STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2012
v	No. 299989 Wayne Circuit Court
FREDDIE LEE SMITH, Defendant-Appellant.	LC No. 10-004724-FC

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

Defendant assaulted a liquor store employee, Yacoub ("Jacob") Hermiz, with a knife, and stole money and liquor from the store. Hermiz suffered an abrasion on his stomach.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues on appeal that trial counsel was ineffective, asserting numerous grounds for this claim. We disagree.

An ineffective assistance of counsel claim is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. Constitutional questions are reviewed de novo. *Id*. A *Ginther* hearing[1] was not held therefore our review is "limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

To prove ineffective assistance of counsel, a defendant must show counsel's performance was deficient, and the deficiency resulted in prejudice to the defendant. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To show deficiency, a defendant must establish

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

counsel's performance fell below an objective standard of reasonableness. *People v Gardner*, 482 Mich 41, 50 n 11; 753 NW2d 78 (2008). To show prejudice, a defendant must demonstrate a reasonable probability of a different outcome were it not for counsel's deficiency. *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). There is a "strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463 Mich at 600. Counsel's performance must be evaluated without the benefit of hindsight. *Grant*, 470 Mich at 485.

Many of defendant's arguments in support of counsel's alleged ineffective assistance are grounded in counsel's failure to object. We note at the outset that counsel is not ineffective for failure to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

A. FAILURE TO MAKE AN OPENING STATEMENT

Waiving an opening statement is a matter of trial strategy "which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel." *Payne*, 285 Mich App at 190, quoting *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983).

Here, the defense chose to reserve its opening statement until the close of the prosecution's case. After the prosecution rested, defendant decided not to testify and defense counsel waived his opening statement. Reserving opening until the close of the prosecution's case, perhaps to tailor it to the evidence the prosecution presented or the testimony of witnesses the defense might call, and then waiving it once it became apparent the defense would call no witnesses, was within the realm of sound trial strategy. If counsel had made an opening statement and then called no witnesses, his statement would have been immediately followed by the prosecution's closing argument, then defense counsel's closing, then prosecution's rebuttal. Defense counsel may have chosen to avoid such a round-robin set of arguments to minimize jury confusion and prevent dilution of the defense's message. Therefore, defense counsel's failure to make an opening statement did not constitute ineffective assistance of counsel.

B. FAILURE TO OBJECT TO DR. SHEESLEY'S ANATOMICAL DIAGRAM

Demonstrative evidence may be used at trial if it can help a factfinder determine an issue material in the case. *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). When an expert is using such evidence to illustrate his testimony, rather than to recreate the circumstances of the case, an exact replica is not required. *Id*. There are no specific rules for the admissibility of demonstrative evidence other than the "traditional requirements for relevance and probative value." *Id*. At trial, the prosecution asked its medical expert, Dr. Daniel Sheesley, to fill in a diagram of the human body with the major organs, vessels, and arteries found in the abdominal cavity in the area where Hermiz was injured. The prosecutor then asked Sheesley to testify regarding what would have happened if defendant's knife had punctured any of these major organs or arteries. Sheesley responded that a very serious injury could have resulted. The diagram and related line of questioning was relevant to the issue of defendant's specific intent, an element of assault with intent to do great bodily harm less than murder, MCL 750.84, because attempting to stab someone in an area of the body containing many vital organs indicates an intent to do more harm than, for example, stabbing someone in an outer extremity.

The diagram was also not overly prejudicial because it merely illustrated what Sheesley was already testifying to, and because the majority of, if not all, reasonable people presumably know that getting stabbed in the stomach could cause serious injury or death. Therefore, any objection defendant could have made would have been futile, and counsel was not ineffective for failure to make a futile objection. See *Milstead*, 250 Mich App at 401. Even if defendant's objection would not have been futile, defendant cannot show the result of the trial would have been different had the diagram not been used, for the same reasons stated above.

Defendant argues on appeal that the diagram and Sheesley's testimony relating to it should not have been admitted without a showing that defendant had knowledge of this anatomy. Otherwise, he claims, it is irrelevant to defendant's intent. This argument has no merit. The jury was free to infer that defendant knew stabbing someone in the stomach could cause serious injury. And although the obviousness of this knowledge indicates Sheesley's testimony may not have even been necessary to the issue of defendant's intent, we cannot conclude that it was entirely unhelpful. Additionally, the obviousness of the testimony also indicates that the diagram was not overly prejudicial because it is very likely the jury would have come to the same conclusion without it. Because an objection to the diagram would likely have been overruled, and defendant cannot show prejudice resulting from counsel's failure to object, defense counsel was not ineffective in this regard.

C. FAILURE TO OBJECT TO ADMISSION OF THE KNIFE

Evidence is admissible if it is relevant and not unduly prejudicial. *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The rule for admitting physical evidence is that "a proper foundation be laid and that the articles be identified as that which they purport to be and that the articles are shown to be connected with the crime or with the accused." *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). An item is authenticated by evidence showing the item is what its proponent claims it is. MRE 901(a).

Here, the knife was admitted into evidence. Detective Taft, Hermiz, and witness William Lain all testified that the knife was found at the crime scene near where defendant and Hermiz struggled. A photograph admitted into evidence also showed the knife where the witnesses said it was. Hermiz testified the knife was not there before the altercation. The knife was admitted through Taft, who testified that it was the knife he recovered from the floor of the liquor store. According to testimony, a video recording of the incident also apparently showed defendant taking out a knife and trying to stab Hermiz with it. Finally, Hermiz had an abrasion on his stomach after the assault, and the knife had biohazard on it. The knife was relevant to the issue of whether defendant was armed. In light of the evidence presented, the prosecution established a proper foundation for the knife and connected the knife with the crime and with defendant. Therefore, the evidence was properly admitted, and any objection defense counsel made with respect to the admissibility of the knife would have been futile. Accordingly, counsel was not ineffective for failing to object to the admission of the knife.

D. FAILURE TO OBJECT TO SPECULATIVE EVIDENCE REGARDING THE HOLES IN HERMIZ'S CLOTHES

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." MRE 602. "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701. Facts relied upon by the witness to form his opinion must be in evidence. MRE 703.

Here, Hermiz testified that holes in the clothes he was wearing the day of the altercation were caused by defendant's knife. The clothes were admitted into evidence, and Hermiz pointed out that all of the shirts he was wearing that day had a hole in them in the location of his injury and that his undershirt had blood on it around the hole. Defendant argues that, because Hermiz testified he did not see defendant with a knife and did not feel himself get stabbed, he had no personal knowledge that the knife created the holes in his clothes. However, Hermiz's testimony that the knife caused the holes was an opinion rationally based on his perception of the knife on the floor, the abrasion on his stomach, and the circumstances of the assault, and all of these facts were in evidence. Additionally, Hermiz was actually wearing the clothes when he discovered the wound and the holes, giving him personal knowledge of circumstances to which the jury was not privy. Therefore, Hermiz's testimony was admissible and, accordingly, counsel's failure to object to it did not constitute ineffective assistance. Even if the testimony was not admissible, defendant cannot show prejudice resulting from the jury hearing it because other evidence strongly pointed to the fact that the knife caused the holes in Hermiz's clothes. Accordingly, defendant cannot establish an ineffective assistance of counsel claim on this ground.

E. FAILURE TO OBJECT TO DETECTIVE TAFT'S NARRATION OF THE RECORDING OF THE INCIDENT

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704. "As the rule itself makes clear, however, such testimony must be 'otherwise admissible,' thereby implicating, inter alia, the 'helpfulness' requirement [of MRE 701]." *People v Joseph Smith*, 425 Mich 98, 107; 387 NW2d 814 (1986).

Here, the video recording of the altercation between defendant and Hermiz was played for the jury during Hermiz's testimony and again during Taft's testimony. Taft's testimony about the contents of the recording failed the test for admissibility under MRE 602 because he did not have personal knowledge of the contents of the video recording. Furthermore, Taft's testimony failed the "helpfulness" test of MRE 701 because his knowledge of the contents of the video was no greater than the jury could obtain upon viewing the video.

Because Taft's testimony included an assertion that defendant was holding a knife and used it to try to stab Hermiz, the testimony was damaging to defendant, particularly because whether defendant was armed was a major issue in this case. Allowing the testimony does not appear to be a matter of strategy. However, there was significant evidence otherwise indicating

defendant was armed. Hermiz, Taft, and Lain all testified to the presence of the knife. The knife had not been there prior to the incident. Hermiz had holes in his clothes and an abrasion on his stomach consistent with a knife wound, and the knife appeared to have biohazard on it. In light of this evidence, we do not conclude that defense counsel's failure to object to Taft's testimony regarding the contents of the video recording prejudiced defendant. Therefore, defense counsel was not ineffective for failing to object to this testimony and, accordingly, defendant is not entitled to a new trial on this ground.

F. FAILURE TO MOVE FOR A DIRECTED VERDICT

Counsel is not ineffective in failing to move for a directed verdict when the prosecution submits sufficient evidence to defeat the motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). "Defense counsel is not required to make frivolous or meritless motions." *Id.*

A motion for a directed verdict will not be granted if the prosecution has submitted sufficient evidence to persuade a rational trier of fact that each element of the crime charged was proved beyond a reasonable doubt. *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010).

The elements of armed robbery, MCL 750.529, are: "(1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon." *People v Bobby Lynell Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). The evidence must show that the assault occurred before or at the same time as the taking of the property. *People v Scruggs*, 256 Mich App 303, 310; 662 NW2d 849 (2003).

Here, the video recording showed an assault, and Hermiz and Lain both testified that defendant assaulted Hermiz. The recording also showed, and Hermiz testified, that defendant stole liquor and lottery money from the store in Hermiz's presence after defendant assaulted Hermiz. Store owner Mike Oraha confirmed that the money and liquor were missing. Finally, as discussed in sections (C) and (E) above, there is sufficient evidence that defendant was armed with a knife during the assault.

Defendant argues, with respect to his sufficiency of the evidence claim, that Hermiz did not know defendant had a knife during the assault and, therefore, was never put in fear of a weapon, negating an element of the crime. However, this Court has consistently rejected the argument that a directed verdict should be granted in an armed robbery prosecution when the victim never actually saw the defendant with a weapon. See *People v McCadney*, 111 Mich App 545, 550-551; 315 NW2d 175 (1981). That the defendant *had* a dangerous weapon during the assault is sufficient. *Id.* Therefore, a motion for a directed verdict on the charge of armed robbery would have been denied, and counsel was, accordingly, not ineffective for failing to so move.

Defendant was also charged with assault with intent to murder, MCL 750.83, and, in the alternative, assault with intent to do great bodily harm less than murder, MCL 750.84, as well as felonious assault, MCL 750.82. The elements of assault with intent to commit murder are: "'(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). The

elements of assault with intent to do great bodily harm less than murder, MCL 750.84, are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). And the elements of felonious assault are: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Here, Hermiz testified that defendant "dropped" him in the store. Lain testified he saw defendant over Hermiz when he walked in. The holes in Hermiz's clothes and his stomach abrasion are consistent with a knife attack. These facts are sufficient to establish an assault occurred here, and that defendant wielded a dangerous weapon during the assault. That the knife was bent also suggests a forceful, but unsuccessful, blow to Hermiz's abdomen. This fact could allow a jury to infer that defendant intended to kill or do great bodily harm to Hermiz. Therefore, the prosecution presented sufficient evidence at trial to defeat a motion for a directed verdict on the charges of assault with intent to murder, assault with intent to do great bodily harm less than murder, and felonious assault. Accordingly, defense counsel was not ineffective for failing to bring such a motion; therefore, defendant is not entitled to a new trial on this ground.

G. FAILURE TO MENTION EXCULPATORY EVIDENCE IN CLOSING ARGUMENTS

What arguments defense counsel chooses to make in closing argument is a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Here, defense counsel spent the majority of his closing argument attempting to undermine the credibility of the witnesses. This Court will not question counsel's choice. Particularly because review is limited to facts apparent on the record, we cannot conclude that defense counsel's omission of certain arguments constituted ineffective assistance of counsel. Therefore, we find defendant is not entitled to a new trial on this ground.

H. FAILURE TO OBJECT TO THE PROSECUTOR'S MISCHARACTERIZATION OF EXPERT TESTIMONY

A prosecutor may not make a statement to the jury that includes facts not in evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, she may make reasonable inferences from the evidence presented, and is given wide latitude in making her arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980), overruled on other grounds *People v Perry*, 460 Mich 55, 64; 594 NW2d 477 (1999). "[D]eclining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. "[T]here are times when it is better not to object and draw attention to an improper comment." *Bahoda*, 448 Mich at 287 n 54. Additionally, "[e]rror requiring reversal will not be found if a curative instruction could have alleviated any prejudicial effect, given that jurors are presumed to follow their instructions." *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010), lv gtd on other grounds 488 Mich 955 (2010).

Here, the prosecution stated in her closing argument: "[T]he doctor testified that . . . [Hermiz] could have died. He could have bleed [sic] to death." Sheesley's actual testimony was:

> *Q.* Is it possible that a very serious injury could result if the knife punctured any of those arteries or organs?
>
> *A.* That's correct.

Sheesley also testified that under the skin in the area of Hermiz's abrasion was muscle, colon, small intestines, the femoral artery (which branches off the iliac artery, a major vessel), the femoral vein (a major vein), and the liver. Sheesley finally testified that Hermiz's abrasion was within a couple of inches of an artery.

In light of Sheesley's testimony, the prosecutor's assertion during closing that Hermiz could have bled to death, if defendant's knife had punctured Hermiz instead of grazing him, was a reasonable inference drawn from Sheesley's testimony. Therefore, any objection defense counsel could have made that the prosecutor's argument was improper was futile. We conclude, accordingly, that counsel was not ineffective for failing to object to the prosecutor's statement, and defendant is not entitled to a new trial on this ground.

Additionally, the jury was instructed: "The lawyers[']statements and arguments to you are not evidence." Because the potential prejudice, if any, from the prosecutor's statement was minimal, the trial court's instruction cured any error. Therefore, the error, if any, does not warrant reversal.

I. FAILURE TO IMPEACH DETECTIVE TAFT

At the preliminary examination, Taft testified as follows:

> *Q.* Okay. Did you see Mr. Smith do anything on the tape to Mr. Hermiz?
>
> *A.* Yes, sir.
>
> *Q.* What?
>
> *A.* I--the--the first thing that I seen was Mr. Hermiz was he--had gone to the cooler and he had walked back and he had set something on the counter. When he did that, I watched Mr. Smith had something in his hand and he walked up and thrust it into Jacob.
>
> *Q.* Okay. What part of him?
>
> *A.* It would have been in the--the stomach area the--where I found the wound.
>
> *Q.* Okay. Could you tell at that time what was being thrust or what he was thrusting with?

A. It--it appeared to me to be a knife.

Q. Why do you say that?

A. The length of it and it was--it was--you could--you could see--or I could see a--appeared to be a long object.

Q. Okay. About how long?

A. Approximately a foot.

At trial, Taft testified:

> When I watched the video I observed him standing at the store. He stood there quite some[]time. Then, I observed Mr. Smith assault Jacob Hermiz during the . . . watching the video. I watched as something was thrust into the stomach of Jacob Hermiz. At which point I immediately went to Jacob and I started to have him remove part of his clothing. It was obvious to me that through the video . . . watching the video that he had been . . . something had hit him in the stomach, and it was a[n] object.
>
> Looking at the evidence, I felt it was the knife.

Later, when Taft was narrating the video recording, he testified: "[N]ow he's walking to the front. This was at the point where everything is being taken at. And he'll reach into his pocket, right here with his jacket. He pulls out a knife--." And then, a few moments later, "You can watch Mr. Smith reach into his left breast pocket inside, and you can watch and you see him pull out a . . . Mr. Smith pull out a knife."

The distinction between "what appeared to [Taft] to be a knife" and "Mr. Smith pull[ed] out a knife" is not an inconsistency that could be used to successfully impeach Taft as a witness. Additionally, the jury heard Taft testify that he "felt it was" a knife, so any assertion Taft later made while narrating the video that defendant definitely had a knife was tempered by that earlier statement. To fail to draw out an inconsistency in testimony where none exists cannot constitute ineffective assistance of counsel. Furthermore, we cannot conclude that Taft's definitive statement regarding defendant's possession of the knife prejudiced the jury. The jurors had several opportunities to review the video and draw their own conclusions, and a significant amount of other evidence pointed toward defendant's use of the knife while assaulting Hermiz. Accordingly, defendant is not entitled to a new trial on this ground.

Defendant argues that the cumulative effect of these errors resulted in a deprivation of his constitutional right to effective assistance of counsel. "It is true that '[t]he cumulative effect of several minor errors may warrant reversal where the individual errors would not.'" *Unger*, 278 Mich App at 258, quoting *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Here, however, the only claim of error with any merit is counsel's failure to object to Taft's narration of the events on the video recording. We have already concluded that this individual error did not prejudice defendant. Because no other claims of error have merit, there are no

claims to aggregate for a finding of cumulative error. Therefore, defendant is not entitled to a new trial based on the accumulation of error.

In summary, defense counsel was not ineffective. Most of his decisions were within the realm of sound trial strategy, and any that were not did not so prejudice defendant that he is entitled to a new trial.

II. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecution mischaracterized Sheesley's testimony during closing arguments, and that this impropriety, in conjunction with the admission of anatomical evidence despite a lack of evidence regarding defendant's knowledge of anatomy, rose to the level of prosecutorial misconduct. We disagree.

To preserve a claim of prosecutorial misconduct, a defendant must timely and specifically object. *Unger*, 278 Mich App at 234. Defendant did not do so here. However, an unpreserved claim may still be reviewed if an objection would not have cured the error, or failing to review would cause a miscarriage of justice. *Id*. at 235. Unpreserved claims of prosecutorial misconduct are reviewed for outcome-determinative, plain error. *Id*.

As discussed above, with respect to defendant's claim that counsel was ineffective in failing to object to the prosecutor's statement during closing arguments, the prosecutor's assertion that Sheesley testified Hermiz could have bled to death did not constitute prosecutorial misconduct. The statement was a reasonable inference based on the testimony, the omission of the statement would not have resulted in a different outcome at trial, and any impropriety of the statement was cured by instructions to the jury not to consider closing arguments as evidence. See *Bahoda*, 448 Mich at 282; *Likine*, 288 Mich App at 659; *Unger*, 278 Mich App at 235. Additionally, as discussed above, with respect to defendant's claim that counsel was ineffective for failing to object to Sheesley's anatomical diagram, admission of the diagram was not improper despite a lack of evidence regarding defendant's knowledge of anatomy. MRE 401-403; *Unger*, 278 Mich App at 247. We conclude the prosecutor did not engage in misconduct in eliciting this testimony from Sheesley, and drawing reasonable inferences from it during closing arguments; therefore, defendant is not entitled to a new trial on this ground.

III. SUFFICIENCY OF THE EVIDENCE

Defendant last argues that there was insufficient evidence to show that he was armed during his assault on Hermiz. We disagree.

This Court reviews a claim of insufficient evidence de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find the elements of the crime were proved beyond a reasonable doubt. *Ericksen*, 288 Mich App at 196. However, this Court generally will not disturb the fact-finder's determinations of the credibility of witnesses or the weight of the evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

As discussed with respect to defendant's claim that counsel was ineffective for failing to move for a directed verdict, the prosecutor submitted sufficient evidence to allow a reasonable jury to find that each element of armed robbery and assault with intent to do great bodily harm less than murder was proved beyond a reasonable doubt. Therefore, defendant is not entitled to a reversal of his convictions. See *Parker*, 288 Mich App at 504.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell