STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DEWAYNE ALDRIDGE,

Defendant-Appellant.

UNPUBLISHED
January 27, 2009

No. 280984
Jackson Circuit Court
LC No. 07-003583-FC

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; 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 as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 25 to 40 years' imprisonment for armed robbery and 25 to 40 years' imprisonment for felon in possession of a firearm, to run consecutively to his sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in permitting hearsay testimony at trial. This unpreserved issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Even where such error is found, this Court will reverse the trial court judgment only if a plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 763.

At trial, the victim, Steven Nelson, testified that immediately before defendant and Russell Baxter attacked him he received a telephone call from Tina Zawacki warning him, "Don't do it, don't – don't mess with them guys, they're trying to hurt you." Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence. MRE 802. However, a statement that does not amount to hearsay may be admitted. See *People v Fisher*, 449 Mich 441, 450; 537 NW2d 577 (1995).

We conclude on the record before us that Nelson's testimony was not hearsay because the statement was not elicited to prove the truth of the matter asserted, i.e., that defendant and Baxter

were "out" to hurt Nelson. Instead, the record shows that the statement was offered to establish the sequence of events leading up to the crime. The prosecutor attempted to extract the sequence of events:

> *Q*. Now, the jury wasn't there that night –
>
> *A*. Mm-hmm.
>
> *Q*. –so you need to explain to them the sequence of how things happened. Would you please tell them how this occurred?
>
> *A*. All right. As I said, I pulled up to make a [drug] transaction, they got out of their car, they entered mine. I'm not sure of what was said. I know I got a phone call from Tina, which is how I know these guys, through Tina. Tina was a good friend of mine, of my family, my mom, my auntie. She immediately – soon as I answered the phone she got to screaming, don't do it, don't – don't mess with them guys, they're trying to hurt you, and that's when the defendant in the back seat said, "Let me speak to Tina." I gave him the phone because I'm like – I'm asking him, "What is you talkin' about?" And she – when he – I gave him the phone he was talking to her calmly, he was talking to her and he hung the phone up but before the phone got hung up I was struggling with the passenger and I started struggling with the passenger first and then the defendant in the back seat pulled out a gun and pressed it to the back of my head and said, "Nigger, give me your money."

The prosecutor did not focus on the truth of the assertion made in the statement but was using Nelson's testimony about the telephone call to describe the sequence of events. Because Zawacki's statement was not offered for the truth of the matter asserted, it was not hearsay, and the rule against hearsay did not preclude its admission. MRE 801(c); *Fisher*, *supra*. Defendant has thus failed to show the existence of a plain error.

Even if it were inadmissible hearsay, reversal is not warranted because any error was harmless. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). The prosecution produced ample other evidence that defendant robbed Nelson while armed with a gun, and intended to do so. Nelson testified that he had a prior relationship with defendant and met him at the Taco Bell to sell defendant drugs. Shortly after defendant and Baxter arrived, they attacked Nelson, and defendant put a gun to Nelson's head and said, "Nigger, give me your money." Although Nelson's account of his relationship with defendant changed, his account of the robbery was consistent. Two witnesses corroborated Nelson's version when they testified to seeing defendant with a gun to Nelson's head. Furthermore, defendant himself spontaneously told the arresting officer, "Yeah, we yanked that nigger's shit. If you're – if you sell crack and you're a nigger we're going to yank your shit." Therefore, defendant has failed to demonstrate that "it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence." *Id.*

Defendant next argues that during closing argument, the prosecutor engaged in misconduct by commenting that the evidence was uncontroverted. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Watson*, 245 Mich App 572, 586;

629 NW2d 411 (2001). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Prosecutors are afforded great latitude in their closing arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may not comment upon a defendant's failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). Nevertheless, a prosecutor may comment that evidence against the defendant is "uncontroverted" or "undisputed" even if the defendant is the only person who could have disputed the evidence. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). A prosecutor's remark that evidence is undisputed is proper when arguing the weight of the evidence. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991).

Defendant has failed to demonstrate that the prosecutor denied him a fair trial or otherwise violated his right against self-incrimination by referring to the evidence as "uncontroverted." *Id.* Moreover, the prosecutor was permitted to remark that the evidence is "uncontroverted"; such statement did not shift the burden of proof or improperly comment on defendant's failure to testify. *Fields*, *supra.* In reaching our conclusion, we note that defendant could have produced other witnesses to rebut Nelson's testimony, and defendant had ample opportunity to cross-examine each of the prosecution's witnesses to challenge whether any money was taken. He did not do so. The prosecution's comments were proper because the prosecutor was merely arguing the weight of the evidence. Furthermore, the trial court instructed the jury not to consider "[t]he lawyers' statements and arguments" as evidence because "[t]hey are only meant to help [the jury] understand the evidence and each side's legal theory or theories." Therefore, even if error were established, it was cured by the trial court's instruction to the jury that the attorneys' arguments and statements are not evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003).

Defendant finally contends that because defense counsel failed to object to Nelson's testimony and the alleged prosecutorial misconduct, he performed deficiently and a new trial is required. We disagree. Defense counsel was not ineffective for failing to object to these matters at trial because no error existed and it would have been futile to object. And, even if the admission of hearsay was error, it was harmless. Trial counsel is not ineffective for failing to advocate a meritless position. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Besides, it may have been trial strategy not to object to the hearsay and this Court does not assess counsel's competence based on hindsight and will not second-guess matters of trial strategy. *People v Rice* (*On Remand*), 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey