STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2013
v	No. 308024 Jackson Circuit Court
JERRY DON JOHNSON, Defendant-Appellant.	LC No. 11-004509-FH

Before: SAWYER, P.J., and MARKEY and M. J. Kelly, JJ.

PER CURIAM.

Defendant Jerry Don Johnson appeals by right his jury conviction of being a prisoner in possession of a weapon. MCL 800.283(4). The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to serve three to ten years' in prison consecutively to his prior sentence. Because we conclude that there were no errors warranting relief, we affirm.

Defendant was an inmate in the G. Robert Cotton Correctional Facility. On the day at issue, a first-shift officer overseeing defendant's cellblock received a tip that defendant had a weapon; he phoned the prison yard officers and Sergeant Robert Schiller II and informed them of the tip. Officers Forner, Pell, and Cavender were working in the prison yard when they received the call. The officers approached defendant to perform a pat-down search and asked him to let them put him in restraints. Defendant refused and walked away. After reaching the yard, Schiller also approached defendant and began to speak with him about whether he had a weapon. Schiller testified that he asked defendant to let the officers put him in restraints, but he again refused. Eventually Schiller grabbed defendant and knocked him to the ground. The other officers assisted Schiller and handcuffed defendant. Forner testified that he then patted defendant down and found a shank in defendant's right coat sleeve.

At trial, defendant testified that he had asked to be walked, unrestrained, to the segregation unit to be searched because he knew that area was monitored. He also denied being in possession of a weapon.

On appeal, defendant argues that the prosecutor committed two instances of misconduct which were sufficient to deprive him of a fair trial. Defendant failed to object to either; as such, our review is for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant first argues that the prosecutor engaged in misconduct by asking him to comment on the credibility of the prosecutor's witnesses by labeling them liars. More than 25 years ago, our Supreme Court held that it is error for a prosecutor "to ask [a] defendant to comment on the credibility of prosecution witnesses." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). It is error because the defendant's "opinion of their credibility is not probative of the matter." *Id.*

Here, the prosecutor asked defendant whether it was his position that the officers had perjured themselves and were essentially "making all this stuff up." The prosecutor's decision to ask defendant to label the officers liars and accuse them of perjury was in clear violation of the rule stated in *Buckey*. The prosecutor apparently posed these improper questions to show contempt for defendant's theory by contrasting it with that of the—presumably far more credible—officers. See *id.* (noting that the prosecutor in that case apparently posed the questions to discredit the defendant). The questions were not only improper under longstanding precedent, they were unnecessary; the jury had to have been aware that it was defendant's position that the officers were not accurately describing the events. The prosecutor should, for that reason, have refrained from asking the improper questions and instead commented on the incredibility of defendant's theory given the evidence in closing arguments.

Despite the clear impropriety of the prosecutor's questions, we do not agree that the error warrants relief. As our Supreme Court has explained, such questions do not involve the prejudice occasioned when a prosecutor improperly bolsters "the credibility of prosecution witnesses" or when the prosecutor allows "an opinion on [the defendant's] guilt or credibility." *Id.* And, where the defendant handled the improper questioning well, there may be little or no prejudice. *Id.*

By the close of the trial, the jury was well aware that it was defendant's theory that the officers who approached him might have set him up in order to retaliate against him for filing grievances against fellow officers. Accordingly, the jury was already aware that defendant felt that the officers were not testifying accurately. Moreover, after reviewing the transcript, we conclude that defendant mitigated the harm caused by the improper questioning by handling the questions fairly well. Given the evidence against defendant and the minimal prejudice caused by the questioning, we conclude that this error does not warrant relief. *Callon*, 256 Mich App at 329.

Defendant next claims that the prosecutor argued facts not in evidence by saying in his closing argument that "He's a level 4, the security setting, it's a high level. He causes problems, he caused one on January the 9th." "A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008).

There was evidence that defendant was assigned to level 4 and that level 4 was the highest level. An officer also testified that prisoners can have their security level raised for violating prison rules. From that evidence, the prosecutor could reasonably argue that defendant was the type of prisoner who causes problems and, for that reason, needs to be in level 4. *Id.* at 236 (stating that a prosecutor is generally free to argue the evidence and all reasonable

inferences.). And there was evidence that defendant caused the problem on January 9 by possessing a shank and refusing to be searched. Consequently, we do not agree that this argument was improper.

To the extent defendant argues that the prosecutor's argument implicated MRE 404(b), we note that MRE 404(b) deals with the admission of evidence, not closing arguments. Finally, even if these comments could be said to be improper, this Court will not reverse a conviction where unpreserved and "isolated improper remarks [by the prosecutor] did not cause a miscarriage of justice." *People v Guenther*, 188 Mich App 174, 183; 469 NW2d 59 (1991). Because the trial court's instructions cured any minimal prejudice, any error would not warrant relief. *People v Lueth*, 253 Mich App 670, 687-688; 660 NW2d 322 (2002).

There was no prosecutorial misconduct warranting a new trial.

Finally, defendant challenges the trial court's scoring of ten points for offense variable (OV) 9. This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

Ten points must be scored under OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury . . . ." MCL 777.39(1)(c). In this case, the officers gave defendant clear, verbal commands to let them put him in restraints to be searched, but defendant repeatedly refused to comply. The officers had little choice but to physically subdue defendant, and in subduing an uncooperative prisoner in possession of a weapon, they were placed in danger of physical injury.

Defendant nevertheless argues that once his conduct satisfied the elements of the crime, it was "completed" and merely resisting should not be scored because it was outside the completed offense. See *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). However, defendant was convicted of a possessory offense, which is a continuing offense that is not complete until the perpetrator is dispossessed of the contraband. See *People v Owen*, 251 Mich App 76, 80-82; 649 NW2d 777 (2002); *People v Beverly*, 247 Mich 353, 355-356; 225 NW 481 (1929). Defendant's unlawful possession, therefore, continued until the officers seized the shank. The trial court did not clearly err when it scored OV 9 at 10 points.

There were no errors warranting relief.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly