STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2005
v	No. 255448 Allegan Circuit Court
LEONARD PRELESNIK, Defendant-Appellant.	LC No. 03-013289-FH

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felonious assault, MCL 750.82. The trial court sentenced defendant to a six-month jail term with two months to be served, the remaining four months at the court's discretion, and two years' probation. Because we do not find any of defendant's arguments persuasive, we affirm.

This case arose out of a dispute between defendant and his next-door neighbor Vanetta Crum. Defendant and Crum both lived in a townhouse complex in Holland. Testimony at trial indicated that several complex residents including defendant and Crum had previously agreed to keep the noise level down and not to have loud parties in an effort to quell neighborhood problems. On the evening in question, Crum had about five of her friends over and they were socializing in her driveway. Defendant went to Crum's townhouse, photographed the people in the driveway, got into an altercation with one of Crum's guests, and then returned home.

Crum testified that she wanted to find out what was wrong so she went over to defendant's townhouse to talk to defendant. After defendant's girlfriend let Crum in, defendant came down the stairs pointing a gun at her. Crum left immediately and called the police. Police arrived at the scene to investigate. Defendant admitted to owning several guns but stated they were located at his other residence in Arizona and that he did not have any guns in his townhouse in Holland. After obtaining a search warrant, the police located a loaded gun, outside of its case, with the safety off, in a file cabinet under a pile of papers in defendant's townhouse. Police arrested defendant who maintained that Crum mistook his camera for a gun.

Defendant argues that his Sixth Amendment right to counsel was violated when he made an incriminating statement to Sergeant Velthouse that was errantly admitted against him at trial. Defendant further asserts that defense counsel provided ineffective assistance for failing to move to suppress this testimony before trial or object to it at trial. Because defendant failed to move to

suppress his statement to Velthouse, or object to its admission at trial, we review this unpreserved, constitutional issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The Sixth Amendment right to counsel attaches at the initiation of adversary judicial criminal proceedings. *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977); *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). This right provides that a criminal defendant shall enjoy the right to the assistance of counsel at "critical stages" of the proceedings. See *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). "Therefore, after formal adversarial proceedings have begun and the defendant asserts the right to counsel either at questioning or arraignment, 'the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police.'" *Id.* at 402, citing *People v Bladel*, 421 Mich 39, 66; 365 NW2d 56 (1984). But "[I]f a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right." *Bladel*, *supra* at 66.

The conversation defendant refers to occurred on July 21, 2003 between defendant and Velthouse. A review of the record reveals that defendant was arraigned and appointed counsel on July 16, 2003, days before the conversation occurred. Further, testimony at trial indicated that defendant initiated the communication with Velthouse.[1] The record also shows Velthouse did not deliberately elicit statements from defendant, and that the conversation did not occur in a custodial situation.

Whether defendant waives his Sixth Amendment right to counsel by initiating communications with police depends upon the circumstances of the case, including the defendant's background, experience, and conduct. *People v McElhaney*, 215 Mich App 269, 274; 545 NW2d 18 (1996). The giving of *Miranda*[2] warnings is sufficient to establish that a post-indictment waiver of counsel was knowing and intelligent. *Id*. at 275. Although the record indicates that Velthouse did not give specific *Miranda* warnings to defendant during this conversation, it is clear from the record that defendant initiated the communication and chose to continue the conversation after Velthouse informed him of the circumstances under which they could speak. Plainly, defendant's right to counsel was not violated. We also conclude that defense counsel was not ineffective in failing to object to this testimony either before or during trial, because defense counsel is not required to make futile objections. See *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant next argues that he was denied a fair trial and his right to confrontation based on Velthouse's testimony that Officer John Osborn told him that defendant had admitted to

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[1] Velthouse stated, "I explained to Mr. Prelesnik on the phone indicating to him that I knew he had been arraigned and he had been appointed counsel and explained to him that I could not talk to him unless he was making contact with us, and I asked him if he still needed to talk to us or wanted to and he indicated yes."

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

handling his handgun on the night of the incident. Defendant also argues that defense counsel provided ineffective assistance for failing to object to this testimony at trial. We review this unpreserved issue for plain error. *Carines, supra* at 764. In support, defendant cites the United States Supreme Court's holding in *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1374; 158 L Ed 2d 777 (2004), that for testimonial hearsay evidence to be admissible against a defendant, the declarant must be unavailable and the defendant must have had "a prior opportunity for cross-examination" of the declarant.

A review of the record reveals that the contested statements were not hearsay because the statements were not offered for the truth of the matter asserted. See MRE 801(c). The context of the testimony clearly indicates that the statement was part of Velthouse's explanation regarding why he did not believe the gun should be have been tested for fingerprints. And, Osborn previously testified to the contested statement at trial. Thus, any hearsay objection by defense counsel would have been futile, and defense counsel's failure to object to this testimony does not constitute ineffective assistance of counsel. *Milstead, supra* at 401.

Defendant next argues that defense counsel provided ineffective assistance at trial. The denial of effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). These are reviewed, respectively, for clear error and de novo. *Id.* A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or a motion for new trial before the trial court, or our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In the present case, our review is limited to mistakes apparent on the record because the trial court did not hold a *Ginther* hearing.

The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. To establish ineffective assistance, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

> Defendant argues that defense counsel provided ineffective assistance because he did not call witnesses Jeff Osborn, Aumond Johnson, and Garry Morris to testify at trial. Defendant contends that each of these witnesses would testify that Crum filed false police reports against these witnesses and that the charges against these witnesses were later dismissed. However, had these

witnesses been called to testify, their testimony would have been inadmissible character evidence under MRE 608(b).[3]

Further, the decision to call or question witnesses is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call or question witnesses, or present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense, which might have made a difference in the outcome of trial. *Id*. This Court will neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor will it evaluate counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Even if the proposed testimony relayed the type of specific instance of conduct admissible under MRE 608(b), the defense could not properly present it during direct examination of the three witnesses at issue. The record indicates that defense counsel chose to attack Crum's memory of the incident on cross-examination. This was a matter of trial strategy that did not deprive defendant of a substantial defense.

Defendant alleges several instances of prosecutorial misconduct during the prosecutor's closing argument, and also argues that defense counsel was ineffective assistance for failing to object to these comments. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Because the present claims of prosecutorial misconduct are unpreserved, we will review the issue for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Prosecutorial misconduct is decided case by case, and this Court must consider the relevant part of the record and examine the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*. Prosecutors are "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). They are given wide latitude and

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[3] MRE 608(b) provides,

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character of truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

need not confine their arguments to the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Defendant first argues that the prosecutor unfairly vouched for Crum's credibility and bolstered her testimony. A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda, supra* at 276. In addition, a prosecutor may not argue for conviction based upon the prestige of his office or an opinion of the police that a defendant is guilty. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). However, the record neither shows that the prosecutor's statements were made with any inference of special knowledge that Crum was telling the truth, nor does it show that the prosecutor used her position to her advantage. Further, a prosecutor is allowed to comment on his own witnesses' credibility during closing argument. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004); *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). We conclude that based upon the testimony at trial, the prosecutor's statements are within the scope of the wide latitude enjoyed by prosecutors regarding their arguments and conduct. *Bahoda, supra* at 282.

Defendant also argues that the prosecutor improperly burdened defendant's exercise of his Fourth Amendment right against unreasonable search and seizure by stating to the jury that defendant forced police to obtain a search warrant for his residence. Defendant seeks to support his argument by reference to case law indicating that the Fifth Amendment forbids the prosecutor from commenting on an accused's post arrest silence. However, defendant cites no authority that there is any such analogous prohibition relating to the Fourth Amendment's search and seizure constraints. "A party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Bahoda, supra* at 282. Because the prosecutor's statement was properly based upon testimony at trial, defendant has not shown plain error.

Defendant next argues that the prosecutor improperly shifted the burden of proof to defendant by stating the following: "defense counsel didn't bring forward any witnesses to support something about this prior controversy. If he wanted you to have information about this conflict that he says there's more to, where are his witnesses for that," and "there's no evidence in this trial to show that Vanetta Crum is a liar." While defendant correctly notes that a prosecutor bears the burden of proof in a criminal case, *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987), we conclude that the doctrine of "fair response" is applicable to this case.

Our Supreme Court adopted the "fair response" doctrine in *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995). Under it, while a prosecutor's comments that infringe on a defendant's right to refrain from testifying may constitute error, it is permissible for a prosecutor to comment on the defendant's failure to call or produce witnesses to support an alternate theory of the case if one is offered. *Id*. at 111-112, 115. An argument that the defendant has not produced corroborating witnesses or evidence points out the weakness in his case. *Id*. at 112. Therefore, unless the prosecutor's comments burden the defendant's right not to testify, or shift the burden of disproving an element of the offense to the defendant, they are not improper. *Id.* at 112-113.

The prosecutor's comments constituted a permissible response to defense counsel's closing argument, in which he argued that Crum provided inconsistent statements about the incident and that there was "more to this earlier conflict that's been [al]luded to so often than Vanetta is willing to describe." In addition, defense counsel argued an alternate theory, that defendant had his camera in his hand, and also argued that Crum's claim that defendant pulled a gun on her was a lie. Defense counsel also attacked the police work conducted, and argued that the officers did not attempt to locate any of Crum's friends to find out their version of the events. Defendant has not established prosecutorial misconduct that denied him a fair and impartial trial. Defendant's associated ineffective assistance of counsel argument also fails. *Milstead*, *supra* at 401.

Defendant also filed a supplemental brief. In it, he argues that all references to his prior conviction must be deleted from his PSIR because that conviction has been expunged. Defendant relies on MCL 780.622(1) which states, "Upon entry of an order pursuant to section 1, the applicant, for purposes of the law, shall be considered to not have been previously convicted, except as provided in this section and section 3." However, subsection MCL 780.623 (2)(c) states that the record shall be nonpublic and made available to a court of competent jurisdiction only for certain purposes, one of which is "The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year." Defendant's conviction in the present case was for felonious assault, MCL 750.82, a felony. Therefore, the mention of the conviction in the PSIR was proper and this issue is wholly without merit.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio