

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 19, 2013

v

BRITTANY RAE FALCONER,

Defendant-Appellant.

No. 310037
Saginaw Circuit Court
LC No. 10-034416-FC

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right her April 13, 2012 convictions, following a jury trial, of assault with intent to do great bodily harm, MCL 750.84; two counts of armed robbery, MCL 750.529; two counts of conspiracy to commit armed robbery, MCL 750.157a; unlawful imprisonment MCL 750.349b; conspiracy to commit unlawful imprisonment, MCL 750.157a; torture, MCL 750.85; conspiracy to commit torture, MCL 750.157a; carjacking, MCL 750.529a; conspiracy to commit carjacking, MCL 750.157a; two counts conspiracy to commit extortion, MCL 750.157a; first-degree home invasion, MCL 750.110a(2); conspiracy to commit first-degree home invasion, MCL 750.157a; and 15 counts of felony-firearm, MCL 750.227b(a). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On May 28, 2010, defendant, along with Donald Anderson and Glenn Jett, held the victim against his will and inflicted physical abuse on the victim. The victim was tied up and placed in a bathtub full of water where he was hit with the butt of a gun. The victim was stripped naked, burned with a metal object, had hot water and bleach poured on him, and cut with a knife. Jett also demanded that the victim pay \$10,000 to Jett, Anderson, and defendant. Defendant participated in this conduct, including by tying the victim up, cutting him, and slapping him.

Defendant and Jett managed to get the victim's keys, took the victim's classic car, and went to the victim's house. While there, defendant and Jett tied up the victim's wife and two sons, threatened their lives, and ransacked the house, taking valuables.

At trial, defendant argued that she committed the acts under duress because Jett had threatened to kill her. The victim, his wife, and his two sons testified that defendant appeared to be a willing participant. The jury returned a verdict of not guilty on a conspiracy to commit first-

degree murder charge, two counts of extortion, and associated felony-firearm counts. The jury returned a guilty verdict on the remainder of the charges as listed above.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the jury erred in finding her guilty because she successfully raised the defense of duress, and the prosecutor failed to prove beyond a reasonable doubt that defendant was not acting under duress. We disagree.

We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Duress is an affirmative defense. *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). Duress is applicable in circumstances where committing a crime avoids some kind of greater harm. *Id.* at 246. In order for a defendant to successfully raise the defense of duress, defendant carries the initial burden of establishing a prima facie case. *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003). The trial court is only required to instruct the jury on the defense of duress after the defendant has presented sufficient evidence from which the jury could find all of the elements present. *Lemons*, 454 Mich at 248.

Questions of law are the responsibility of the judge, while questions of fact are left to the jury to decide. *People v Kolanek*, 491 Mich 382, 411; 817 NW2d 528 (2012). The judge is responsible for determining whether the defendant has presented sufficient evidence "from which a reasonable jury could conclude that the elements of the defense have been met . . ." *Id.* If the judge determines a defense instruction is to be given, whether the defense is valid is then a question for the jury. *Id.* at 411-412.

The trial court instructed the jury on the defense of duress and indicated that, if the prosecutor did not prove beyond a reasonable doubt that defendant was not acting under duress, then the jury had to find defendant not guilty. Defendant does not claim there was an error with the instruction, but rather claims that a rational jury could not have believed defendant was not acting under duress.

In this case, defendant testified to having a history of being in abusive relationships. Defendant said that she was fearful of Jett, only did what Jett told her to do, and was not a willing participant. Defendant also claimed that she did not know what Jett and Anderson were planning until right before the victim arrived. Defendant said that Jett told her she would be killed if she messed up, and defendant thought that Jett was serious.

However, the victim testified that defendant did not seem surprised by what was happening and that defendant appeared to be voluntarily participating in the events. The victim's wife and two sons also all testified that defendant appeared to be acting voluntarily. There was also testimony that defendant did not argue with Jett, nor did defendant appear to be in fear of Jett. And evidence was presented that defendant left the presence of Jett and Anderson more than once, but returned to the pair: once when defendant went across the street, by herself, to try and get the victim's keys, and again when defendant went by herself to move the car out of the neighbor's driveway. Both times, defendant was out of the presence of Jett and Anderson, and both times defendant returned and continued to assist in the crimes.

Whether defendant was actually under duress was a question of which witnesses the jury believed. Questions of credibility are the responsibility of the jury. *Harrison*, 283 Mich App at 378. Also, what inferences can be drawn from the evidence and the weight given to those inferences is a question left to the jury. *Hardiman*, 466 Mich at 428. There was sufficient evidence presented for the jury to determine that defendant was voluntarily participating. Also, the jury could have inferred that defendant was not under duress because she left twice and returned and continued to participate. Viewed in the light most favorable to the prosecution, and without second-guessing the jury's judgment of witness credibility, we find that the prosecution presented sufficient evidence to enable a rational jury to conclude beyond a reasonable doubt that defendant was not acting under duress.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed misconduct by improperly vouching for the credibility of two witnesses: one during direct examination and one during closing argument. Defendant also argues that the prosecutor committed misconduct by improperly arguing that defendant was lying. We disagree.

Defendant did not object to any of the alleged misconduct. A claim of prosecutorial misconduct is unpreserved "unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (quotation marks and citation omitted). Unpreserved claims of prosecutorial misconduct are, therefore, reviewed for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "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." *Unger*, 278 Mich App at 235 (quotation marks and citation omitted).

A prosecutor has a duty to ensure justice, which is not just the conviction of the guilty. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). Claims of prosecutorial misconduct must be evaluated on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments must be considered as a whole in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. Generally, a prosecutor has great latitude in his argument and conduct, and is free to argue any reasonable inference that may arise from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). When arguing the inferences, the prosecutor does not have to

use the blandest terms available. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Furthermore, the prosecutor is permitted to use emotional language. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

One of the prosecution witnesses, Candice Williams, testified against defendant. While on the stand, the prosecutor asked if the witness had originally been charged in connection with this case:

Q. And, ma'am, is it true that originally you were charged in this matter?

A. Yes.

Q. Charges were brought against you of accessory after the fact and receiving and concealing stolen property?

A. Yes.

Q. And is it true those charges were dismissed?

A. Yes, they are.

Q. And is it also true as a result – as a part of those charges being dismissed, you agreed to testify truthfully in this matter?

A. Yes, I did.

Defendant argues that the prosecution improperly vouched for the witness's credibility because the prosecutor asked if the charges were dropped in return for Williams's *truthful* testimony.

A prosecutor may not directly “vouch for the credibility of his witness to the effect that he has some special knowledge concerning a witness' truthfulness.” *Bahoda*, 448 Mich at 276. However, the prosecutor may argue from the evidence whether a particular witness is worthy or not worthy of belief. *Dobek*, 274 Mich App at 66. Additionally, evidence of a plea agreement may be admitted as long as the prosecutor does not suggest that there is special knowledge of whether the witness actually testified truthfully. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Furthermore, the prosecutor has a duty to disclose any agreements as to future prosecution that would be relevant to the witness' credibility. *Giglio v US*, 405 US 150, 154-155; 92 S Ct 763; 31 L E 2d 104 (1972); *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). In this case, the prosecutor's comment was not intended to indicate special knowledge of witness' truthfulness, but what the plea deal entailed. The witness agreed that truthful testimony was part of the deal, not that her testimony was in fact truthful. We find no plain error warranting reversal in the prosecutor's questioning of Williams. *Brown*, 279 Mich App at 134.

Defendant also argues that the prosecutor vouched for the victim's credibility during closing argument. On rebuttal, the prosecutor said:

[The victim] has no bones to pick with the people that humiliated and terrorized him, humiliated and terrorized his family that day, when he was on that witness stand. Instead, he got on that witness stand, and he told you the truth about what happened.

Again, the prosecutor may argue from the facts whether a witness is worthy of belief. *Dobek*, 274 Mich App at 66. And it is not error for the prosecutor to comment on the credibility of a witness. See *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). The prosecutor was responding to the defense argument that defendant was acting under duress. The prosecutor went on to indicate that the victim would have told the jury if defendant appeared unwilling, but his testimony was that she was a willing participant.

The evidence presented established that the victim had been humiliated and terrorized. In light of that, it was reasonable for the prosecutor to argue that the victim was telling the truth. Furthermore, based on the humiliation suffered by the victim, it was reasonable to infer that the victim would have testified whether someone else was also being forced against their will to participate. The prosecutor did not improperly vouch for the credibility of the victim and, therefore, there was no plain error. *Brown*, 279 Mich App at 134.

Defendant also argues that the prosecutor committed misconduct with the following comment during rebuttal argument:

The defendant, on the other hand, gives you this cock and bull story about Glenn Jett racking up his Tech-9 and holstering—bringing it up here and taking it across the street, because he is going to get his keys come hell or high water. We all know that is a bold faced lie.

However, the full context of the comment must be examined, in light of the evidence and defense arguments. *Brown*, 279 Mich App at 135. The prosecutor went on to say that neither of the victim's friends from across the street testified to Jett going to get the keys. Both of the victim's friends testified that it was defendant who tried to get the keys. Defendant had testified that "So I think that is when [Jett] went over to the neighbor's house with the—now he has the Tech-9, I think. And his is like, threatening—I don't know if he is threatening. I couldn't really hear what was being said. But he is yelling at the neighbor."

Again, the prosecutor may argue from the evidence whether a witness is worthy of belief. And here, the prosecutor was pointing out the inconsistent stories and using that evidence to argue that defendant was not worthy of belief. There was no error because the prosecutor was permitted to comment on the credibility of defendant. Defendant has failed to demonstrate that there was any prosecutorial misconduct requiring relief.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that counsel was ineffective for failing to object to the alleged prosecutorial misconduct. As discussed above, however, we find no prosecutorial misconduct.

Counsel was not required to make futile objections to testimony and prosecutor conduct that was not erroneous. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011). Therefore, defendant has failed to overcome the presumption of effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Affirmed.

/s/ Stephen L. Borrello

/s/ Michael J. Kelly

/s/ Mark T. Boonstra