluded evidence, and thus, provided the trial court with an adequate basis on which to make its ruling and provided this Court with a basis to evaluate the admissibility of the letter.[3] However, defendant failed to preserve his constitutional right to a fair trial, right to confront and right to present a defense challenges by not raising them before the trial court. See *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004).

This Court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). When the decision involves a preliminary question of law, such as whether a rule of evidence precludes the admission of the evidence, the question is reviewed de novo. *Id.* at 412. However, even if erroneous, an evidentiary ruling does not warrant reversal unless it involves a substantial right and, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Moorer, supra* at 74. This Court reviews unpreserved evidentiary error, including alleged constitutional error, for plain error affecting defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Therefore, defendant's constitutional claims are reviewed for plain error affecting defendant's substantial rights.

Generally, all relevant evidence is admissible. MRE 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The credibility of a witness is a material issue. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995). Any party may attack a witness' credibility. MRE 607; *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002).

We hold that the trial court did not err in refusing to admit the letter into evidence. Even if erroneous, the refusal was harmless and did not deny defendant his rights to a fair trial, to confront Chavez and to present a defense.

Outside the presence of the jury, defendant moved to admit a letter from defendant to Chavez, arguing that the letter was relevant to show the jury that Chavez was not threatened. Chavez testified that he recanted his prior statements after receiving threats. Defendant recanted his prior statements that he witnessed defendant shoot Mario on July 17, 2003. The letter that defendant sought to admit was dated July 28, 2003, and therefore, could not have caused Chavez to recant. Moreover, Chavez did not assert that this particular letter was threatening or caused him to recant. At trial, Chavez explained that he lied to the police and recanted his statements because he had received numerous threatening phone calls and letters, and thus, was afraid for himself and his family.

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[3] On appeal, defendant argues that the trial court's refusal to admit the letter as impeachment evidence denied defendant his rights to a fair trial, to confront Chavez and to present a defense. Although, at trial, defendant did not explicitly state that he sought admission of the letter to impeach Chavez' claim that he recanted after receiving threats, this purpose was implicit in defendant's stated purpose.

Given that the relevancy threshold is minimal, the letter has some probative value with respect to the alleged threats and Chavez' credibility. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). However, the letter's probative value tends to support Chavez' credibility. The letter could be construed as threatening Chavez. As the trial court noted, quoting from the letter, "'And one day I'll see you. I promise.' That sounds like a threat to me." The probative value of the letter regarding whether Chavez recanted because he was threatened was slight.

Even if the trial court erred in excluding the letter, the error does not warrant reversal of defendant's convictions. It does not affirmatively appear that it is more probable than not that any error was outcome determinative. *Moorer, supra* at 64. The single letter written after Chavez recanted had little probative value regarding whether Chavez recanted because he was threatened by defendant and the letter tended to support Chavez' credibility. Additionally, defendant cross-examined Chavez regarding the alleged threats, including the threatening letters, and during closing argument, questioned Chavez' claim that he was threatened. Given that the letter tended to support Chavez' credibility and defense counsel cross-examined Chavez about the alleged threats, defendant was not prejudiced by the exclusion of this particular letter and this Court will not reverse defendant's convictions on that basis.

For the reasons stated above, reversal is not warranted on the basis of defendant's unpreserved constitutional challenges. Defendant did not establish plain constitutional error. The trial court's refusal to admit the letter did not result in a denial of defendant's rights to a fair trial, to confront Chavez and to present a defense. Defendant was not denied the opportunity to effectively cross-examine Chavez regarding the alleged threats and Chavez' explanation for his inconsistent statements. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). During cross-examination of Chavez and closing argument, defense counsel pursued the theory that Chavez' inconsistent statements could not be explained by the alleged threats. Therefore, reversal is not required on the basis of defendant's unpreserved constitutional challenges.

Defendant's fourth issue on appeal is whether he was denied the right to a fair trial by the prosecutor's misconduct. Defendant argues that he was denied a fair trial when the prosecutor improperly vouched for Chavez' credibility, called defendant a liar and denigrated the defense. We disagree.

Defendant did not object to the alleged instances of prosecutorial misconduct at trial. Unpreserved claims of prosecutorial misconduct are reviewed under the plain error test. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). When reviewing claims of prosecutorial misconduct, this Court will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

The propriety of a prosecutor's comments depends on the facts of the particular case. *Thomas, supra* at 454. This Court reviews the pertinent part of the record and examines a prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *Id.* A prosecutor may argue the evidence and all reasonable inferences arising from the evidence that relate to the theory of the case. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). Additionally, a prosecutor is not required to argue in the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

We hold that the claimed prosecutorial misconduct did not deprive defendant of a fair and impartial trial. First, the prosecutor did not vouch for Chavez' credibility. A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of the prosecutor's office. *People v Bahoda*, 448 Mich 261, 276, 286; 531 NW2d 659 (1995). Similarly, a prosecutor may not vouch for the credibility of a witness by suggesting that he has special, extrajudicial knowledge of the witness' truthfulness. *Thomas*, *supra* at 455. However, a prosecutor may comment on his own witness' credibility during closing argument. *Id.*

The prosecutor stated, "[t]wo things about Chavez Smith, ladies and gentlemen, that I believe is [sic] very compelling on an evidentiary value" are the facts that he had nothing to gain and no problems with defendant. "The propriety of the prosecutor's comments 'does not turn on whether or not any magic words are used.' The crucial inquiry is not whether the prosecutor said 'We know' or 'I know' or 'I believe,' but rather whether the prosecutor was attempting to vouch" for the witness' credibility. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995), quoting *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

Reading the prosecutor's use of "I believe" in context, the prosecutor neither asked the jury to convict defendant on the basis of her personal knowledge, nor improperly vouched for Chavez' credibility by suggesting that she had special knowledge of Chavez' truthfulness. Instead, the prosecutor used the evidence presented at trial, namely that Chavez had nothing to gain and no problems with defendant, and inferences drawn from that evidence to argue that Chavez had no motive to lie.

Second, the prosecutor did not call defendant a liar during her closing argument. A prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In discussing the credibility of Chavez, the prosecutor stated, "I anticipate [defense counsel] is going to say here is why you shouldn't believe Chavez Smith. He smokes marijuana, he is a convicted felon – so is [defendant] – he's a liar, he smokes marijuana, he is a convicted felon. So don't believe him." Considering the prosecutor's statement in context, "he's a liar," referred to Chavez. In anticipating defendant's argument that the jury should not believe Chavez because Chavez is a liar, smokes marijuana and is a convicted felon, the prosecutor merely mentioned that defendant is also a convicted felon. On appeal, defendant does not point to any other particular passages of the prosecutor's closing argument to support his claim that the prosecutor called defendant a liar. Thus, defendant has presented no plain error affecting his substantial rights.

Third, defendant argues that the prosecutor personally attacked and denigrated the defense by calling his argument "laughable and insulting." A prosecutor may not personally attack the defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Similarly, a prosecutor may not suggest that the defense counsel is intentionally trying to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, otherwise improper prosecutorial comments may not warrant reversal if the prosecutor is responding to the defense counsel's argument. *Id.*

The prosecutor's characterization of the defense as "laughable," "insulting" and "ludicrous" was made in rebuttal to defendant's closing argument, in which defense counsel argued that Chavez murdered Mario and asked the jury, "have I said anything that is not backed

up by what came out on that stand?" The prosecutor's characterizations highlighted the lack of evidence supporting defendant's theory of the case and were properly responsive to defendant's argument, and therefore, did not warrant reversal. As this Court recently stated, "while the prosecutor's assertion that the defense argument was 'ridiculous' may have been characterized differently, a prosecutor does not need to state arguments in the blandest possible terms." *People v Matuszak*, 263 Mich App 42, 55-56; 687 NW2d 342 (2004) citing *Aldrich, supra* at 112.

Several of the prosecutor's remarks also suggested that defense counsel was attempting to mislead the jury. The prosecutor referred to the defense as a "wild tale by defense counsel." Similarly, the prosecutor suggested that defense counsel was running a "bait and switch" and attempting to distract the jurors by pointing a finger at Chavez. Although these remarks were improper, reversal is not warranted. The prosecutor's comments were made in response to defense counsel's closing argument which was unsupported by the evidence. See *Watson, supra* at 592.

Additionally, this Court will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Ackerman, supra,* 257 Mich App 449. A timely, curative instruction could have eliminated any prejudice that the prosecutor's comments may have caused. Also, absent an objection, the trial court's instructions that the case must be decided on the evidence and that the remarks of counsel are not evidence were sufficient to eliminate any possible prejudice. *Thomas, supra* at 455.

Lastly, defendant argues on appeal that he was denied the effective assistance of counsel when defense counsel failed to object to the alleged instances prosecutorial misconduct. As defendant failed to move for a new trial or evidentiary hearing on this claim, this Court's review is limited to the existing record. *Thomas, supra* at 456. The determination of whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). After finding the facts, the trial court must decide whether those facts constitute a violation of defendant's constitutional right to effective assistance of counsel. *Id.*, citing *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. *LeBlanc, supra* at 579.

To establish a denial of effective assistance of counsel under the state and federal constitutions:

> "'first the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment.' In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. 'Second, the defendant must show the deficient performance prejudiced the defense.' To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" [*People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003), quoting *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), quoting *Strickland v*

Washington, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (internal citations omitted).]

We hold that defendant was not deprived of the effective assistance of counsel by defense counsel's failure to object to the alleged prosecutorial misconduct. As the prosecutor's remarks regarding Chavez' credibility, defendant's credibility and the "laughable" defense were not improper, any objection to these remarks would have been futile. "Counsel is not ineffective for failing to make a futile objection." *Thomas, supra* at 457.

Although defense counsel failed to object to the prosecutor's two improper remarks, defense counsel's performance was not necessarily deficient. Defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *Hill, supra* at 138. The failure to object can constitute sound trial strategy. *People v Rice*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Even if defense counsel's failure to object to the prosecutor's improper remarks could be considered deficient, defendant failed to demonstrate prejudice. Defendant is required to demonstrate the existence of a reasonable probability that, but for defense counsel's error, the result of the trial would have been different. *Hill, supra* at 138. Any possible prejudice was alleviated by the trial court's instructions to the jury that the case was to be decided on the evidence and that the comments of counsel were not evidence. See *Thomas, supra* at 455. Therefore, defendant failed to demonstrate ineffective assistance of counsel.

Affirmed.

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