

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 11, 2011

v

DAVID BERNARD GREER,
Defendant-Appellant.

No. 298379
Oakland Circuit Court
LC No. 2009-227652-FH

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering, MCL 750.110, and was sentenced as a fourth habitual offender, MCL 769.13, to serve 18 months' to 20 years' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of breaking and entering into Three Sisters Market in Pontiac during the early morning hours of July 5, 2009. Police and store representatives reviewed the market's surveillance video and obtained a description of the perpetrator. Approximately three hours later, an officer observed defendant a few blocks from the market and noticed that he matched the perpetrator's description. Defendant was subsequently arrested and partially signed a *Miranda*¹ waiver form.

On appeal, defendant first argues that the trial court erred when it denied his request for funds to hire a handwriting expert to determine whether it was his signature on the statement. We review a trial court's decision on whether to appoint an expert for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *Id.*

A trial court may appoint an expert witness to assist an indigent defendant if the trial court finds that the defendant "cannot safely proceed to a trial" without the witness' testimony. MCL 775.15. However, "a trial court is not compelled to provide funds for the appointment of

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

an expert on demand.” *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). Instead, a defendant must “show a nexus between the facts of the case and the need for an expert.” *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995) (internal quotation marks and citation omitted). Absent such a showing, a defendant is not entitled to an expert witness and the trial court’s refusal to appoint one is not an abuse of discretion. *Tanner*, 469 Mich at 442-443.

Aside from defendant’s speculative assertion, there is no evidence that anyone other than defendant signed the form. Defendant testified during an evidentiary hearing that he has no memory of what happened from the point he was placed in the police car until he woke up in a holding cell a few hours later, due to various substances he had consumed prior to his arrest. It was during this time frame that Pontiac Police Officer Daniel Main questioned defendant after reading him his *Miranda* rights. According to Main, defendant did not appear to be under the influence of any controlled substance and asked relevant questions while he was being transported to the police station. Main testified that defendant answered the first two questions on the statement, initialed his answers, and signed the signature line on the *Miranda* warning form.

This is more than a credibility contest between the two witnesses as to whether defendant’s signature is genuine. Only one witness, Main, claimed to have firsthand knowledge about what happened during the time period the *Miranda* warning was signed. Main clearly testified that defendant signed the form, which defendant averred he simply has no memory of. Instead, defendant conjures that, because he has no memory, he did not sign the form. We agree with the trial court that this is insufficient to justify appointing a handwriting expert. At the hearing on defendant’s motion, defendant provided the statement and known copies of his signature for the trial court to review. During trial, defendant had ample opportunity to cross-examine Main and to present his assertion that he did not sign the form. It cannot thus be said that defendant could not safely proceed to trial without a handwriting expert. Accordingly, the trial court did not err when it denied defendant’s request.

Next, defendant asserts that he was denied a fair and impartial trial because of repeated mischaracterizations the prosecutor made during closing argument. Claims of prosecutorial misconduct are reviewed on a case by case basis to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Unpreserved arguments, as this one is, are reviewed for plain error that affected the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

A prosecutor’s role within our judicial system is to seek justice and not merely to convict. *People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973). Prosecutors are not limited to presenting their arguments in the blandest terms possible, and instead have great discretion on how to argue the facts and reasonable inferences at trial. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). “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.” *Id.* at 64. A prosecutor may not mischaracterize the evidence presented at trial. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Defendant cites three ways that the prosecutor mischaracterized evidence during her closing argument or rebuttal. All are without merit as the record supports the prosecutor's characterizations. The store manager testified during trial about his observations of the videotape and his identification of defendant as the person who broke into the store. During closing argument, the prosecutor accurately and carefully conveyed that there was some uncertainty in the store manager's identification of defendant and the prosecutor never argued that the manager was certain of his identification. Additionally, she briefly reminded the jury that the manager could not identify defendant based on his appearance in court. As to defendant's second challenge to the prosecutor's closing argument, Officer Main testified that the man stopped with defendant refused to provide him the name of the individual who had given him the cigarettes, but the description the man provided was consistent with that of defendant. Thus, the prosecutor's characterization of this testimony was accurate. Finally, the prosecutor did not mischaracterize the prior relationship, if any, between defendant and Main. She instead used defendant's assertion that the pair did not know one another, which she is allowed to do. See *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

Furthermore, even if the prosecutor's comments were improper, defendant still received a fair and impartial trial. This is because unfair prejudice resulting from prosecutorial misconduct can be cured by "the trial court's careful and explicit instructions to the jury that it was required to decide the case on the evidence alone and that the lawyer's statements were not evidence." *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Although not requested, the trial court instructed the jury that "[y]ou must not let sympathy or prejudice influence your decision" and that "[t]he lawyer's statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." These curative instructions, which the jury is presumed to have followed, would have cured any potential prejudice that could have resulted. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant's final argument is that counsel's failure to secure a jury instruction or object to the prosecutor's closing argument denied him the effective assistance of counsel. On de novo review, we are limited to the facts on the record as defendant did not move for an evidentiary hearing or a new trial before the trial court. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To establish a claim of ineffective assistance of counsel, defendant bears the heavy burden of showing that trial "counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant claims that counsel should have requested an adverse inference jury instruction because the prosecution failed to preserve the surveillance video that was used to identify defendant. "A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control." *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Upon showing that the prosecutor acted in bad faith in failing to produce evidence, a defendant is entitled to an adverse inference instruction that allows the jury to infer that the evidence would have been favorable to the defendant. *Id.* at 514-515.

However, defendant has not shown that the prosecutor acted in bad faith. The video was automatically erased by the surveillance system before a copy was made, and the detective responsible for the case was unaware that he only had 30 days to retrieve the video. This would at most constitute negligence, but not bad faith, as the video was always under a private citizen's exclusive control. Absent a showing of bad faith, defendant was not entitled to an adverse inference jury instruction. And, because counsel is not required to assert futile motions or arguments, defendant is unable to show that failing to object to prosecutor comments that were appropriate or in failing to request an unwarranted jury instruction denied him the effective assistance of counsel. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray