

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NOE NAVARRO,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 259292

Wayne Circuit Court

LC No. 04-006505-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAMON NAVARRO,

Defendant-Appellant.

No. 259293

Wayne Circuit Court

LC No. 04-006505-02

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

In a joint trial, a jury convicted defendants Noe and Ramon Navarro of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84,¹ and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendants to concurrent prison terms of 19 months to 10 years for each assault conviction, and a consecutive two-year term for the felony-firearm conviction. Both defendants appeal, and we affirm.

I. Facts

¹ Both defendants were acquitted of assault with intent to commit murder, MCL 750.83.

On April 16, 2004, at approximately 11:00 p.m., Rodrigo and Roberto Tapia spray painted graffiti on the garage of a house on Pearl Street in Detroit. Rodrigo wrote a symbol that refers to a particular gang, while Roberto crossed out an existing symbol on the garage, which represented a different gang, i.e., “Mertos.” As the Tapia brothers walked away, someone started shooting at them. Rodrigo testified that he saw sparks on the ground and, when Roberto looked back, he saw gunfire originating from the porch area of a house, which was later identified as defendant Noe’s residence. The victims testified that they heard about six gunshots, but could not identify who was shooting. Rodrigo was shot in the bottom of his right foot, and the top of his buttocks.

In the meantime, the police received a radio report of gunshots fired on Pearl Street. When the police knocked on defendants’ door, defendant Noe Navarro answered. Noe told the police that there were no guns in the house, and no one inside had been shot. According to the police testimony, Noe gave the officers his consent to search the house. When an officer went into the basement, he saw defendant Noe’s brother, defendant Ramon. Ramon allegedly told the police that there were no weapons in the basement. An officer testified that he subsequently noticed the end of an SKS rifle protruding from a rolled-up carpet. On top of the rifle was a bag with ammunition for the rifle. The police also allegedly observed graffiti associated with the Mertos gang in the basement and in an upstairs bedroom. In the same upstairs bedroom, the police found a loaded .22 caliber semi-automatic pistol in a dresser drawer. The police found a total of five spent shell casings in and around defendants’ house; one spent shell casing was found in the kitchen, one was found on the back porch, and three were found on the ground beneath the porch. Four of the casings were determined to have been fired from the SKS rifle, and the remaining casing was determined to have been fired from the .22 pistol. Gunshot residue was found on both of defendant Noe’s hands, and on one of defendant Ramon’s hands. According to the police testimony, when questioned about what occurred, defendant Noe stated, “I thought I was being robbed so I shot at them.”

At trial, both defendants denied that they shot anyone and they denied having any gang affiliation or gang graffiti in their home. Noe also denied giving the police permission to search his home, and denied telling them that he shot at someone. Noe explained that he obtained the weapons from someone in lieu of payment for work, and admitted that he had shot the rifle on the ground a week before the incident. As noted, the jury convicted both defendants of two counts of assault with intent to do great bodily harm less than murder.

II. Prosecutorial Misconduct

Both defendants argue that they are entitled to a new trial because the prosecutor testified while questioning a defense witness, made an improper civic duty argument, and vouched for the prosecution’s witnesses. We disagree.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendants failed to object to some of the prosecutor’s conduct below. We review those unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in

part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. Improperly Testifying

Defendants argue that the prosecutor inserted his own testimony during his cross-examination of a defense witness, Father Donald Hanchon. A prosecutor may not inject himself into trial as a witness. See *Rodriguez, supra* at 35. However, after objecting to the prosecutor's questions, defendant Noe's counsel withdrew the objection. With regard to defendant Ramon, when given the opportunity to challenge the propriety of the prosecutor's questions, defendant Ramon's counsel chose not "to take a position on this." Given defense counsels' actions, defendants cannot now complain of an error. To hold otherwise would allow defendants to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Accordingly, any objection in this regard was waived, and there is no error to review. *Id.* at 214-216.

B. Civic Duty Argument

Defendants also contend that the prosecutor impermissibly appealed to the jurors' civic duty. Prosecutors should not resort to civic duty arguments that appeal to the prejudices of jurors. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Such arguments are condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence, and because they encourage the jurors to suspend their own powers of judgment. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, the prosecutor's comments must be considered in light of defense counsel's comments. See *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Here, the prosecutor did not suggest that the jury convict defendants on the basis of their civic duty, or as support for the police. Rather, viewed in context, the remarks focused on refuting defense counsels' assertions made during trial and closing argument that the responding police officers were deceitful, unnecessarily "barged" into defendants' home, and conducted a search, and should not be trusted or believed.² Moreover, in its final instructions, the trial court instructed the jury that the lawyers' comments are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, this claim does not warrant reversal.

² Defendant Noe moved for a new trial, arguing, *inter alia*, that the prosecutor impermissibly made a civic duty argument. We agree with the trial court which, in denying defendant Noe's motion, concluded that, given defense counsel's argument and comments regarding the police officers, the prosecutor "did not cross the line." The court noted that defense counsel "specifically had castigated and disparaged and indicted these officers."

C. Vouching

Defendants also contend that the prosecutor impermissibly vouched for the credibility of the victims and the police officers when he stated that they testified truthfully.

Defendants did not object to the prosecutor's remarks, and defendants have not demonstrated an error affecting their substantial rights. *Carines, supra*. Through their partial and selective recitation of the record, defendants have mischaracterized the prosecutor's arguments. Although a prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witnesses are testifying truthfully, *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), the challenged remarks did not suggest that the prosecutor had special knowledge that the prosecution witnesses were credible. Rather, the remarks were part of a permissible argument based on the testimony and physical evidence produced at trial. In making the challenged remarks, the prosecutor discussed the evidence at length, urged the jurors to evaluate the physical evidence as compared to defendant Noe's testimony and the prosecution witnesses' testimony, assess what makes "sense," and consider that defendants had a motive to lie and attack the prosecution witnesses' credibility to avoid being convicted. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case, including arguing from the facts that a witness is credible. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Consequently, this claim does not warrant reversal.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens