# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 19, 2009 |
| v | No. 281860<br>Wayne Circuit Court |
| THOMAS ARDRECE BAKER,<br><br>Defendant-Appellant. | LC No. 07-007035-FC |

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to natural life in prison for the first-degree murder conviction, three to five years in prison for the felon in possession conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecutor committed misconduct by comparing defense counsel's tactics to a squid that shoots ink into the eyes of an attacker, a statement that defendant believes implies that defense counsel was trying to mislead the jury. According to defendant, these remarks were prejudicial to the defense.

If, as in this case, the challenged prosecutorial statements are "not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Under the plain error rule, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*, quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Moreover, "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Unger*, *supra* at 235.

This Court considers issues of prosecutorial misconduct "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court also

examines the relationship between the remarks and the evidence admitted at trial. *Brown*, *supra* at 135.

It is well settled that a prosecutor may not personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), or "suggest that defense counsel is intentionally attempting to mislead the jury," *Unger*, *supra* at 236. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *McLaughlin*, *supra* at 649 (citations omitted).

The prosecutor's comments in this case are similar to those in *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001), where the prosecutor told members of the jury that the defense was trying to distract them, stating, "You just had the whole boatload of red herrings thrown at you, and it didn't change the truth." This Court held that, while "the prosecutor's comments did suggest that defense counsel was trying to distract the jury from the truth," such comments had to be considered in light of what defense counsel had argued. *Id.* at 592-593. Although defense counsel had "emphasized discrepancies between the various accounts of the events" by suggesting that the prosecutor was not concerned about the truth, and wanted the jury to convict defendant simply because of the seriousness of the crimes, *id*. at 593, this Court held that "[i]t was not improper for the prosecutor to respond by emphasizing the truth of the big picture, despite defense counsel's attempts to find discrepancies between the testimony of various witnesses." *Id.*

*Unger* presented a different situation, for in that case the prosecutor argued that "defense counsel had attempted to 'confuse' and 'mislead' the jury by using 'red herrings' and 'smoke and mirrors.'" *Unger*, *supra* at 238. This Court held that, unlike *Watson*,

> the challenged prosecutorial statements in this case were not made during the prosecution's rebuttal. Instead, they were made during the prosecution's initial closing statement and were not in direct response to defense counsel's argument. The prosecution's statements in this regard certainly suggested that defense counsel was trying to distract the jury from the truth, and they were therefore improper.
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> However, . . . the trial court instructed the jury that "[t]he attorneys' statements and arguments are not evidence" and that "[y]ou should only accept things the attorneys say that are supported by the evidence or by your own common sense and general knowledge." Further, because a timely objection and curative instruction could have alleviated any prejudicial effect the improper prosecutorial comments may have had, we can find no error requiring reversal. [*Unger*, *supra* at 238.]

See, also *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988) (holding that while "the prosecutor's argument attacked defense counsel and suggested to the jury that defense counsel was intentionally trying to mislead the jury[,] . . . the prosecutor was arguing that the

whole defense was 'a pack of lies,' thus chastising defense counsel and defendant's entire defense.").

On the other hand, in *People v Dobek*, 274 Mich App 58, 67-68; 732 NW2d 546 (2007), this Court held:

> The prosecutor's designation of defense counsel's arguments as "red herrings" did not generate the type of accusatory prejudice decried in [*Dalessandro*, *supra* at 579-580]. . . . Although the prosecutor's comments might have suggested that defense counsel was trying to distract the jury from the truth, the comments were, in general, properly made in response to defense counsel's suggestion that the prosecutor failed to recognize evidence that was allegedly problematic to the prosecution's theory. Moreover, assuming some of the prosecutor's comments were improper, any prejudicial effect could have been cured by a timely instruction, and, therefore, reversal is unwarranted. [Citations omitted.]

In the case at bar, defense counsel's closing argument focused on inconsistencies and discrepancies in the testimony presented by the prosecutor; he did not comment on any tactic or strategy of the prosecutor. The prosecutor's rebuttal compared these arguments to a squid[1] shooting ink in the face of an attacker so that "he can swim away."

Specifically, the prosecutor punctuated her rebuttal by persistently analogizing between defense counsel and a squid:

> There is a sea animal I believe that is a squid, and when the squid feels under attack he squirts ink into the eyes of his attacker, so that he can swim away. I submit to you, ladies and gentlemen, some of the issues raised by defense counsel is nothing but ink being squirted in your eyes so that the Defendant will not be held responsible for his actions.
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> Is that really a consequence or is that just ink, ladies and gentlemen.
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> Again, does that really have any substance or is that just more ink to allow Mr. Baker to get away with this.
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> * * *

[1] The "squid" theme has, somewhat surprisingly, arisen in several appellate decisions. See *People v Light*, 480 Mich 1198; 748 NW2d 518 (2008) and *People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued June 20, 1997 (Docket No. 188030). Although the prosecutor's ink and squid comments were considered improper, in neither case was error requiring reversal found.

> But again to throw that out there, again is that more ink, ladies and gentlemen, or is that really something of substance.
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> * * *
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> So we can all talk about the third man. But, again, is that an attempt to spray that ink in your eyes to keep from looking at the damning evidence presented to [sic] from the witnesses against the defendant.

In *People v Light*, 480 Mich 1198; 748 NW2d 518 (2008), our Supreme Court condemned a similar argument premised on an identical squid theme:

> We take this opportunity to emphasize that it is improper for a prosecutor to make a personal attack on defense counsel, suggesting to jurors in closing argument that counsel is intentionally trying to mislead them. Although such conduct may not require reversal in a given case, it is still improper and unbecoming of a representative of the state.

In light of our Supreme Court's unequivocal language, which plainly applies to the prosecutor's argument in this case, we hold that the prosecutor committed misconduct by repeatedly suggesting that defense counsel sought to mislead the jury.

However, although defendant did not object to the statements nor ask for a curative instruction, the court *did* instruct the jury that, "[t]he lawyers' statement and arguments are not evidence." Moreover, under a plain error analysis, defendant has not shown that any error resulted in prejudice to defendant. Minor discrepancies and inconsistencies paled in comparison to three eyewitnesses who testified that defendant was the shooter, and a fourth who received a phone call from defendant shortly after the shooting, wherein he stated that Daniel "Keith" Jarrett, the victim, "got what he deserved." Therefore, "because there is overwhelming evidence of defendant's guilt, the remarks in question did not affect the outcome of the trial or seriously affect the fairness, integrity, or public reputation of judicial proceedings." *People v Matuszak*, 263 Mich App 42, 55; 687 NW2d 342 (2004). Thus, even if error occurred, reversal is not required.

Defendant also argues that counsel rendered ineffective assistance by failing to object to the prosecutor's statements. Defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or an evidentiary hearing, and so "review is limited to the existing record." *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

> Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law.
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> [R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. [*People v Dendel*, 481 Mich 114, 124, 130; 748 NW2d 859, amended 481 Mich 1201 (2008) (citations omitted).]

"An accused's right to counsel encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const Am VI, Const 1963, art 1, § 20, and *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, to establish ineffective assistance of counsel, a defendant must show that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland, supra* at 687. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

"[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *Matuszak, supra* at 58, citing *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Declining to raise an objection, especially during closing arguments, "can often be consistent with sound trial strategy." *Unger, supra* at 242.

In *Matuszak*, this Court concluded that prosecutorial misconduct had occurred in one instance during rebuttal. This Court noted, however, that, as in the case at bar, "the comment was made at the end of rebuttal argument, just before the instructions by the trial court . . . ." *Id.* at 58. Therefore, in *Matuszak* and in the trial below, counsel's performance met an objective standard of reasonableness: "[C]ounsel may have considered an objection to be superfluous to the trial court's instructions that the statements of counsel were not evidence and that the jury should decide the case only on the basis of the evidence properly admitted. It is presumed that the jury followed these instructions of the trial court when it deliberated defendant's guilt." *Id.*

We hold that the outcome in this case would not have been different but for the comments, and the result that did occur was not fundamentally unfair. As noted above, there were three eyewitnesses who identified defendant as the shooter, and one who testified that she heard defendant say that the victim got what he deserved. Defendant's arguments consisted solely of pointing out inconsequential discrepancies and inconsistencies in their testimony. Therefore, defendant's claim of ineffective assistance of counsel is without merit.

Affirmed.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly