

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 21, 2017

v

ROGER ALAN DAVIS,

No. 330245  
Kent Circuit Court  
LC No. 14-011719-FC

Defendant-Appellant.

---

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, under theories of felony murder and premeditated murder, MCL 750.316, armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, and second-degree arson, MCL 750.73. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to imprisonment for life without parole for the murder conviction, along with terms of life imprisonment for each of the other three convictions, with all sentences running concurrently. Defendant appeals as of right, and we affirm.

This case arises out of the brutal murder of Richard Priebe in which defendant slit his throat after Priebe had generously allowed defendant, defendant's girlfriend, Angie Smith, and defendant's friend, John Liebeck, into his home. Defendant, Smith, and Liebeck proceeded to steal Priebe's wallets, checkbooks, and debit card, and defendant started multiple fires in the house, including one directly on Priebe's lap, before the three perpetrators left the premises.

Smith testified against defendant at trial as part of a plea agreement, and defendant first argues on appeal that his right to due process was violated when the prosecution did not disclose that there were "implied understandings" as to Smith's trial testimony and the ultimate sentence in her criminal case. Smith testified that the prosecution had agreed not to try her on a felony murder charge<sup>1</sup> and to recommend a sentence of somewhere between 7 and 11 years with respect to the charges of armed robbery and conspiracy to commit armed robbery. Subsequent to

---

<sup>1</sup> On cross-examination, defense counsel, in formulating a question for Smith, pointed out that felony murder carried a mandatory life sentence.

defendant's trial, Smith was sentenced in her case to 5 to 30 years' imprisonment. At an evidentiary hearing on defendant's motion for new trial, an assistant prosecutor, who prosecuted the cases against both defendant and Smith, testified that he had agreed with Smith's attorney that Smith deserved to get less than seven years, but his hands were tied by the chief assistant prosecutor who handled the formal plea deals related to Priebe's murder. However, *after* Smith testified at defendant's trial, the assistant prosecutor went to the chief prosecutor with his thoughts of a more lenient sentence for Smith, and the chief prosecutor authorized the assistant prosecutor to give Smith a better deal consisting of a five-year minimum sentence. The trial court denied defendant's motion for a new trial, ruling that there was no evidence indicating that the prosecution was ready to offer Smith a more favorable deal at the time of defendant's trial than the one to which she testified, and that all discussions concerning a five-year minimum sentence occurred subsequent to Smith's trial testimony.

On appeal, defendant claims a violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), *Napue v Illinois*, 360 US 264; 79 S Ct 1173; 3 L Ed 2d 1217 (1959), and *Giglio v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972), where "the prosecution should have disclosed that . . . Smith's 'deal' was still unresolved[] and open to even greater leniency during further negotiation." We review for clear error a trial court's factual findings on a motion for new trial, while the decision whether to grant or deny the motion is reviewed for an abuse of discretion. *People v Gratsch*, 299 Mich App 604, 618; 831 NW2d 462 (2013), vacated in part on other grounds 495 Mich 876 (2013). "This Court reviews due process claims, such as allegations of a *Brady* violation, de novo." *People v Stokes*, 312 Mich App 181, 189; 877 NW2d 752 (2015).

In *Giglio*, 405 US 150, the United States Supreme Court held that a due process violation occurred, where an assistant United States attorney promised a key government witness that he would not be prosecuted if he testified against the petitioner, which was not disclosed to the jury, even though a different United States attorney actually tried the case against the petitioner and was unaware of the promise; the promise, authorized or not, was attributable to the government in general. In *Napue*, 360 US 264, the Supreme Court held that the petitioner was denied due process, because a witness for the state falsely testified that the witness had received no promise of consideration in return for his testimony, and because the prosecutor did nothing to correct the witness's false testimony. In *People v Chenault*, 495 Mich 142, 150-151; 845 NW2d 731 (2014), our Supreme Court summarized *Brady*, while touching on *Giglio* and *Napue*:

[T]he components of a "true *Brady* violation," are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material.

The contours of these three factors are fairly settled. The government is held responsible for evidence within its control, even evidence unknown to the prosecution, without regard to the prosecution's good or bad faith . . . Evidence is favorable to the defense when it is either exculpatory or impeaching. *Giglio*[, 405 US at 154] ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule of *Brady*."), quoting *Napue*[, 360 US at 269]. To establish materiality, a defendant must show that "there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” This standard “does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal[.]” The question is whether, in the absence of the suppressed evidence, the defendant “received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” [Citations and alteration brackets omitted.]

We initially conclude that the asserted nondisclosure, i.e., that Smith might receive a more lenient minimum sentence than one between 7 to 11 years’ imprisonment, was not material, as the failure to disclose the purported information did not undermine confidence in the outcome. The jury was informed that Smith was avoiding a murder charge and facing a minimum sentence of seven years on robbery charges by testifying for the prosecution and against defendant. We are extremely confident that defendant would still have been convicted of murder even had the jury been told that Smith might face a five-year minimum sentence or some amount of time less than seven years. The jury clearly found Smith to be credible, even though her testimony allowed her to escape a murder charge for which she would have been sentenced to life imprisonment without parole upon conviction. Under such circumstances, it would defy logic to believe that the jury would have found her credibility lacking had she been facing a five-year instead of a seven-year minimum sentence.

Regardless, the trial court’s ruling was fully supported by the record. There was no evidence whatsoever indicating that there was any other plea agreement *at the time of defendant’s trial*. When Smith testified for the state, the agreement allowed Smith to avoid a felony murder charge and provided for a minimum sentence of seven years on the robbery charges; there was no other deal in place at the time and certainly not one for a five-year minimum sentence. The assistant prosecutor’s sentiment that Smith was worthy of a better deal, in and of itself, was essentially meaningless, and the assistant prosecutor’s successful effort to reduce the minimum sentence recommendation was not made until after defendant’s trial was concluded. In sum, reversal is unwarranted.

Next, defendant argues that the prosecutor committed misconduct during closing argument by calling defendant a liar, or arguing that he was lying, by denigrating defense counsel, and by vouching for witnesses. Defendant further contends that trial counsel was ineffective for failing to object to any of the alleged instances of prosecutorial misconduct. We hold that the prosecutor did not engage in any misconduct. Furthermore, because there was no misconduct and thus no basis to object to the purported instances of prosecutorial misconduct, defense counsel was not ineffective, as counsel need not raise meritless or futile objections. *People v Ericksen*, 288 Mich App 192, 205; 793 NW2d 120 (2010).

In *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007), this Court recited the core principles relative to claims of prosecutorial misconduct:

Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be

jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. The propriety of a prosecutor's remarks depends on all the facts of the case. A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. [Citations and quotation marks omitted.]

Because defendant failed to object to the alleged instances of prosecutorial misconduct, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).<sup>2</sup>

With respect to the prosecutor's remarks that defendant was lying or was a liar, in *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1998), this Court addressed a similar argument, observing:

Defendant next argues that the prosecutor improperly characterized him as a liar . . . during closing argument. A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully. A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief.

Here, the challenged remarks regarding defendant were made in reference to the testimony and evidence presented at trial. The prosecutor was advancing his position that various claims made by defendant were not credible in light of contradictory evidence adduced at trial. [Citations omitted.]

---

<sup>2</sup> In *Carines*, 460 Mich at 763, our Supreme Court explained:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence. [Citations, quotation marks, and alteration brackets omitted.]

The same is true in the instant case. We have reviewed each of the alleged instances of misconduct concerning defendant “lying” or being a “liar,” and all of the remarks were made in reference to the testimony and evidence presented at trial. The prosecutor was merely indicating that defendant’s claims were not credible in light of the contradictory evidence elicited and presented at trial. Indeed, defendant himself testified that he had repeatedly lied to detectives and officers about the circumstances of the crime following his arrest. Reversal is unwarranted.

With respect to defendant’s assertion that the prosecutor denigrated defense counsel, the comment by the prosecutor during rebuttal that defendant finds offensive was as follows:

As [defense counsel] indicated, I get an opportunity to speak to you. I have a great deal of respect for [defense counsel]. We’re friends. He and I get along. I learned a while ago from a former prosecutor who said when you listen to a defense closing, *if they have to alter the proofs to match their story then you know their story is full of lies.* [Emphasis added.]

A prosecutor is not allowed to suggest that defense counsel is intentionally attempting to mislead a jury; however, a prosecutor’s remarks must be considered in light of comments made by defense counsel, and a comment may be permissible if a prosecutor is simply responding to a defense argument. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). A prosecutor may engage in “valid commentary based on the evidence and testimony and inferences arising therefrom.” *Dobek*, 274 Mich App at 67. Here, the challenged remark appears to be more in the nature of a continuation of the prosecutor’s proper assault on defendant’s credibility in regard to his story, as spelled out during defendant’s testimony, and not a claim that defense counsel was intentionally attempting to mislead the jury. Moreover, defendant neglects to indicate that immediately following the above-quoted passage, the prosecutor stated, “Let me tell you what I mean by that,” and then launched into a detailed examination of the evidence and the discrepancies in defendant’s story. Also, the prosecutor was properly responding to defense counsel’s closing argument that the police and prosecution had rushed to judgment in charging defendant with murder and that it was actually Liebeck that had committed the murder. In sum, the prosecutor’s remarks constituted valid commentary based on the evidence and testimony and inferences arising therefrom.

Finally, with respect to defendant’s argument that the prosecutor improperly vouched for the credibility of his witnesses, we hold that it has no merit. At one point during his argument, the prosecutor stated, “I’m one man that can sign that piece of paper that can let this charge go.” Defendant contends that this was clear vouching, given that, “[b]y this comment, the prosecutor was saying that if the charges were not true, he would have signed a piece of paper letting the charges go.” (Internal quotation marks omitted.) “A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses’ truthfulness.” *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

Defendant reads the challenged remark entirely out of context. The prosecutor was arguing that defendant had waited until trial to divulge a story that had never been heard before, i.e., that Liebeck committed the murder, and that, if the story were true, it made no sense for defendant not to have gone to the police or prosecutor earlier, especially where the prosecutor had the power to dismiss the murder charge against defendant and instead charge Liebeck.

Again, the prosecutor was essentially calling defendant's credibility into question; he was not vouching for the credibility of his witnesses. Reversal is unwarranted.<sup>3</sup>

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Brock A. Swartzle

---

<sup>3</sup> Again, considering that counsel need not raise meritless or futile objections, *Ericksen*, 288 Mich App at 205, we reject defendant's argument that trial counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct.