

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY LEONARD TAYLOR,

Defendant-Appellant.

UNPUBLISHED

October 21, 2008

No. 280426

Wayne Circuit Court

LC No. 07-008671-01

Before: Servitto, P.J. and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a vehicle while impaired, MCL 257.625(1)(a) and driving with a suspended license, MCL 257.904(1). Because no prosecutorial misconduct occurred during trial, we affirm.

Defendant's convictions arises from his arrest for operating a motor vehicle while intoxicated, third offense. Defendant was arrested after police observed him sitting on his stopped motorcycle impeding traffic. The arresting officers testified that defendant admitted at the scene that he had been driving the motorcycle, and defendant was the only person that police encountered at the scene. However, on the following day while in custody and during testimony at trial, defendant insisted that he had not been driving the motorcycle, and that instead an individual he met in a bar had been driving. According to defendant, this individual disappeared the moment the police officers arrived at the scene. An expert witness also testified that defendant was physically incapable of driving the motorcycle due to past injuries. During her closing argument, the prosecutor referred to defendant's theories of the case as "completely ridiculous", "ridiculous", "incredible", "a last ditch effort", and "a last ditch effort to come up with something because the evidence is so strong."

The only issue on appeal is whether the prosecutor's statements during closing argument amounted to misconduct warranting reversal. Defendant claims that the prosecutor denigrated his defense, and introduced her own opinion into the case, thereby denying him his right to a fair trial.

Defendant preserved for review his challenge regarding the prosecutor's statement that his defense was a "last ditch effort" by making a timely and contemporaneous objection to the content of the prosecutor's statement at trial. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). However, defendant failed to preserve for review of any of the other

statements made by the prosecutor because he did not make timely and contemporaneous objections to them at trial. *Id.* Claims of prosecutorial misconduct that have been properly preserved at trial are reviewed de novo to determine if defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). This Court reviews unpreserved claims of prosecutorial misconduct for outcome-determinative plain error. *Id.* at 453-454. Under the plain error review, even where a plain error affecting a defendant's rights exists, reversal is warranted only when a plain error "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Callon*, *supra* at 329. Defendant bears the burden of showing prejudice. *Carines*, *supra* at 763. Moreover, this Court will not "find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Callon*, *supra* at 329-330. Issues of prosecutorial misconduct are reviewed on a case-by-case basis and viewed in context of the record. *Thomas*, *supra* at 454.

Defendant fails to demonstrate how his unpreserved challenges of misconduct amounted to plain error. Defendant fails to show how any prejudicial effect by the prosecutor's reference to his defense as "ridiculous," "completely ridiculous," and "incredible" could not have been cured by a curative instruction or that they were outcome-determinative. In addition, defendant fails to provide any supporting authority for his argument related to the unpreserved challenges. This Court has held that "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant's failure to cite authority and his cursory treatment of the issue constitute abandonment of his unpreserved challenges. *Id.* Nevertheless, we have reviewed all of the statements and conclude that none of the challenged statements constitute misconduct warranting reversal.

While the prosecutor's statements may appear colorful and harsh, prosecutors are "typically afforded great latitude regarding their arguments and conduct at trial." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). A prosecutor may use "hard language" when it is supported by the evidence, and is not required to phrase arguments in bland terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). And, a prosecutor may comment on the improbability of a defendant's theory or evidence once the defendant makes an issue relevant. *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995). Because counsel was not required to use the blandest possible terms, the challenged unpreserved arguments did not amount to plain error warranting reversal. In addition, the prosecutor's statements were isolated remarks made during closing argument and the jury was instructed that closing arguments are not to be considered evidence. See *Unger*, *supra* at 238. Furthermore, the prosecutor presented significant evidence of defendant's guilt, and we find that the statements were not outcome-determinative and that a curative instruction could have cured any prejudice.

Reviewing the preserved, challenged argument de novo, *Thomas*, *supra* at 453, we also conclude that defendant has failed to show that he was denied his right to a fair trial. "Error warranting reversal does not occur where the defendant fails to articulate how he was harmed." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). While the prosecutor referred to the defendant's theory of the case as a "last ditch" effort because the "evidence [of

guilt] was so strong” a prosecutor may argue that a defendant, based on the facts, is not worthy of belief, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997), and may comment on the improbability of a defendant’s theory or evidence, *Fields, supra* at 116. The statements in this case were isolated remarks made during closing argument, and the jury was instructed that the argument was not evidence. Reviewing the entire the record of the case, we conclude that defendant was not denied his right to a fair trial.

Affirmed.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood