

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHELLE RENEE JOHNSON-JAMES,

Defendant-Appellant.

UNPUBLISHED

September 16, 2010

No. 289925

Oakland Circuit Court

LC No. 2008-221160-FH

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of delivering 50 grams or more but less than 450 grams of a controlled substance (to wit: crack cocaine), MCL 333.7401(2)(a)(iii). The prosecution presented evidence that defendant twice provided 74 grams of cocaine (74.2 grams and 73.9 grams) to an undercover police officer during controlled buy exercises executed by the Oakland County Narcotics Enforcement Team. Because the prosecutor's statements did not violate defendant's due process rights or cause a miscarriage of justice, and, because defendant has not shown she was prejudiced by the prosecution's statements, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that reversal is required because the prosecution impermissibly argued facts that were not in evidence and attacked the integrity of defense counsel. Because defendant failed to object below, these prosecutorial misconduct issues are unpreserved. We review unpreserved issues under the plain error doctrine, whereby the defendant has the burden of showing that an error occurred, that it was plain, and that the error affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 765; 597 NW2d 130 (1999). When a defendant establishes plain error, reversal is warranted only when the error resulted in the conviction of an actually innocent person, or it "seriously affected the fairness, integrity or public reputation of the judicial proceedings independent of [the defendant's] innocence." *People v Knox*, 469 Mich 502, 508; 672 NW2d 366 (2004). See also *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (review of unpreserved prosecutorial misconduct issues is precluded except where an objection could not have cured the error, or review is required to prevent a miscarriage of justice).

Defendant specifically argues that a new trial is required because the prosecuting attorney improperly argued facts not in the evidence to bolster the credibility of the prosecution's witness.

Defendant takes issue with the prosecution's statements that defendant had a reason and motive to lie whereas the police witness did not. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecuting attorney may not vouch for a witness's credibility by suggesting that he or she has special knowledge that the witness is telling the truth. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, the prosecution may argue from the evidence that a witness should be believed, or the defendant disbelieved. *Dobek*, 274 Mich App at 67.

In this case, the prosecutor was addressing the credibility contest that arose from a police officer's testimony that defendant produced and handed him the cocaine, and defendant's own testimony that she did not. It was thus permissible for the prosecution to argue that the police witness's testimony should be believed rather than defendant's testimony. Further, the statement that a police officer has no vested interest in lying does not suggest any special knowledge pertaining to the veracity of that witness. Defendant has failed to show plain error affecting her substantial rights.

Defendant also argues that a new trial is required because the prosecution impermissibly attacked defense counsel during rebuttal argument by stating that defense counsel was throwing out every argument possible with the hope that one stuck. A prosecuting attorney may not personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996). Nor may one suggest that defense counsel is intentionally attempting to mislead the jury. *Unger*, 278 Mich App at 236. However, a prosecutor's comments must be evaluated as a whole and in relation to the defense's arguments. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). An otherwise improper remark is generally not error when made in response to comments of defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

Here, defense counsel, during closing arguments, emphasized that no fingerprints or DNA samples were taken from the baggies of cocaine. In response, the prosecutor stated that defense counsel's strategy was to throw out every conceivable argument with the hope that something would stick. Our review of the record reveals that the prosecutor's remarks were an appropriate response to defense counsel's broad arguments, and plainly not a personal attack on defense counsel. Again, defendant has failed to show that plain error occurred.

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio