STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 2, 2011
v	No. 295591 Saginaw Circuit Court
RONIE ARBRITION ROGERS, Defendant-Appellant.	LC No. 07-029323-FH

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of assaulting, battering, resisting, or obstructing a police officer, MCL 750.81d(1). We reverse and remand for further proceedings.

Defendant stopped his Land Rover SUV in an eastbound lane on Holland Road while he went into a nearby parking lot to speak to a woman. State Troopers Rich and Sack drove by in the westbound lanes and observed defendant's car parked in the road. The troopers turned around to investigate.

Defendant testified that he saw the troopers, got into his vehicle, and pulled it into the parking lot before the troopers pulled up behind him. The troopers testified that they pulled up behind defendant's vehicle while it was still in the road. Rich instructed defendant not to get in his vehicle, but defendant ignored the instruction and, instead, got into the vehicle and slowly pulled it forward from four to ten car lengths into the nearby parking lot. Rich testified that as defendant was pulling forward, he opened the driver's side door and first walked and then sped up to increasing faster jogging to keep up with the vehicle, all the while shouting at defendant to stop. Rich then jumped inside the open door, resulting in part of his body landing on defendant's left leg, and attempted to strike the shift lever to knock it out of gear. Rich described himself as roughly half-inside and half-outside the vehicle at that point. Sack testified that, from his angle, Rich appeared to be "half-inside" the vehicle and he "couldn't tell if Trooper Rich was being drug by the vehicle or if he was trying to reach in."

When the vehicle stopped, defendant was pulled out of the vehicle, handcuffed, and brought to the police car while his vehicle was searched. Defendant was released, but was

informed that the prosecutor would review the information and decide what charge was to be lodged.

Defendant observed an in-car video system in the patrol car. No video from that system was ever produced. Defendant's court-appointed trial counsel did not request information related to the state police requirements and policies concerning in-car video systems. Defendant made the request himself, but had not obtained the information by the time trial began. Defendant requested an adjournment on the first day of trial, but the trial court denied the motion.

Sack testified that he knew that the car had a video system, but he did not know why a video of the incident did not exist. He stated that occasionally cameras malfunctioned or eight-hour tapes ran out on ten-hour shifts. Rich testified that he thought that the car had a video system, but that he was not certain. Initially he testified that there were no rules or regulations regarding in-car video systems, but then noted that some policy covered the use of the systems.

During closing argument the prosecutor stated that in order to acquit defendant the jury would be required to conclude that the troopers committed perjury and conspired to commit perjury. The jury returned a verdict of guilty.

On appeal, defendant argues 1) that he was denied the effective assistance of counsel because counsel failed to obtain and use the state police policy regarding in-car video systems while questioning the troopers; 2) that the trial court erred in denying defendant's request for an adjournment; and 3) that he is entitled to a new trial because the prosecutor's closing argument constituted misconduct because it distorted the burden of proof. For the reasons discussed below, we agree that defendant is entitled to a new trial based on the prosecutorial misconduct. Given that conclusion and because defendant now has the documents he was seeking and can utilize them for that trial, defendant's other issues on appeal are moot.

Defendant asserts that the prosecution engaged in misconduct during closing argument by telling the jury what it must find in order to return a verdict of not guilty. Defendant did not object to the prosecutor's closing argument. When no objection is made to a prosecutor's closing argument, appellate review is generally precluded because the trial court did not have an opportunity to cure the error. *People v Bass* (*On Rehearing*), 223 Mich App 241, 246; 581 NW2d 1 (1997). However, "reversal is warranted in the absence of an objection if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice." *Id.*

To establish a miscarriage of justice, a defendant has the burden to show that it is more probable than not that the error affected the outcome of the lower court proceedings. *People v Houthoofd*, 487 Mich 568, 590; 790 NW2d 315 (2010). "[T]his test is not and never has been whether defendant is guilty regardless of the error. The test is simply whether the conduct rose to the level of denying defendant a fair trial." *People v Bahoda*, 448 Mich 261, 267 n 7; 531 NW2d 659 (1995).

A prosecutor may argue that defendant or another witness is lying or not worthy of belief, but he may not suggest that the defendant must prove something. *Bass*, 223 Mich at 247.

Prosecutorial statements that present the jury with "stark, bright-line, and absolute alternatives," *id*. at 250, quoting *United States v Marshall*, 75 F3d 1097, 1108 (CA 7, 1996), including those that expressly state that a verdict for the defendant would require a finding that all the government's witnesses were lying, are considered "starkly offensive" and have been found to be improper because they distort the burden of proof by telling the jury what they must find to reach a verdict. *Bass*, 223 Mich App at 248-250.

Those improper comments are in contrast to other allowable prosecutorial statements that focus on credibility even to the point of saying that either the police officers or defendant was lying. *Id.* at 250. When focusing on credibility in an allowable manner, the prosecutor does not inform the jury what must be found to convict or acquit, and the prosecutor also does not exclude ways other than credibility to reach a verdict. *Id.*

In the instant case, the prosecutor stated in closing argument:

> I want to be very clear as the representative of the People in this case, that *you cannot say in deliberations* as you reach a verdict, we're pretty sure the troopers were telling the truth, and we're pretty sure the defendant was lying right to our faces, but *we're just not convinced beyond a reasonable doubt* of their truthfulness, so our verdict, unfortunately has to be not guilty. . . . *To find the defendant not guilty on the evidence you have heard in this case means that you, as jurors, have to say Trooper Rich and Trooper Sack both committed perjury in their testimonies in this trial. . . . You would have to find both of those men committed perjury.* But more importantly, since they both said basically the same story, you'd have to agree they committed another crime; they conspired together to commit perjury, if you were to find the defendant not guilty.
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> And in order for you to arrive at these preposterous propositions about all the lies they'd have to tell, you'd have to base your decision on the fact that that man told you the truth. *That would be the only evidence you would have to support a verdict of not guilty*, that [defendant] told you the truth.
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> [*I]f you vote not guilty, you will have reached the unreasonable conclusion that these troopers intentionally lied about what occurred. . . . And that unreasonable conclusion will be directly dependent on an even more unreasonable judgment on your part, that you found the defendant not only had told you the truth, but that he was more credible than them as witnesses*, even though everything about how he testified and what he said appeared to be a selfish effort to escape responsibility for his actions.

These statements by the prosecutor did not simply focus on credibility by stating that because the testimonies could not be reconciled, either the troopers or defendant lied. See *id.* Rather, they told the jury that in order to find defendant not guilty, it must find that both prosecution witnesses lied and conspired to lie and that a reasonable doubt as to the accuracy of the prosecution's sole evidence was not a sufficient basis upon which to acquit the defendant. Further, the prosecutor told the jury that the conclusions necessary to find defendant not guilty were "unreasonable" and that believing defendant over the officers was "even more unreasonable

judgment." The prosecutor engaged in both burden distortion and burden shifting, going so far as to argue, contrary to the most the most basic premise of criminal law, that the jury had to *find evidence* to support an acquittal. Thus, the prosecutor's statements are similar to the "starkly offensive" conduct comments in which prosecutors equated a not guilty verdict with a finding that all the government's witnesses lied. See *id*. at 248, 250-251.

Defendant did not object to the prosecutor's statements; thus, no curative instruction was given at that time. The trial court did instruct the jury that it alone was to decide which witnesses to believe, and also instructed the jury on the elements of the charged offense. However, these instructions did not erase the prejudicial effect of the prosecutor's statements that told the jury what it must find to acquit or convict. Under the circumstances, defendant was denied a fair trial and reversal is required.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro