

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES E. CALHOUN,

Defendant-Appellant.

UNPUBLISHED

December 28, 2006

No. 264233

Wayne Circuit Court

LC No. 05-001746-01

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to two to five years in prison for the felon in possession of a firearm conviction, and 45 to 75 years in prison for the second-degree murder conviction. We affirm.

Defendant first argues that the prosecutor made improper remarks during closing argument that denied him a fair trial. We disagree. Defendant failed to preserve this issue at trial because he did not object to the prosecutorial remarks, thereby depriving the trial court the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Unpreserved claims of constitutional error are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture: 1) an error must have occurred, 2) the error must be clear or obvious, 3) and the error must have affected defendant's substantial rights, meaning it affected the outcome of the trial. *Carines, supra*, p 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Carines, supra*, pp 763-764, citing *Olano, supra*, pp 736-737.

In general, "[p]rosecutors are accorded great latitude regarding their arguments and conduct" and 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) (citations omitted). Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court examines the record and evaluates the remarks in context, taking into consideration defendant's arguments. *People v Thomas*, 260

Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may fairly respond to an issue raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995).

“[T]he prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed.” *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). In his closing argument, the prosecutor focused on the credibility of the witnesses throughout the argument, reminding the jury that the attorneys’ arguments are not evidence or the law and that the court would instruct them regarding the credibility of witnesses. The prosecutor argued that several witnesses, including Maurice Avery, were intimidated by defendant’s friends, so that they would not cooperate with the police and the prosecution. Avery had given the police a statement placing defendant at the scene of the shooting death of Jimmy Powell, but at trial, Avery testified that he had fabricated the entire statement. In the context of his argument, the prosecutor logically pointed out that Avery’s statement to the police differed significantly from his testimony, and argue that the reason for this difference was fear. In addition, the prosecution’s main witness was Barbara Spanish, whose testimony conflicted with the testimony of Avery. The prosecution also introduced into evidence tapes of recorded phone calls made by defendant to his friends from jail, discussing intended and actual intimidation of the witnesses.

Contrary to defendant’s argument, the prosecutor did not impermissibly refer to Avery’s statement to police as substantive evidence. Taken in the context of his entire closing argument, the inconsistent statements were clearly used to impeach Avery’s testimony and put in question its credibility. Because Avery’s testimony and the tapes of the phone calls were part of the evidence, the prosecutor was free to comment on them and argue reasonable inferences therefrom. *Bahoda, supra*, p 282; *Flanagan, supra*, p 796. In addition, defendant produced Avery as an alibi witness, and the prosecutor was permitted to respond to defendant’s alleged alibi. *Fields, supra*, pp 110-111. Finally, the court instructed the jury regarding what was permissibly considered as evidence, that the jury alone was the finder of facts, and that the jury determined the credibility of the witnesses and weight to be given to the out-of-court statements. Therefore, any possible error was dispelled by the trial court’s instruction and would not have affected the outcome of the trial. *Bahoda, supra*, p 281. Defendant was not deprived of a fair trial by the prosecutor’s remarks during closing argument.

Defendant next argues that he was denied the effective assistance of counsel because his attorney produced a witness, Betty West, who corroborated part of Spanish’s testimony. We disagree. Defendant has not fully preserved this issue for review. To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). “Failure to move for a new trial or *Ginther* hearing usually forecloses appellate review unless the appellate record contains sufficient detail to support defendant's claims.” *Marji, supra*, p 533. Because defendant did not move for a new trial or an evidentiary hearing before the trial court, this Court must review this issue on the basis of the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The determination whether defendant received ineffective assistance of counsel is a question of both fact and constitutional law. The trial court’s findings of fact are reviewed for

clear error, while questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The right to effective assistance of counsel is guaranteed by the United States and Michigan Constitutions, in order to protect a criminal defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674. There is a strong presumption that defendant received effective assistance of counsel, and the burden is on defendant to prove counsel's actions were not sound trial strategy. *Strickland*, *supra*, p 689; *LeBlanc*, *supra*, p 578. To prevail on a claim of ineffectiveness of counsel, defendant must show: (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, *supra*, p 687; *LeBlanc*, *supra*, p 578; *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). A defendant must show that, but for trial counsel's errors, there would have been a different outcome. *Strickland*, *supra*, p 694; *Pickens*, *supra*, p 314.

Decisions regarding whether to call witnesses are presumed to be questions of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Trial counsel stated to the trial court that his reason for presenting West as a witness was to demonstrate that someone physically tampered with the evidence at the scene before the police arrived. West testified that one of her friends ran over to Powell, picked up the gun that was lying beside him, and ran off. Such tampering could put doubt into the jurors' minds about the reliability of the investigation and the testimony regarding defendant's possession or ownership of the gun. Trial counsel's decision to call West as a witness constitutes trial strategy, and this Court will not substitute its judgment for that of counsel in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Finally, defendant has not shown that West's testimony affected the outcome of the trial. The prosecution's main witness was Spanish, whose testimony conflicted with that of Avery, the defense's main alibi witness, and the jury had to determine whose testimony was more credible based on all the evidence. The jury requested and received the transcripts of Spanish's and Avery's testimony during deliberations, and it received all the tapes of the recorded phone calls made by defendant to his friends from jail, demonstrating that they were threatening the witnesses. The jury weighed all the evidence and reached a verdict. Therefore, defendant was not deprived of a fair trial.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello