

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOMINIQUE XAVIER WIRRICK,

Defendant-Appellant.

UNPUBLISHED

July 28, 2009

No. 285353

Saginaw Circuit Court

LC No. 07-028976-FC

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit great bodily harm less than murder, MCL 750.84, being a felon in possession of a firearm, MCL 750.224f, carrying a firearm with unlawful intent, MCL 750.226, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of 71 to 180 months for the assault conviction, and 60 to 90 months for the felon in possession and carrying a firearm convictions, all consecutive to a two-year term of imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm, and decide this case without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from a March 2007 shooting at a Saginaw restaurant. The victim testified that as she waited for food at the restaurant, she saw defendant, with whom she was acquainted, enter the restaurant with his girlfriend, then watched them leave the restaurant before placing an order. The victim recounted that moments later, as she waited for food at a booth near the restaurant's front window, she saw defendant running toward her from outside and pointing a handgun at her. Defendant fired two shots at the victim through the window, striking the victim once in the shoulder. The prosecutor presented testimony that defendant targeted the victim because he blamed her for the death of his best friend.

Defendant first maintains that the prosecutor engaged in misconduct during his closing argument by urging the jury to find that because defendant was a convicted felon, he intended to kill or harm the victim. Because defendant failed to object at trial to the allegedly improper argument by the prosecutor, we review this claim only to determine whether any plain error affected defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We review properly preserved claims of prosecutorial misconduct according to the following standards:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*Id.* at 721.]

We consider properly preserved instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The prosecutor devoted the bulk of his closing argument to a discussion of permissible factual inferences concerning defendant's intent at the time of the shooting, emphasizing his position that defendant intended to kill the victim. In the middle and at the conclusion of the closing argument, the prosecutor mentioned the several weapons offenses that also awaited the jury's determination. Defendant complains on appeal regarding the following excerpt that concluded the prosecutor's closing:

The weapons offenses you have to decide about are fairly straightforward, and I don't need to go through all the elements of those. You're getting those from the Court in written form. They're important decisions, but your time should be devoted to what appears to be the only issue. The defendant has pled not guilty to this charge, he has no duty to prove anything. The People in this case have proven beyond a reasonable doubt that he shot at . . . [the victim] with the intent to kill her, *that he was a person convicted of a specified felony on March 7th, 2007*, that it happened at the Magic Kitchen here in Saginaw, that he couldn't properly carry the firearm under those circumstances, and that he carried it with the intent to do harm to her. We ask your verdict be guilty as charged. [Emphasis added.]

Viewing the italicized comment above within the entirety of the prosecutor's argument, he at no time suggested that the jury should find defendant guilty of the assault and other charges merely on the basis that defendant had a felony conviction. Instead, the prosecutor theorized at length that defendant's threats months before the shooting and his firing of gunshots at the victim proved his intent to kill the victim. Furthermore, the prosecutor's comments regarding defendant's felony conviction plainly were directed toward proving a requisite element of the felon in possession of a firearm charge that the jury had to consider. MCL 750.224f.¹ Because no reasonable construction of the prosecutor's argument supports defendant's contention that the prosecutor urged the jury to convict simply because defendant had a felony and thus was a bad

¹ Defendant stipulated at trial that he had a conviction of a "specified felony," as defined in MCL 750.224f(6).

person, we find no prosecutorial misconduct, let alone plain error, inherent in the prosecutor's closing argument.

Defendant additionally asserts that he was denied the effective assistance of counsel by his attorney's incorrect closing argument statement that a second witness had identified him as the restaurant shooter. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*² hearing, we limit our review to mistakes apparent in the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant generally must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 308-327; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 714-715.

Defendant assigns as erroneous and highly prejudicial the following characterization of the trial testimony by his counsel:

Jarrett Byrne's her friend. He corroborated her testimony, but he's her friend and apparently associate. He admits using crack and he admits using it that day. He identified, when I say corroborated her, that is *he identified my client as the assailant*. But he'd never seen him before, hadn't seen him since before he was on the witness stand, and [defendant's] at that time sitting right where he is right now in the defendant's chair.

And Mr. Byrne's here knowing that he's being asked to testify in a case of the People against Dominique Wirrick. Now, who do you think he's going to identify in that situation? The very situation is suggestive of guilt and he knows it. Byrne knows it. What do you think the chances are he's going to come in here after a year and say, I don't know, I don't recognize him.

He's here as a state's witness and he knows it, and he's going to testify accordingly. [Emphasis added.]

Although defense counsel did misstate that Byrne had testified to seeing defendant fire gunshots into the restaurant, when Byrne in reality could only identify defendant at trial as the man who had entered and left the restaurant immediately before the shooting, a review of the entirety of counsel's argument makes evident that he properly discharged his duty as defendant's advocate in attempting to discredit Byrne. As the transcript excerpt above reflects, defense counsel

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

attacked Byrne's testimony by suggesting that it qualified as drug clouded, influenced by his friendship with the victim, and manufactured on the basis that defendant was standing trial for the shooting; counsel further criticized Byrne's description of the shooter's attire and insinuated that Byrne fabricated the description. In conclusion, defendant has failed to overcome the strong presumption that counsel pursued a reasonable trial strategy in seeking to discredit Byrne. *Rodgers, supra* at 714-715.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher