STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 293894 Kent Circuit Court
NIEVES HERNANDEZ, Defendant-Appellant.	LC No. 08-012484-FH

Before: MARKEY, P.J., AND WILDER AND STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to 120 days in jail, with 36 days' credit, and costs and fees. We affirm.

On November 15, 2008, Officers Jason Sotke and William Keiser of the Grand Rapids Police Department were dispatched to the home of defendant's daughter and her boyfriend on a domestic disturbance call. At trial, both officers testified that defendant was extremely intoxicated, and his daughter and her boyfriend had asked him to leave. Defendant was directing racial slurs at the boyfriend, members of the boyfriend's family who were present, and the officers. The officers did not intend to arrest defendant, but he had a bloody nose and they were attempting to calm him outside the house while waiting for an ambulance. The officers handcuffed defendant after he "took a swing" at Sotke and threw his colostomy bag at the boyfriend and others who were outside. Defendant started spitting and kicking at these people, and as the officers walked toward him, defendant kneed Keiser in the groin with enough force to bring him down on one knee. The officers thereafter arrested defendant, and the prosecution charged him based on his conduct toward Keiser.

During the assistant prosecutor's opening statement, he remarked:

> [W]hen you hear [the officers] describe just what the defendant's conduct was on November 15, 2008, the facts are going to indicate that the defendant is guilty as charged. On behalf of these two officers, I'm going to ask that your verdict reflect that. . . . In their job, and it's a somewhat thankless job at times, but they have to put up with certain conduct of people they arrest or people that they're attempting to calm down and people that they're approaching on the street. But I

> submit to you, ladies and gentlemen of the jury, they don't have to put up with this. Being spit on, having people throw colostomy bags in their direction . . . .[1]

During closing argument, the prosecutor again remarked that although the police "have to put up with a fair amount of grief and abuse," they "shouldn't have to put up with a colostomy bag thrown in their direction . . . [or] with a person spitting at them, and, more importantly . . . shouldn't have to put up with a person who knees them in the groin." The prosecutor concluded by asking for a guilty verdict "on behalf of these police officers who dealt with [defendant]."

Defendant first argues that the prosecutor made improper civic duty arguments. We review the unpreserved allegations of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

As a general rule, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor is not required to present his arguments using only the blandest possible terms. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but [he] is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). However, prosecutors "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *Bahoda*, 448 Mich at 282. Such arguments are generally condemned because they inject issues into trial that are broader than a defendant's guilt or innocence. *People v Williams*, 179 Mich App 15, 18; 445 NW2d 170 (1989), rev'd on other grounds 434 Mich 894 (1990) (citation omitted). "[T]he prosecutor's 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." *Ackerman*, 257 Mich App at 452. And, "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Unger*, 278 Mich App at 235 (citation omitted).

With respect to the prosecutor's comments asking the jury to convict on behalf of the officers, these were not improper civic duty arguments. *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Like in *Truong*, the comments in question did not inject improper issues into the trial and did not distract the jurors from exercising their powers of judgment. Defendant also argues that because he testified that he had been assaulted and did not kick, swing at, or spit at the officers, there was a credibility issue for the jury, yet the prosecutor's comments such as those indicating that officers have a "somewhat thankless job" and "shouldn't have to put up with this," improperly injected a theme of civic duty to protect the police. Viewed alone, these comments were not based on the evidence and arguably injected issues broader than guilt or innocence, but on this record, they do not constitute plain error requiring reversal. The comments did not encourage the jurors to suspend their powers of

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[1] While the evidence showed that defendant actually threw the colostomy bag at and spit at other people who were present, defendant was still resisting the officers' attempts to calm him.

judgment, and in both opening statement and closing argument, the prosecutor focused on the evidence and defendant's guilt in light thereof. The trial judge instructed the jurors that the lawyers' statements and arguments were not evidence, and that they were to judge the police officers' testimony by the same standards they used to evaluate the testimony of any other witness. Thus, any prejudice resulting from the prosecutor's comments was eliminated by the judge's instructions. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004); *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant further argues on appeal that the prosecutor maintained his theme of civic duty in his closing argument by commenting on defendant's "mental health issues" and arguing that the police should not have to put up with defendant's alleged behavior. He argues that the prosecutor encouraged the jurors to convict him in order to prevent a mentally unstable person from threatening the community. Prosecutors "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda*, 448 Mich at 283. The prosecutor commented that although the jurors might have thought during defendant's testimony, "[I]s there a mental health issue here or are there mental health issues," such issues are "not for [the jury] to decide" but instead must be "left up to the judge." When viewing the statement in context, the prosecutor was merely cautioning the jury not to allow defendant's possible mental health issues to influence its decision. There was no plain error.

Defendant also argues that he was deprived of a fair trial where counsel failed to object to the prosecutor's statements. To establish ineffective assistance of counsel, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's error there is a reasonable probability that the results of the trial would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). A defendant "must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant did not move for a new trial or a *Ginther*[2] hearing, review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Where there was no prosecutorial misconduct, counsel could not have been deficient by failing to object during opening statement or closing argument. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (citation omitted). Thus, defendant has not shown that his counsel's performance fell below an objective standard of reasonableness, at least with regard to the statements asking the jury to convict defendant on behalf of the officers and the comments on defendant's mental health issues. Moreover, even if counsel should have objected or requested a curative instruction, defendant has failed to establish that there is a reasonable probability that the result would have been different given the evidence presented against him. The jurors were still free to believe

[2] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

Sotke and Keiser's testimony, which overwhelmingly demonstrated defendant's guilt. Defendant has failed to show ineffective assistance of counsel.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens